

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9577 OF 2017

Tatyaba Bala Barkade (Since deceased through
LRs.) - Vishnu Tatyaba Barkade & Ors. .. Petitioners

Versus

Rajaram Bapu Choudhari (Since deceased
through LRs.) - Shakuntala Rajaram Choudhari
& Ors. .. Respondents

.....

- Mr. Vaibhav R. Gaikwad for Petitioners
- Mr. Venkatesh Shastry i/by Mr. Manmath S. Athalye for
Respondent Nos.1(a) to 3.

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CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 06, 2022.

P.C.:

1. Heard Mr. Gaikwad, learned Advocate appearing for
Petitioners and Mr. Shastry, learned Advocate appearing for
Respondent Nos. 1(A) to 3 at length and perused the record.

2. The Petition challenges the legality and validity of the Order
dated 29.06.2017 passed below Exhibit-19 in Regular Civil Appeal No.
141 of 2016 seeking appointment of Court Commissioner for the
purpose of joint measurement of property bearing C.S.No. 2501B and
2491C on the ground of deciding the element of encroachment if any.

3. Perusal of the impugned Order and record indicates that
Respondents (original Plaintiffs) filed suit on 21.04.2008. Immediately
thereafter an application was made by them for seeking joint

measurement of the aforesaid properties on the basis of M.R.No.07 of 2008 on the ground that the said measurement carried out by the Taluka Inspector of Land Records (T.I.L.R.) was not carried out as required by law. Other reasons for maintainability of challenge the said joint measurement were *inter alia*, relating to non-receipt of statutory notices by the parties before the measurement was carried out, non consideration of any of the title documents or relevant documents challenge to the baseline having not being properly done and the Schedule-A map having not been produced. Due to the aforesaid challenges, joint measurement of the subject properties was carried out in the presence of all parties.

4. Petitioners had also specifically disputed the said joint measurement under M. R. No. 07 of 2008 and had filed a parallel application under Exhibit-16 in the Trial Court seeking appointment of Court Commissioner for seeking joint measurement afresh.

5. By Order dated 27.05.2009, the learned Trial Court directed carrying out joint measurement of the subject properties in the presence of the Plaintiffs and Defendants through the Court Commissioner since both parties had objected to the earlier measurement. Admittedly, both subject properties were jointly measured and the Court Commissioner submitted his report alongwith map at Exhibit-207 under being Report No. 179 of 2009. The report is part of the record and proceedings of the Trial Court.

6. Petitioner (Defendant in Suit) after a hiatus of 7 years in the year 2016, filed application under Exhibit-19 once again seeking joint measurement of the subject properties. It is pertinent to note that in the application, Petitioner did not disclose and suppressed the fact that the subject properties were jointly measured earlier in the year 2009 by the Court appointed Commissioner.

7. Paragraph Nos.3 and 9 of the impugned order are relevant and give the reasons for dismissal of Petitioners' fresh application seeking joint measurement once again below Exhibit-19. Paragraph Nos. 3 and 9 reads as under:-

- “3. *The said application has been resisted by the respondent plaintiff on the ground that the applicant-appellant has not approached the Court with clean hands. The appellant guilty of suppressing of vital informations. It is submitted that the appellant had disputing the said M.R.No. 07/2008, had filed an application at Exh.60 in the Trial Court seeking appointment of Court Commissioner for joint measurements of both the properties and the Ld. Trial Court vide its order dated 27/05/2009 directed the joint measurement of the plaintiff and the defendants properties through a Court Commissioner. Accordingly, both parties properties were jointly measured and the Court Commissioner has submitted his report and map at Exh.207 under M.R.No. 179/2009. The said reports are already part of the record and proceedings and in such circumstances joint measurements being done of both the properties at the instance of the appellant-defendant himself, there is no necessity for again having both the properties jointly measured as sought by the appellant defendant in the present appeal proceedings. It is contended that the present application is filed merely to prolong the hearing in the appeal proceedings. It is also contended that in view of the previous application at Exh.16 in the Trial Court, the report submitted thereunder, the present application is also hit by principle of Estoppel as it was incumbent upon the defendant to get the said report proved, however the defendants did not deliberately do so and hence hit by the principle of Estoppel.*
9. *Considering the fact that already there was a joint measurement done of both the properties and the report being M.R.No. 179/2009 thereof alongwith the map being produced at Exh.207, there appears no reason for having another round of measurements of these*

properties again. In such circumstances, the applicant-appellant has not made any grounds seeking the appointment of Court Commissioner for measurements of the said properties and in view of the circumstances enumerated above, I proceed to pass the following order.

ORDER

- 1) *Application Exh.19 is dismissed.*
- 2) *No order as to costs."*

8. I do not find any reason to interfere with the order passed by the learned Trial Court in rejecting the application below Exhibit-19. Petitioners (original defendants) cannot be permitted to approach the Court for seeking the same relief in respect of the same cause of action before the Trial Court to suit their convenience. In support of Petitioner's case learned Advocate for Petitioner has relied upon a decision of this Court dated 27.03.2019 in Second Appeal No.510 of 2018 in the case of ***Bajrang Bandu Borate and Ors. Vs. Rucha Kishor Shinde and Ors.*** *inter alia*, contending that in the facts of that case, this Court had permitted carrying out fresh joint measurement and called for Commissioner's Report on the complaint of the adjacent land owner and the said Commissioner was also allowed to be cross examined. Mr. Gaikwad, learned Advocate for Petitioner submitted that the fresh application seeking joint measurement was at the behest of Petitioners seeking 'Nimtana' measurement.

9. *Prima facie*, Nimtana as understood under the Maharashtra Land Revenue Code, 1966 pertains to confirmation of the measurement of the property already undertaken by the Statutory

Officer by following the due process of law. However perusal of application below Exhibit-19 does not seek Nimtana, but is specifically for seeking determination of earlier application filed by the Petitioners which was allowed by the Trial Court in the year 2009. The principle of estoppel therefore squarely applies to the facts of the present case. Exhibit-19 is filed only to create fresh evidence by the Petitioners despite participating in the earlier round of joint measurement directed by the Court and the Report being on record.

10. In view of the above reasons, the impugned order dated 29.06.2017 is sustained. It does not call for any interference. Writ Petition stands dismissed.

[MILIND N. JADHAV, J.]