

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7809 OF 2017

Suman Sonba Thorat & Anr.

....Petitioners

V/S

Budhaji Hiranman Pingle

....Respondent

...

Mr. Sudhir V. Sadavarte for the Petitioners.

None for the Respondent.

...

CORAM: SANDEEP V. MARNE, J.

DATE : AUGUST 17, 2023.

P.C.:

1 By this Petition the Plaintiffs-Petitioners challenge the order dated 1 April 2017 passed by 4th Joint Civil Judge Junior Division, Pune rejecting Application at Exhibit 19 filed for appointment of Court Commissioner for measurement of land under the provisions of Order XXVI, Rule 9 of the Code of Civil Procedure.

2 Plaintiffs-Petitioners have filed suit for declaration as well as recovery of possession of encroached portion of land.

3 Two reasons have been cited by the Trial Court for rejecting application for appointment of Court Commissioner. Firstly, it is observed that the land bearing Gut No.41 was already measured at the instance of

Plaintiffs-Petitioners and the measurement map is already on record. The second reason recorded for rejecting the application is attempt on the part of Plaintiffs-Petitioners to collect evidence by measurement of land through Court Commissioner.

4 In the Written Statement filed by the Defendant-Respondent, he has repeatedly raised the contention that the entire Survey No.19 is required to be measured and that unless such measurement is carried out, the suit cannot be progress. This contention has been raised in paras 1 and 3 of the Written Statement. It thus appears that the Respondent-Defendant himself sought measurement *albeit* of the entire Survey No.19. This aspect is not taken into consideration by the Trial Court while passing the impugned order.

5 Today none appears for the Respondent though appearance on his behalf is filed. However, considering the fact that Respondent-Defendant himself desired measurement of land, no purpose would be served by deferring hearing of the Petition for appearance on his behalf.

6 Considering the assertion made by Respondent-Defendant that the suit cannot progress without carrying out measurement of Survey No.19, in my view the Trial Court ought to have allowed the application for measurement of the suit property.

7 The Writ Petition accordingly succeeds. The order dated 1st April 2017 passed by the Trial Court is set aside and application at Exhibit 19 stands allowed in terms of the prayers made therein. Court Commissioner to carry out measurement both of entire Survey No.19 as well as of Gat No.41 (Gat No.42 before sub-division) within three months and submit his report alongwith measurement map.

8 Plaintiffs-Petitioners to bear the expenses of the Court Commissioner. With the above directions the Writ Petition is disposed of.

(SANDEEP V. MARNE, J.)

SUDARSHAN
RAJALINGAM
KATKAM

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