

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

21 WRIT PETITION NO.2021 OF 2023

**BALASAHEB EKNATH CHOKHAR
VERSUS
GANESH BHAUSAHEB DALE AND OTHERS**

...
Advocate for Petitioner : Mr. Balaji B. Yenge

...

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 24-02-2023

PER COURT :

. Heard.

2. By this petition, the challenge is to the order dated 28.11.2022 passed by the Civil Judge Senior Division, Rahata rejecting the petitioner's application for appointment of the Court Commissioner.

3. Regular Civil Suit No.370 of 2021 was instituted by the petitioner – plaintiff seeking the relief that the illegal construction be stopped permanently by order of permanent injunction and the area encroached be cleared by removing the encroachment. Perusal of the plaint shows that the petitioner claims to be the owner of the property and the defendants therein are owners of the adjacent property. It is further averred that the defendants have purchased the land property admeasuring 79.07 sq meters by sale-deed and after

the purchase of the property the construction has been started. There is no further averments which are made except the bare statement that the defendants have encroached upon the land of the plaintiff by the east of the property. The said position has been disputed by the defendants. Considering the disputed position, the trial Court has rejected the application for appointment of the court commissioner by observing that it is first necessary for the petitioner to lead evidence to prove the ownership of the portion of the property in respect of which the encroachment is claimed.

4. Considered the submissions of the learned counsel for the petitioner.

5. The learned counsel for the petitioner submits that it is apparent from the photographs that there is an encroachment on the property. The issue in the present case is whether there is an alleged encroachment on the property belonging to the petitioner as there are no pleadings in the plaint substantiating the ownership of the property over which the encroachment is claimed.

6. In the facts of the preset case, it is necessary that the evidence be led to prove the ownership of the property and thereafter

the issue of encroachment can be said to have arisen.

7. The learned counsel for the petitioner relies upon the decision of the Apex Court in the case of **Ravinder Kaur Grewal and Others vs. Manjit Kaur and Others, (2019) 8 SCC 729**. The facts in the case of **Ravinder Kaur** (*supra*) are different than the facts in the present case and therefore the said case is not applicable in the present case.

8. For the reasons above, I do not find any illegality or infirmity in the impugned order dated 28.11.2022.

9. The writ petition is devoid of merits and stands dismissed.

10. Needless to state that after the evidence has been led, the petitioner will be at liberty to file appropriate application for appointment of Court Commissioner which the trial Court will consider on its own merits and in accordance with law.

(SHARMILA U. DESHMUKH, J.)