

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 12831 OF 2019

Namdev Shamrao Suryavanshi & Ors.

...Petitioners

vs.

Santosh Shivaji Jagtap

...Respondent

Mr.Mahindra B. Deshmukh for Petitioners.

Mr.Pramod J. Pawar with Sangita P. Pawar for Respondent 2.

CORAM : ROHIT B. DEO, J.

DATED : 28 JUNE 2022

P.C. :

1. The contesting Respondents have instituted Regular Civil Suit 128/2012 seeking decree of removal of encroachment and possession.

2. The plaintiff has stepped into the witness box. It is common ground that the evidence of the plaintiff is over. At that stage, the plaintiff preferred an application under Order 26 Rule 9 seeking appointment of Court Commissioner. The plaintiff contended that considering the nature of the controversy unless the entire property is measured by a technically qualified and competent person and such material is available for the perusal of the court, the controversy would be incapable of resolution by oral evidence of the parties. This application is allowed by the learned trial Judge placing reliance on catena of decisions of this Court which

articulates that ordinarily in disputes touching boundaries and encroachment, it would be necessary to obtain the report of a technically qualified expert.

3. The learned Counsel for the defendants has reiterated the submissions which have not found favour with the trial court.

4. The first submission is that in paragraph 3 of the suit plaint, the subject property is described with particularity and therefore, the Court Commissioner could not have been appointed. The submission is noted, only for rejection. The fact that the plaintiff has described the property with particularity does not detract from the plaint allegation that part of the property is encroached by the defendants from the eastern and the western sides. The learned Counsel for the defendants appears to be more serious about the other submission which is that a similar request was made by the plaintiff vide Exhibit 43 which came to be rejected by the trial court vide order dated 20 August 2014. Presumably, the learned Counsel for the defendants is invoking the principles akin to *res judicata* or issue of estoppel. I am not inclined to accept the submission of the learned Counsel for the defendants that the trial court was precluded from entertaining application seeking appointment of Court Commissioner and the reasons

are more than one.

5. First and foremost, the application, Exhibit 43, was preferred before the commencement of the evidence. Secondly, the application, Exhibit 43, does not appear to have been decided on the merits or on the touchstone of Order 26 Rule 9 of CPC. It appears that the plaintiff had preferred an application earlier in the year 2008 seeking measurement of the property and the TILR was of the opinion that considering the inconsistency between the municipal map and the map of the plaintiff, he would not be in a position to measure the land. Accordingly, the TILR informed his inability to measure the land by communication dated 6 June 2009. While rejecting Exhibit 43, the learned trial Judge has reasoned that the plaintiff did not challenge the said communication and the TILR having earlier expressed inability to measure the land, Exhibit 43 merits rejection. Apart from the fact that the learned trial Judge seriously erred in not considering the earlier application on merits, I am satisfied that in essence, there was no adjudication at all and the learned trial court was swayed by the fact that prior to the institution of the suit, the TILR expressed inability to measure the land.

6. The learned trial judge has given sound reasons for appointing

the Court Commissioner.

7. As of fact, the order impugned is in the interest of the parties to the suit.

8. The petition is dismissed.

9. The learned trial court is requested to expedite the suit.

(ROHIT B. DEO, J.)