



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

911 WRIT PETITION NO. 2075 OF 2023

Santabai Sitaram Sirsewad & anotherPetitioners

VERSUS

Maheshkumar Mathuradasji Malpani
& anotherRespondents

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Mr. T. R. Quadri, Advocate for the Petitioners,.

Mr. S. S. Gangakhedkar, Advocate for Respondent Nos. 1 and 2.

CORAM : R. M. JOSHI, J.

DATE :28th JUNE, 2024.

PER COURT :

1. This Petition takes exception to the order of appointment of Court Commissioner at the instance of Plaintiffs vide Exhibit 78.

2. Petitioners are Defendants and have raised objection to the said application. It is the contention of the learned counsel for the Defendants that the Plaintiffs have filed the suit with a specific averment that prior to filing of the suit measurement of the disputed lands was done twice. It is his submission that once such measurement is done, it is not open for the Plaintiffs to seek re-measurement of the suit properties unless the Court comes to the conclusion that said measurement carried out earlier is not in

accordance with law. In support of his submission, he placed reliance on following judgments :-

- i) Mukhtar Khan Badsha Khan vs. Salimabi & another
Writ Petition No. 6019/2022
- ii) Chandrarao vs. Dhondu
LAWS (BOM)-2012-1-40
- iii) Shantaram Dattatray Kekan and others vs. Bhausahab
Karbhari and others
Writ Petition No. 14046/2021
- iv) Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar
2017(5) ALL MR 104
- v) Dattatray Ramchandra vs. Baluti ailas Ranjana
AIR ONLINE 2021 BOM 880.

3. Learned counsel for the Respondents supported the impugned order.

4. There is no dispute about the fact that during the pendency of the suit, there is no order passed by the Court appointing Court Commissioner to measure the suit properties. Measurement carried out prior to filing of the suit is not admitted by the other side. The law on the point of decision of the suit involving issue of encroachment and recovery of possession is well settled. The suit for encroachment and possession cannot be decided on the basis

of oral evidence but it ought to be decided on the basis of measurement of the land. If it is so, then the discretion exercised by the learned Trial Court in appointing the Court Commissioner cannot be faulted with. The stage of the proceeding is for recording of evidence, as such no objection can be raised that the appointment of Court Commissioner is before commencement of trial. Further, no prejudice would be caused to the Defendants if Court Commissioner is appointed as it is always open for them to challenge the said measurement as per law.

5. Having regard to the aforestated facts, the judgments cited supra appear to be passed in altogether different set of facts and hence are not applicable to this case. Hence, Petition stands dismissed.

(R. M. JOSHI)
Judge

dyb