

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO. 4556 OF 2018

Ganesh s/o Ramdas Rathod and anr.

Vs.

Sheshrao s/o Ganpat Chauhan and anr.

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. V.N. Patre, Advocate f or petitioners.

Mr. A.M. Kukday, Advocate for respondents.

CORAM : MANISH PITALE J.

DATE : 20.07.2022.

By this writ petition, the petitioners i.e. the original plaintiffs have challenged order dated 15.03.2018, passed by the Court of 6th Joint Civil Judge Junior Division, Pusad, whereby an application at Exhibit 55, seeking appointment of Court Commissioner was rejected.

2. The petitioners in the present case, have filed suit for removal of encroachment against the respondents. In the plaint, there is no reference to any registered documents on the basis of which, the petitioners have raised their claim. Instead, emphasis is placed on 7/12 extract. Boundaries of the land allegedly belonging to the petitioners is stated and

thereafter, it is stated that on an application filed by the petitioner, the Taluka Inspector of Land Records (TILR) carried out measurement and on the basis of such measurement and plaint map the petitioner sought relief against the respondents for removal of alleged encroachment. The respondents filed their written statement and denied the claims made on behalf of the petitioners.

3. During the course of evidence, the petitioners examined the TILR as their witness. During cross-examination, certain statements were made by the TILR and when the evidence of the TILR was over, the petitioner filed the aforesaid application at Exhibit 55 for appointment of Court Commissioner. The same has been rejected.

4. Mr. Patre, learned counsel appearing for the petitioners submitted that no prejudice would be caused to the respondent, if the prayer made in the said application at Exhibit 55 is granted, for the reason that the ground reality has to be ascertained. It is submitted that the statement made in the cross-examination clearly indicated that the basis on which the measurement was carried out by the TILR was defective and that therefore, a clear case for

appointment of Commissioner was made out. The learned counsel relied upon judgments of this Court in the case of *Vijay s/o Shrawan Shende and Ors. Vs. State of Maharashtra and Ors.*, 2009 (5) Mh.L.J. 279 and *Manikrao Ramji Chawake Vs. Ashok Ambadas Gawande and anr.* 2014 (2) Mh.L.J. 840.

5. On the other hand, Mr. Kukday, learned counsel appearing for respondents submitted that no interference is warranted in the impugned order, for the simple reason that the petitioners as plaintiffs must stand on their own legs and they have to first make out a semblance of a case of encroachment and in certain circumstances, where extent of encroachment is the real controversy, appointment of Commissioner would be justified. It is further submitted that, it is the petitioners themselves who applied to the Office of the Inspector of Land Records and caused the measurement to be conducted by the TILR and now on an apprehension that statements made in the cross-examination may weaken their case, the petitioners have rushed to the Court for appointment of Court Commissioner. This amounts to an attempt to collect evidence. Therefore, it is submitted that the petition deserves to be dismissed. The judgments upon which the

learned counsel for the petitioners placed reliance, were sought to be distinguished on facts.

6. This Court has heard the learned counsel for the rival parties, in the context of the material placed on record. A perusal of the plaint in the present case shows that the entire case of the petitioners is based on measurement carried out by the TILR and plaint map annexed to the plaint on the basis of such exercise. Although boundaries of the land have been stated but there is no reference to any registered documents showing the exact location and extent of the land belonging to the petitioners. It is also a matter of record that the petitioners examined the TILR as their own witness and they are now apprehensive that certain statements made in the cross-examination by the TILR may have an effect of not supporting the claims made in the plaint. It is also significant that the petitioners chose not to re-examine the TILR.

7. The question is whether, when the plaintiffs like the petitioners herein approached the Court with a positive case that there is encroachment on their land by the respondents who are the defendants and they placed reliance on

measurement carried out by the TILR at their behest, can such petitioners be permitted to seek appointment of Court Commissioner, on an apprehension that statements made by their own witness in cross-examination were apparently not supporting their case. The crucial aspect is that the petitioners as plaintiffs need to make out at least a semblance of a case of encroachment and then in a situation where there is confusion regarding the extent of encroachment, the question of appointment of Court Commissioner assumes significance.

8. In any case, the Court may, in a given case, while exercising power under Order 26 Rule 9 of the CPC, find it appropriate to appoint the Court Commissioner in specific circumstances.

9. This is evident from the judgments on which the learned counsel for the petitioners has placed reliance. In the case of *Vijay s/o Shrawan Shende and Ors. (supra)*, much emphasis was placed on findings rendered as regard the particular question framed by the Court. But, a proper appreciation of the specific question framed by the Court shows that in the said case, the Court proceeded on the basis that the party in the suit

proved the act of encroachment and extent of encroachment was the matter of controversy. It is in such circumstances that specific directions were given for appointment of Court Commissioner. Insofar as the case of *Manikrao Ramji Chawake* (supra) is concerned, this Court has commented upon the presumptive value of report of TILR under Section 83 of the Evidence Act, as regards, accuracy of such report and the map prepared on the basis of the same. The observations made in the said judgment cannot enure to the benefit of the petitioners, because in the facts of the present case, the measurement report of the TILR is already on record and the TILR as a witness of the petitioners is already examined. In such circumstances, the Court is yet to arrive at any finding or conclusion on the basis of the material available on record, on the basic question as to whether a case of encroachment at all is made out. In such circumstances, insistence of the petitioners for appointment of Court Commissioner cannot be justified.

10. In the light of the above, this Court is of the opinion that no error can be attributed to the Court below in passing the impugned order. Accordingly, the writ petition is dismissed.

11. Needless to say, the order passed by this Court dismissing the present writ petition would not coming in the way of the Court below in *suo motu* taking appropriate steps under Order 26 Rule 9 of the CPC, if the Court deems it appropriate.

JUDGE