



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 14949 OF 2023

Narayan s/o Janardhan Kakde

.. Petitioner

versus

Suryabhan s/o Roduba Kakde & others

.. Respondents

Mr. N. S. Muthiyan, Advocate for the Petitioner.

Mr. S. D. Hiwrekar, Advocate for Respondent Nos. 1 to 4.

CORAM : R. M. JOSHI, J.

RESERVED ON : 5th JULY, 2024.

PRONOUNCED ON : 9th JULY, 2024.

ORDER :

1. Petitioner/Plaintiff in Regular Civil Suit No. 240/2020 being aggrieved by order dated 14.08.2023 passed below Exhibit 67 rejecting application for appointment of Court Commissioner for joint measurement of the properties has preferred this Petition.
2. Parties are referred to as Plaintiff and Defendants for the sake of convenience.

3. Plaintiff had filed suit for recovery of possession of encroached portion of about 36 R from suit property. It is alleged that Defendants had carried out the said encroachment. Before filing suit, Plaintiff got his property measured from Surveyor in order to ascertain encroachment and on the basis of the said measurement the suit came to be filed. Defendants' written statement is in the form of denial.

4. After framing issues, Plaintiff examined the surveyor who had carried the measurement prior to filing of the suit. After his evidence was recorded Plaintiff filed application Exhibit 69 seeking appointment of Court Commissioner for measurement of the properties of both Plaintiff as well as Defendants. This application is opposed by Defendants with the contention that this amounts to collecting evidence which is not permissible in law. On these amongst other grounds, application was opposed. The said objection was upheld by the Trial Court and by passing the impugned order, application Exhibit 69 came to be dismissed with observation that accepting such application at the stage of trial would amount to seeking assistance of the Court for proving case of Plaintiff which is not permissible in law.

5. Learned counsel for Plaintiff submits that since the suit is for determination of encroachment and possession of such encroached portion, such issue can be decided only on the basis of measurement of the properties and not by ocular evidence. It is his submission that prior to filing of the suit the properties of both Plaintiff and Defendants were not measured and, on the basis of measurement of Gat No. 60 i.e. land belonging to Plaintiff, the issue of encroachment cannot be determined. Thus, it is his submission that the Trial Court has committed error in holding that it amounts to collecting of evidence.

6. Learned counsel for Defendants opposed the said contention by supporting the impugned order. It is his submission that once Plaintiff has got his land measured and no encroachment is found, it is not permissible for Plaintiff to seek appointment of Court Commissioner which according to him, amounts to collecting evidence which is not acceptable in law.

7. It is trite that in case of suit for encroachment and possession of the immovable property, measurement of the properties

is absolutely relevant for the parties for determination of such encroachment. Needless to say that the issue of encroachment cannot be determined solely on the basis of ocular evidence led by the parties. In the instant case, Plaintiff has filed an application for appointment of Court Commissioner while evidence is being recorded. Thus, it cannot be said that the stage at which such application is filed is improper. It is further pertinent to note that Plaintiff has led evidence in order to substantiate his contention of encroachment caused by Defendants and thereafter application is moved for measurement of properties of Plaintiff and Defendants. Had it been the case that prior to filing of suit the properties of Plaintiff and Defendants were measured, in that case, Plaintiff would not have been permitted to lead further evidence until the Court accepts or rejects such measurement. This being not the case, it cannot be said that the application filed by Plaintiff for appointment of Court Commissioner to measure lands of both Plaintiff and Defendants amounts to collection of evidence. This Court, therefore, does not concur with the findings recorded by the learned Trial Court that the application filed at this stage of trial amounts to taking assistance of the Court to prove the case of Plaintiff.

8. Having regard to the peculiarity of the facts of the present case and considering the issue involved in the suit of encroachment and possession of encroached portion of the property, it is a fit case wherein application for appointment of Court Commissioner for joint measurement of the properties of Plaintiff and Defendants ought to be allowed. Hence, the impugned order is set aside. Application Exhibit 69 is allowed.

9. Petition is allowed in above terms.

(R. M. JOSHI)
Judge

dyb