

Anand

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

WRIT PETITION NO. 10995 OF 2022

Paresh Hanumantrao Pawar

.Petitioner

Vs.

Praphull Kaluram Shivale

.Respondent

**ANAND
SUDHAKAR
SUDAME**

Mr. Jayesh Joshi, Advocate, for the Petitioner
Mr. Sumit Khaire, Advocate, for the Respondent

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ANAND SUDHAKAR
SUDAME

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 24.7.2023

P. C.

. The challenge in the Petition is to the order dated 06.05.2022 passed by the learned C.J.J.D., Ghodnadi Shirur, District - Pune, rejecting the Petitioner's Application for appointment of Court Commissioner under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 (for short 'CPC').

2. Learned counsel appearing for the Petitioner points out that along with the plaint the Plaintiff had filed a rough map showing encroachment. He would further contend that it is evident from the reply which is filed by the Defendant that there is a compound wall which was constructed by the previous owner and as such, it cannot be said that there is no encroachment.

3. Per contra, learned counsel appearing for the Respondent submits that the Plaintiff has failed to identify the property showing encroachment. He would further contend that filing of the Application for appointment of the Court Commissioner amounts to collection of evidence particularly, when he has not got the property measured.

4. Considered the submissions.

5. The trial Court has rejected the Application for the reason that the Plaintiff has merely filed a rough map for showing the encroachment which is not prepared by any authorized person. The trial Court also observed that the Application for appointment of Court Commissioner is completely silent about the alleged encroachment and hence, the burden lies upon the Plaintiff to prove the said fact by adducing cogent and reliable evidence.

6. The fact remains that the suit in question has been filed for the relief of removal of encroachment, possession and for perpetual injunction. The pleadings indicate that the Defendant has encroached upon Gat No.632. However, considering the fact

that the the Plaintiff has filed only a rough map to show the alleged encroachment, it is incumbent upon the Petitioner – Plaintiff to lead evidence before the Court to show that the suit property is encroached upon by the Defendant. The Application which has been filed by the Petitioner merely reiterates that in case a suit is filed for removal of encroachment, it is necessary to appoint a Court Commissioner for local inspection. The Application further contends that for carrying out inspection and measurement of the suit property it is essential to appoint a Court Commissioner to resolve the dispute between the parties. The Application does not identify location of the property on which the encroachment is alleged and as such, no infirmity can be found in the impugned order dated 06.05.2022.

7. It is open for the Petitioner to renew his request for appointment of the Court Commissioner after the evidence has been led to identify the property in respect of which encroachment is alleged.

8. The Writ Petition is dismissed.

(SHARMILA U. DESHMUKH, J.)