

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4044 OF 2022

BASHKAR BAJIRAO PANDARKAR AND ANOTHER
VERSUS
JAYSING SOPAN ITHAPE AND OTHERS

...
Advocate for Petitioners : Mr Amol Sawant

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 5th APRIL, 2022

ORDER :

1. The application filed by the petitioners/plaintiffs under Order XXVI Rule 9, for appointment of court commissioner is rejected by the trial Court, on the ground that the suit is not filed for encroachment and the suit is simplicitor for injunction. There is no prayer in the plaint for recovery of encroached portion. The petitioners have already carried out measurement of their share from cadestral surveyor. The trial Court has observed that the petitioners have sought relief for appointment of court commissioner for fixing boundaries and if any encroachment is found in the report of the commissioner, then same may be restored to the petitioners. The trial Court therefore, held

that the same is final relief claimed by the petitioners, which cannot be granted at the initial stage.

2. Perusal of plaint shows that the petitioners have specifically averred that when the petitioners got the suit property measured privately it was found that 7R land portion in his possession. However, the defendants are not ready to accept the same. The petitioners have therefore, prayed in clause 'B' that measurement of internal shares/sub divisions of Gut No. 76 (suit property) be carried out through cadestal surveyor. In prayer clause 'C' it is prayed that in the measurement if less area is found with the petitioners then the said area be taken out from the possession of the defendants and be given in the possession of petitioners/defendants.

3. It is thus clear that necessary pleadings are already there and the trial Court has erred in coming to the conclusion that the suit is not for encroachment and therefore petitioners cannot claim appointment of court commissioner. However, considering the fact that the suit is at initial stage and even temporary injunction application is

yet to be decided, this Court is not inclined to interfere in the impugned order at this stage.

4. The writ petition is disposed of by granting liberty to the petitioners to move an application under Order XXVI Rule 9 at the time of recording of evidence or after that. If such application is filed, the same shall be considered on its own merits, without being influenced by the observations of this Court in the present order.

[NITIN B. SURYAWANSHI]
JUDGE