

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Writ Petition No.3345 of 2022

Rajendra S/O Sheshrao Bhuyar and Others
Vs
Nanaji s/o Nathuji Kevatkar (Dead) Thr. Lrs.

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri S.S. Shingane, Advocate for the Petitioners
None for the respondents

**CORAM : ANIL S. KILOR, J.
DATED : 29th March 2023**

1. Heard.
2. In this petition, a challenge is raised to the order below Exh.82 dated 07.04.2022 passed by Civil Judge Senior Division, Amravati in Regular Civil Suit No.190 of 2013, rejecting the application under Order XXVI Rule 9 of the Code of Civil Procedure(CPC), for appointment of Court Commissioner.
3. The petitioner filed the suit for declaration and permanent prohibitory injunction with following prayers:

“It is therefore, most humbly prayed that, this Hon’ble Court be pleased to pass the decree in favour of the plaintiffs and against the defendant as under.

i) to declare that the defendant have no any right, title, interest in respect of the area of encroachment shown in letter क प म ई of the plaint map.

ii) further it be declare that the plaintiffs have absolute owner of the said encroached portion which is shown in letter क प म ई of the plaint map.

iii) defendant permanently restrained for encroaching upon the suit field and for interfering with the possession of the suit field.

iii-a) Further this Hon'ble Court may kindly be pleased to issue order of mandatory injunction thereby the defendant be directed to remove said encroach portion shown by letter ५ ५ ५ ३ in plaint map and if defendant fails to do so, then this Hon'ble Court be pleased to remove the above said encroachment, in the interest of justice.

iv) The cost of the suit be saddle on the defendant.

iv) Grant any other just and suitable relief in favour of plaintiffs and against the defendant in the interest of justice."

4. The pleadings in the plaint, particularly, paragraph (4) makes it clear that the land was measured through TILR prior to filing of the suit and after fixing boundaries by the TILR, the defendants encroached upon the portion shown in the another map prepared by the retired TILR, which is a part of the plaint.

5. The application filed under Order XXIV Rule 9 read with Section 75 of the CPC, states the requirement for appointing Court Commissioner in the present matter. However, without considering the reasons stated in the application and the law in this regard as laid down in numerous cases by this Court, for instance in the case of ***Raghunath Kashinath Chavan vs. Sakharam Maroti Chavan and another***¹ wherein, it has been held that the encroachment cannot be proved in absence of public record and in the cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent.

1 2019(3) MH LJ 183

6. This Court, in the case of **Raghunath Kashinath Chavan** (supra), has held thus:

“10. Here, in this case, the plaintiff got the land measured on 16.03.1999 and suit was filed on 23.09.1999. That means prior to the filing of the suit, he had applied to the TILR for fixing boundaries of the land Sy.No.109. The land of the defendants was Sy.No.108. It appears that the TILR measured only Sy.No.109. He did not measure Sy.No.108. Therefore, without fixing of the boundaries, it appears that the said measurement was carried out; which can be said to be a defective measurement, though the suit was decreed earlier. The learned First Appellate Court, first of all, failed to consider that the measurement was not properly done and therefore, he ought to have exercised his jurisdiction to appoint Court Commissioner under Order XXVI Rule 9 of Civil Procedure Code and get the measurement properly done. However, the appeal came to be allowed on the ground that the brother of the plaintiff is not party to the suit and without him proper demarcation has not been done. It was also observed that when the encroachment is stated to have been made to the extent of 3 Gunthas, plaintiff cannot ask for removal of his half share i.e. 1½ Guntha only. Thus, there is substance in the arguments advanced on behalf of the appellant that both the Courts have not exercised their jurisdiction judiciously and had not tried to bring on record an agreeable measurement to resolve the dispute. Following paragraph in Sulemankhan's Judgment is important.

"8. In cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute. The Trial Court as well as 1st Appellate Court which are Court of Facts, are duty bound to ascertain that a map is drawn to the appropriate scale

by competent Government official from the office of TILR or DILR, as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map. The Trial Court can certainly raise presumption of accuracy and genuineness of such map in view of Section 83 of the Evidence Act if map is drawn by competent authority. (See : Ram Kishor Sen & ors v. Union of India & ors reported in MANU/SC/0052/1965 = AIR 1966 SC 644) Where such vital document is duly produced, proved and established, necessary detailed decree can be follow if there is any encroachment on the suit property. As held by this Court in Vijay Shende's case (supra), in such cases, fact of encroachment may be proved partly by oral evidence although the extent of encroachment cannot be proved in absence of public records without following due procedure emerging from Section 36 and Section 60 of the Evidence Act. In view of this recent judicial precedent referred to above, in the larger interest of justice, when it appears that the trial Court as well as 1st Appellate Court failed to follow proper procedure in this regard to ascertain the boundaries of the suit property."

7. Thus, considering the above referred observations, the findings recorded by the learned trial Court that, allowing the application for appointment of Court Commissioner, it would amount to collection of evidence, is contrary to law.

8. Moreover, the impugned order is cryptic, passed in a casual manner without recording the reasons and without considering the case of the plaintiffs. Accordingly, I am of the opinion that the matter needs to be remanded back to the learned trial Court for deciding the same afresh. Accordingly, I pass the following order:

- i) The writ petition is partly **allowed**.
- ii) The order below Exh.82 dated 07.04.2022 passed by Civil Judge Senior Division, Amravati, is hereby quashed and set aside.
- iii) The matter is remanded back to the learned Civil Judge Senior Division, Amravati to decide the application Exh.82 afresh, after hearing both the parties.

[ANIL S. KILOR, J.]