

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10700 OF 2022

ARUN DATTU WAWRE AND OTHERS
VERSUS
SURYABHAN KASHINATH WARWE DIED THROUGH LRS
CHHBUBAI SURYABHAN WAWRE AND OTHERS

Mr. P.A.Bharat h/f. Mr. Arif Gulab Pathan, Advocate for the
Petitioners.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : JANUARY 23, 2023.

PER COURT :

1. Heard.
2. The petitioners are aggrieved by the order dated 30th June, 2022 passed in RCA No.446 of 2015, whereby the Petitioners' application for appointment of Court Commissioner for re-measurement of the suit property came to be rejected.
3. RCS No.180 of 2008 was filed by the petitioner seeking recovery of the encroached portion, in which the land was measured by the Cadastral Surveyor and the Cadastral Surveyor was cross-examined during the trial. By judgment and decree dated 7th November, 2015, the trial Court dismissed the suit and the finding on one of the issues that the petitioners failed to prove the accuracy of the map and resultantly, alleged encroachment was also not proved. As against the dismissal of the suit, Regular Civil Appeal No.446 of 2015 was filed by the Petitioners, in which the application was made

under Order XXVI Rule 9 read with Order 46 Rules 27 and 28 of the Code of Civil Procedure, 1908, seeking appointment of Court Commissioner for re-measurement.

4. In the suit, the application for the Court Commissioner was made and the suit property was measured, the report came to be filed before the Trial Court and the Cadastral Surveyor was examined before the Trial Court. The Trial Court has come to a finding that the Petitioners have not been able to prove the encroachment and has dismissed the suit. In a proceeding under Order 41 Rule 27, the petitioners are now seeking to produce additional evidence by way of re-measurement of the property and as such, are required to satisfy the requirement of Order XLI Rule 27, which provides the contingency in which such additional evidence can be produced.

5. Learned counsel fairly concedes that none of the contingencies which are provided in Order XLI Rule 27 are applicable in the present case and the petitioners are seeking to produce fresh evidence on record before the Appellate Court.

6. The Petitioners cannot be permitted to bring additional evidence on record at the appellate stage, unless the requirement of Order XLI Rule 27 is fulfilled. As such, there is no merit in the writ petition and stands dismissed.

(SHARMILA U. DESHMUKH, J.)