

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2525 OF 2018

Dipak Ambadas Kulkarni Petitioner

Versus

Hanumant Sarjerao Giramkar
and others Respondents

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Ms. Manjushri Narwade, Advocate for the Petitioner
Mr. Sanket S. Kulkarni, Advocate h/f Mr. D.B. Rode, Advocate
for the respondents

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 09th JUNE, 2023

ORDER :

1. The petitioner is aggrieved by the order passed below Exhibit-58 in Regular Civil Suit No.236 of 2012 by the learned Joint Civil Judge, Junior Division, Shrigonda, thereby rejected the application filed under Order XVI Rule 9 of the Code of Civil Procedure.

2. Suit is filed by the petitioner/plaintiff for mandatory injunction and for removal of construction made by the defendants by way of encroachment in the property of the plaintiff. The respondents/defendants appeared and opposed the Suit by filing written statement. The plaintiff thereafter filed application Exhibit-58 seeking appointment of Court

Commissioner in view of the fact that the defendants averred in the written statement that they are not carrying out construction in the suit property. The plaintiff, therefore, claimed that if the suit property be measured, the boundaries can be fixed and it would be clear as to where the construction of defendants is made. The said application is rejected by the Trial Court on the ground that since other co-sharers in Gut No.356 are not party, and unless their shares are measured, boundaries cannot be fixed, and therefore, direction cannot be issued to measure the share of the plaintiff and defendants.

3. Heard the learned advocate for the petitioner and the learned advocate for the respondents. Perused the writ petition memo, annexures thereto and the impugned order and the citations relied upon by the learned advocates for the petitioner and respondents.

4. It is a specific case of the plaintiff that the defendants have encroached in the suit property and carried out construction. A prayer is made in the plaint for removal of encroachment made in the suit property by the defendants. Considering the pleadings of the parties, this Court is of the opinion that no prejudice is likely to be caused to the defendants if the measurement of the suit property is carried

out, and the boundaries are fixed. The same would enable the Trial Court to effectively adjudicate the dispute between the parties. Though this application was filed prematurely, it is informed at the bar that the stage of recording of evidence has commenced, and therefore, the said appointment can be made.

5. Learned advocate for the petitioner was right in relying upon the decision in ***Mayuresh Subhash Sonawane Vs. Yashwant Babu and others, 2022 (2) BCR 87***, wherein it is held:

"12.6. In the present case, the suit has been filed by the Respondent, who is the owner of the land adjoining the Petitioner's. A specific case has been made out that due to construction carried out by the petitioner and the consequent encroachment, the approach road to the respondent's property is closed. This fact itself is required to be ascertained by the Court at this interim stage so as to enable the Trial Court to pass any interim order pending the trial."

6. In ***Yeshwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar, 2010 (3) Mh.L.J. 956***, it is held:

"It is settled position of law that under Order 26, rule 9 of the Code of Civil Procedure, the Court has discretion to order local investigation. The object of

local investigation is not so much to collect evidence which can be taken in Court, but to obtain evidence which from its peculiar nature can only be had on the spot. Cases of boundary disputes and disputes about identity of lands are instances when a Court should order local investigation under Order 26, rule 9 of the Code. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out exact area encroached upon, Oral evidence cannot conclusively prove such an issue.

The above observations support the case of the petitioner.

7. Learned advocate for the respondents, while opposing the petition, relied upon unreported decision of the learned Single Judge in Writ Petition No.1187 of 2019. The said decision is rendered in different facts, and hence would not help the case of the respondents.

8. In view of the aforesaid reasons, the writ petition is allowed.

9. Impugned order dated 14/07/2016 passed by learned Joint Civil Judge, Junior Division, Shrigonda, below

Exhibit-58 in Regular Civil Suit No.236 of 2012 is hereby quashed and set aside.

10. Application below Exhibit-58 is allowed.

11. There shall no order as to costs.

[NITIN B. SURYAWANSHI]
JUDGE

S.P Rane