

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO. 240 OF 2015

1. Khairati Peer Banwadi,
Tq. Karad, District Satara,
M.S.B.W./STR./127/2009,
Through its Trustee Shafiullah Shaukat
Mulla,
Age; 28 years, Occ; Driver,
R/o; Village Banwadi, Tq. Karad,
District; Satara.

...APPLICANT
(Original Plaintiff)

VERSUS

1. Suresh Bayaji Gurao,
Age; 40 years, Occ; Service,
R/o; At Post Banwadi, Tq. Karad,
District; Satara.
2. Shankar Maruti Khape,
Age; 42 yers, Occ; Chairman
Jagrati Vidhya Mandir, Banwadi,
R/o; At Post Banwadi, Tq. Karad,
District; Satara.
3. Sadruddin Salauddin Mulla,
Age; 40 years, Occ; Business,
R/o; At Post Banwadi, Tq. Karad,
District; Satara.
4. Shamsuddin Saheblal Mulla,
Age; 37 years, Occ; Service,
R/o; At post Banwadi, Tq. Karad,
District; Satara.
5. Maharashtra State Board of Wakfs,
Through its Chief Executive Officer,
Panchakki, Aurangabad.

...RESPONDENTS
(Original
Defendant Nos.
1 to 5)

...
Advocate for Applicant : Mr. Pratap P. Mandlik
Advocate for Respondent Nos. 1 & 2 : Mrs. Charuta S. Deshmukh
Advocate for Respondent No. 5 : Mr. N.E. Deshmukh
Respondent Nos. 3 and 4 Served.
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CORAM : VINAY JOSHI, J.

DATE : 01.03.2022.

JUDGMENT :

1. Challenge in this revision is to the judgment and order dated 29.07.2015 in Wakf Suit No. 93 of 2012 passed by the presiding officer of Maharashtra State Wakfs Tribunal, Aurangabad.

2. The facts in brief are that the applicant (Plaintiff) is one of the trustee of Khairati Pir, which is religious institution. Immovable property bearing Survey No. 27, ad-measuring 7-H 93-R situated at village Banwadi, Tq. Karad, District Satara, was the Wakf property in their possession. It is the plaintiff's case that respondent No. 1 (defendant No. 1) Suresh has encroached over Wakf property, on the area ad-measuring 233.97 Sq. Mtrs., therefore a suit was filed by the Trustee for removal of the encroachment and for possession. After recording evidence the Tribunal has dismissed the suit.

3. Learned counsel appearing for the plaintiff would submit

that though the surveyor has measured the suit property and filed his report, however, the Surveyor was not examined before the Tribunal. He would submit that it is necessary to examine the Court Commissioner (Surveyor) who has measured the suit property to prove the encroachment.

4. The other side has resisted the application by contending that before the Tribunal the plaintiff has not endeavor to examine the said witness.

5. Basically this is a suit for removal of encroachment and for possession. The burden lies on the plaintiff to establish that the defendant No. 1 has encroached over the portion ad-measuring 233.97 Sq. Mtrs. It reveals from the record that the Court Commissioner-Surveyor was appointed to measure the property, whose report was filed on record. Having regard to the said fact it was necessary for the plaintiff to examine the Court Commissioner to prove the encroachment. In the circumstances, it is necessary to examine the Court Commissioner for effectively deciding the dispute. Therefore, the matter can be remanded for fresh adjudication with liberty to examine the Court Commissioner. However, as the plaintiff has failed to examine the Court Commissioner in the trial Court, he shall pay costs of Rs. 5,000/- (Rupees Five Thousand Only) to the

other side, to adequately compensate for involving in one other round of litigation. In view of above the following order is passed :

ORDER

- a. The revision application stands allowed.
- b. The impugned judgment and order dated 29.07.2015 passed in Wakf Suit No. 93 of 2012, is hereby quashed and set aside.
- c. The plaintiff shall deposit the costs amount of Rs. 5,000/- (Rupees Five Thousand Only) payable to the contesting defendant No. 1, within two weeks from today in this Court, on which the defendant No. 1 is entitled for its withdrawal. Failure to deposit of costs, amounts to dismissal of the revision application.
- d. The Wakf suit is remanded to the Tribunal with direction that the plaintiff shall be permitted to examine the Court Commissioner in the suit.
- e. The Tribunal shall decide the Wakf suit afresh on its own merits.
- f. The revision application is disposed in above terms.

**(VINAY JOSHI)
JUDGE**