

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

WRIT PETITION NO.268 OF 2020

**THKARAM MAHADEO MEHETRE AND OTHERS
VERSUS
NEMULAL MAROTI BHANDAWALE AND ANOTHER**

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Advocate for Petitioners : Mr. T. G. Gaikwad
Advocate for Respondent No.1: Mr. D. R. Bhadekar

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 28th March, 2022

ORDER :

1. By this petition filed under Article 227 of the Constitution of India, the petitioners/original defendants challenge the order passed by the learned 2nd Joint Civil Judge, Junior Division, Beed below the application Exhibit-33 in R.C.S. No.555/2018, thereby appointing Court Commissioner under Order 26 Rule 9 of the Civil Procedure Code [For short "CPC"] at the instance of the respondents/original plaintiffs.

2. Admittedly, the suit is filed seeking removal of encroachment at the instance of the petitioners/defendants. It is claimed by the plaintiffs that, in the sale deed wrong boundaries on

the west side were shown. The defendants have taken disadvantage of the same and started illegal construction on the suit property and are trying to dispossess the plaintiffs from their lawful possession of the suit property. Hence, the plaintiffs were required to file the suit. During the trial the plaintiffs moved application Exhibit-33 under Order 26 Rule 9 read with Section 151 of the Code of Civil Procedure *inter alia* contending that the suit is filed by the plaintiffs for removal of encroachment, recovery of possession and permanent injunction. It is also contended that the defendant No.1 has purchased the suit property from the plaintiffs. The defendants by filing written statement have contended that the suit premises belongs to them. They denied the boundaries claimed by the plaintiffs. Since the defendants have denied title of the encroached area and boundaries of the suit property of the plaintiffs, the issue ought to be settled by actual inspection of the suit property by cadastral surveyor who can bring on record the exact and actual encroached area and demarcation of the suit property. The plaintiffs, therefore, prayed for appointment of cadastral surveyor as Court Commissioner.

3. The defendants resisted the application denying the contents of the said application. They contended that temporary

injunction application Exhibit-5 filed by the plaintiffs is already rejected by the trial Court after considering these arguments. The plaintiffs are trying to collect evidence by appointment of Court Commissioner.

4. The trial Court allowed the application for appointment of Commissioner holding that the plaintiff's suit is for mandatory injunction and restoration of possession. He has filed a rough map along with the plaint wherein the defendant Nos. 1 to 5 are shown to have encroached to the extent of 5x33 Sq.Ft. area belonging to him. This fact can be found out by measurement through cadastral surveyor. The encroachment cannot be ascertained without the report of cadastral surveyor. The appointment of cadastral surveyor is not only necessary but also essential for just adjudication of the case. The trial Court, thereafter directed joint measurement of the properties of the plaintiffs and the defendants holding that it is beneficial to appoint the Court Commissioner to solve the controversy between the parties.

5. I have heard the rival submissions of the learned advocates for the respective parties.

6. Admittedly the suit is for removal of encroachment and recovery of possession. It is a settled legal position that in the matter of encroachment it is desirable to appoint the Court Commissioner. Taking into consideration the controversy between the parties the Court Commissioner would facilitate the Court in finding out the actual position of encroachment. In *Ushabai Sharadchandra Vs. Wasudeo and Others*, [2004 (2) Mh.L.J. 594], the Coordinate Bench of this Court held that ‘In case of dispute of an encroachment or dimension of site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case over all again.’

7. In *Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, Deceased through L.Rs.* [2011 (3) Bom.C.R. 807], the Coordinate Bench of this Court held that:

“19. In that view of the matter, to find out as to whether the Defendants have, in fact, encroached upon the City Survey No.1894 or not, I find that the appointment of Court Commissioner would assist the Court in arriving at the just decision. Needless to state that, as has been consistently observed, the report of the Court Commissioner would not be conclusive and if any of the parties are aggrieved by the same, such a party would always be entitled to cross-

examine the Court Commissioner, so as to challenge the veracity of the report. ”

8. In the present case, the trial Court is of the view that the appointment of Court Commissioner is necessary to decide the real controversy between the parties and it would be beneficial to solve the controversy between the parties. View taken by the trial Court is in consonance with the settled legal position. The reasoning adopted by the trial Court, therefore, cannot be faulted with.

9. The learned advocate for petitioners relied on the decision of the Coordinate Bench of this Court in ***Writ Petition No.1091 of 2005 (Sow. Shubhada Rajendra Bidve Vs. Sow. Sanjivani Balaji Pensalwar and Others)***, wherein the application filed by the petitioner for appointment of Court Commissioner was rejected. The original plaintiff/petitioner had filed suit for perpetual injunction, contending that the defendants had started construction thereby causing encroachment and interference in the petitioner's plot. The said application was rejected by the trial Court and this Court upheld the order of the trial Court holding that taking into consideration the prayers made in the application filed under Order 26 Rule 9 the application was rightly rejected. Such are not the facts of the present case.

10. For the aforestated reasons, there is no illegality and perversity in the order impugned in the present petition. No case is made out by the petitioners to interfere in the extraordinary writ jurisdiction. The writ petition is, therefore, dismissed. No costs.

11. At this stage, the learned advocate for petitioners seeks continuation of the stay granted on 07-01-2020 in their favour. The stay is extended for a period of four weeks from today.

[NITIN B. SURYAWANSHI, J.]

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