

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL WRIT PETITION NO. 3794 OF 2023

Vinod Sudam Ghawate & Ors.

..Petitioners

Versus

Shashikala Chandrakant Potavale & Anr.

..Respondents

Mr. Vivek V. Salunke for Petitioners.

Mr. Vaibhav R. Gargade a/w. Suyash N. Khose a/w. Vipul Gujal for
Respondent No.1.

CORAM : SARANG V. KOTWAL, J.

DATE : 24 MARCH 2023

PC :

1. Leave to amend. Amendment to be carried out forthwith.
2. Learned counsel Shri. Vaibhav Gargade appears and states that, he has instructions to appear for the Respondent No.1 who is the contesting Respondent and the original Plaintiff. The Petitioners are the original Defendant Nos.1 to 3.
3. I have heard both learned counsel. The Petitioners have challenged the order dated 28/02/2023 passed by Civil Judge, Junior Division, Ghodnadi-Shirur, District Pune, below Exhibit 36

in R.C.S.No.405 of 2022. The operative part of the order reads thus:

- “1. The application is allowed.
2. TILR Shirur is hereby appointed as a court Commissioner for measurement of suit property para No.1A and 1B to show the encroachment along with tin shed.
3. The court commissioner is directed to show exact encroachment and its location in the map.
4. The plaintiff shall furnish necessary documents in the office of court Commissioner.
5. The plaintiff shall bear entire expenses of Court Commissioner.
6. The Court Commissioner is directed to file its report on or before 28/03/2023.
7. Issue writ accordingly.”

4. The original Plaintiff has filed this suit for mandatory injunction for removal of the encroachment and for possession, as well as, for perpetual injunction. Subsequent thereto, the Plaintiff had preferred an application for appointment of the Court Commissioner under O.26, Rule 9 of the C.P.C.

5. Learned counsel for the Petitioners states that, Exhibit-5 application for interim injunction filed by the Plaintiff is already decided; against which, the Defendants have filed the Appeal which is still pending before the Appellant Court. Learned counsel for the Petitioners submitted that, learned Trial Judge has mentioned in the operative part of the impugned order that the measurement of the suit property be carried out to show the encroachment on the said land and to show the exact encroachment and its location in the map. According to learned counsel, this approach is erroneous, because, this is prejudging the issue between the parties even before the evidence is led. The very issue of encroachment will have to be decided after evidence in that behalf is led. He submitted that, the Petitioners do not have objection for appointment of Court Commissioner and filing of report of the Court Commissioner, however, the observation that the Court Commissioner should show the exact encroachment on the map is not proper. He submitted that, to that extent, the operative part of the impugned order needs to be set aside.

6. Learned counsel for the Respondent No.1 submitted that,

there is no reason to interfere with the impugned order.

7. I have considered these submissions. As the Petitioners do not have objection to the appointment of the Court Commissioner, that part of the impugned order need not be interfered with. However, as rightly submitted by learned counsel for the Petitioners, the operative part mentions that the Court Commissioner has to show the encroachment in his report and also on the map. This really is prejudging the issue before the evidence is led. Therefore, to that extent, the operative part of the impugned order needs interference.

8. Hence, the following order:

O R D E R

i) The Writ Petition is partly allowed.

ii) The operative part of the order dated 28/02/2023 passed by Civil Judge, Junior Division, Ghodnadi-Shirur, District Pune, below Exhibit 36 in R.C.S.No.405 of 2022, partially set aside.

- iii) The direction of appointment of Court Commissioner is confirmed. However, the Court Commissioner shall now file his report only regarding the measurement of the suit property and the necessary description, without commenting on the encroachment.
- iv) Consequently, the Clause 3 of the operative part directing the Court Commissioner to show the exact encroachment and its location in the map is also set aside.
- v) The Court Commissioner is at liberty to describe exact situation at the suit property; without commenting whether it is encroachment or not.
- vi) With this modification, the Writ Petition is disposed of.

(SARANG V. KOTWAL, J.)