

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

WRIT PETITION NO.12965 OF 2017

**NANDLAL HIMMAT PATIL AND OTHERS
VERSUS
MANSARAM BHAGIRATH PATIL (DIED) THROUGH LRS. NATTHU
MANSARAM PATIL AND OTHERS**

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Advocate for Petitioners : Patil Bipinchandra K
Advocate for Respondents No.1B to 1C : Mr. V. R. Dhorde

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 11th JULY, 2022

PER COURT :

1. The petitioners are aggrieved by the order passed by the learned Civil Judge, Junior Division, Pachora, below Exhibit-51 in R.C.S. No.10/2010, thereby rejecting the application filed by the petitioners under Order 26 Rule 9 of the Code of Civil Procedure.

2. The petitioners have filed the said suit seeking declaration and injunction for removal of encroachment on the part of the respondents/defendants. It is the case of the petitioners that the respondents have encroached by making excess construction in the public place situated between the petitioners' and respondents' property. The village panchayat being defendant in the suit has appeared and has supported the case of the petitioners by filing written statement. The village panchayat has categorically stated that respondent No.1 is carrying out illegal construction and,

therefore, injunction needs to be granted against him. No permission is obtained by respondent No.1. The plan is not approved. The village panchayat has informed respondent No.1 that he should not carry out the construction. However, in spite of that, respondent No.1 is carrying out construction and causing obstruction to the road.

3. The petitioners placed on record photographs showing encroachment on the part of respondents. The petitioners, thereafter, filed his affidavit-in-lieu of examination-in-chief and then filed application Exhibit-51 under Order 26 Rule 9 for appointment of Court Commissioner to ascertain the exact extent of encroachment. The trial Court has rejected the same on the ground that petitioner is trying to collect evidence. Hence, the present petition.

4. Heard the learned advocate for petitioners and the learned advocate for respondent No.1.

5. It is a matter of record that petitioners have adduced their evidence and the matter is posted for evidence of respondent No.1. Taking into consideration the fact that suit is filed for removal of encroachment and the Gram Panchayat has also supported the factum of encroachment on the part of respondent No.1, trial Court

ought to have allowed the application filed by the petitioners to ascertain the exact extent of encroachment. Court Commissioner would bring the correct factual position and extent of encroachment on record, which would help the trial Court to factually adjudicate the dispute between the parties. The trial Court has ignored the settled legal position that in a suit for encroachment Court Commissioner needs to be appointed. The impugned order, therefore, is unsustainable in law and facts of the present case.

6. In the result, writ petition is allowed in terms of prayer clause 'B'. Taluka Inspector of Land Records be appointed in terms of application Exhibit-51, within a period of two weeks from the date of receipt of writ of this order.

7. The Taluka Inspector of Land Records shall submit his report before the trial Court within a period of four weeks from the date of appointment. After receipt of the Court Commissioner's report, trial to proceed in accordance with law.

(NITIN B. SURYAWANSHI, J.)