

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

WRIT PETITION NO.10350 OF 2013

**ASHOK KASHINATH KOTE (DECEASED) THROUGH LRs. SMT. REKHA
ASHOK KOTE AND OTHERS
VERSUS
GOPINATH BAYAJI KOTE AND ANOTHER**

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Advocate for Petitioner : Mr. Tushar Shinde, Advocate h/f
Mr. Chandrakant K. Shinde

Advocate for Respondent No.1 : Mr. S.S. Kulkarni

Advocate for Respondent No.2 : Mr. A.V. Hon

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 04th JULY, 2023

PER COURT :

1. Petitioner is aggrieved by the order dated 10/12/2013, passed by learned District Judge-1, Kopergaon, below Exhibit-34 in Regular Civil Appeal No.126/2003.

2. Respondent No.1/plaintiff filed Regular Civil Suit No.272/1997 for perpetual and mandatory injunction praying that metal shed constructed by petitioner/defendant No.1 by encroaching on public road, be removed. The suit was dismissed. Plaintiff filed Regular Civil Appeal No.126/2003, challenging the decision of Trial Court. At the stage of final hearing of the appeal, respondent No.1/plaintiff filed application Exhibit-26 for appointment of expert as a Court Commissioner to measure the suit property and the extent of encroachment. The said application was

allowed and City Survey Officer was appointed as Court Commissioner. After conducting measurement of the suit property, the Court Commissioner submitted report to Appellate Court.

3. Respondent No.1/plaintiff, then filed application Exhibit-34 seeking permission to lead additional evidence of Court Commissioner to prove report filed by him on record. Petitioner did not file say on the said application. Appellate Court allowed the said application. Hence, the present petition.

4. Heard learned advocate for petitioner, learned advocate for respondent No.1 and learned advocate for respondent No.2. Perused the memo of writ petition, annexures thereto, impugned order and the affidavit-in-reply filed by respondent No.1.

5. Learned advocate for petitioner urged that the impugned order is contrary to the mandate of Rule 27(1)(b) of Order 41. No reasons are assigned by the appellate Court, while allowing the application Exhibit-34. Merely because no say is filed by petitioner opposing the said application, appellate Court has erroneously proceeded to allow the same. He further submits that the application ought to have been considered at the time of final adjudication of appeal and the appellate Court has committed procedural impropriety in allowing the same at this stage. He, therefore, submits that by allowing writ petition the impugned order be quashed and set aside.

6. On the other hand, learned advocate for respondent No.1 supported the impugned order. He submits that petitioner has failed to challenge the order of appointment of Court Commissioner. One of the ground on which the Trial Court has dismissed the suit is that there is no report of expert supporting the case of plaintiff that defendant has made encroachment. He submits that, since expert report is available, the same would help the appellate Court to effectively decide the dispute between the parties. According to him, there is no merit in the petition and the same is liable to be dismissed.

7. On going through the judgment of Trial Court, it appears that one of the ground for dismissal of suit is that there is no report of expert before Trial Court showing encroachment by the defendant. Application Exhibit-26 is allowed by the Appellate Court and Court Commissioner is appointed. Petitioner has not challenged the said order. Pursuant to the said order, Court Commissioner has measured the suit property and submitted his report. From the report, it appears that there is encroachment on the suit property. Therefore, to effectively and conclusively resolve dispute between the parties, Court Commissioner's evidence is necessary and the same is rightly permitted by the Appellate Court. It is well settled that in a suit for removal of encroachment it is desirable to appoint

expert as Court Commissioner to verify whether there is any encroachment and/or to measure the extent of encroachment.

8. There is no merit in the submission of learned advocate for petitioner that impugned order is un-reasoned order. Appellate Court has assigned reason that new map has come on record and therefore, additional evidence is necessary. This reason itself is sufficient and in the facts of the present case, Appellate Court is not required to give elaborate reasons. Fact remains that petitioner has failed to file say to oppose the said application Exhibit-34.

9. Argument of the petitioner that application should have been considered at the time of final adjudication of appeal, is devoid of merit, as the application is allowed at the time of final hearing of the appeal.

10. There is no illegality or perversity in the order impugned in present petition. No jurisdictional error or error of law is committed by the Appellate Court while passing the impugned order. Writ petition being devoid of merits is dismissed with no order as to costs.

(NITIN B. SURYAWANSHI, J.)