



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

WRIT PETITION NO. 5438 OF 2019

t. Sumitrabai Yashwant Mutkule and others ..vs.. Suresh s/o Shamrao Mutkule and others)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R.J. Shinde, Counsel for the petitioners,
Mr. M.L. Jadhao, Counsel h/f. Mr. K.S. Narwade, Counsel for Respondent No.1.

CORAM : ABHAY J. MANTRI, J.

DATED : 23-09-2024

The original plaintiffs/petitioners are dissatisfied with the order dated 15-11-2018 passed below Exhibit 31 in Regular Civil Suit No.14/2013 by the learned Civil Judge, Junior Division, Umarkhed, thereby rejecting the application for appointment of the court commissioner to measure the suit land.

2. The learned Counsel for the petitioners has vehemently contended that as per Order XXVI Rule 9 of the Civil Procedure Code, the petitioners are entitled to appoint the commissioner to measure the suit land. However, the learned trial Court did not understand the interpretation of said provisions and erred in passing the impugned order. Therefore, the said order is not sustainable in the eyes of the law.

3. He further argues that whenever there is a dispute about the boundaries of immovable properties, measuring the land to ascertain the correct position is desirable to resolve the controversy between the parties.

4. To substantiate his contentions, he has relied on the judgment of this Court in the matter of *Kolhapuri Bandu Lakade v. Yallappa Chinappa Lakade (Decd.thru.Pooja @ Poojari Y. Lakade) and others* reported in *2011(3)All MR 599* and more particularly drawn my attention to paragraphs 13, 17 and 19 of the said judgment, and submitted that in view of the law laid down in the above judgment, the petitioners are entitled to the relief as claimed. Hence, he urges the petition to be allowed.

5. *As against* Mr. M.L. Jadhao, learned Counsel holding for Mr. K.S. Narwade, for respondent No.1, has supported the impugned order. Hence, he urges the dismissal of the petition.

6. I appreciated the submissions of the learned Counsel for both parties and perused the impugned order and record.

7. At the outset, it appears that the plaintiffs have filed the suit for directing the Deputy Superintendent of Land Records as Court commissioner to measure the suit property, submit its report before the Court, and direct the defendants to hand over the encroached portion to the plaintiffs. In paras 3, 7 & 8 of the plaint, it is averred that on 13-05-2009, the plaintiffs measured the suit property and found that the defendants had made encroachment on 1 H 20 R land. It does not appear that the plaintiffs are aggrieved by the measurement carried out by the competent authority.

8. *Furthermore*, it reveals that by filing the application Exhibit 31, the plaintiffs are seeking a claim under prayer clause (a) of the suit plaint at the initial stage, which is not permissible in the eyes of law. Secondly, if the application as

prayed is allowed, then it would permit the plaintiffs to collect the evidence through the Court in support of their case, which is also not permissible in the eyes of the law.

9. Perused the judgment in the case of *Kolhapuri Bandu Lakade* cited supra. This Court has observed that “*if the commissioner is appointed to carry out the measurement, then it would assist the Court in arriving at the just decision of the matter.*” However, in the case at hand, the measurement map dated 13-05-2009 is already on record, on which the petitioner is relying. Therefore, in my view, the observations made in the aforecited judgment are not helpful to the case at hand. Instead, the observations made in the case of *Chandraro s/o Hanumantrao Wable v. Dhondur s/o Fula Patil* reported in *2012(2) Mh.L.J. 847* apply to the case at hand.

10. Besides, in the order impugned, the learned Judge rightly observed that the measurement map dated 13-05-2009 was already produced before the Court, and no satisfactory reason has been given to re-measure the suit land. Therefore, it held that there was no need to make further measurements of the suit land. The finding of the learned Judge is well-reasoned and proper. Consequently, I do not find any substance in the submission of the learned Counsel for the petitioners that the impugned order is bad in law. Rather, it seems that the order passed by the trial Court is just and proper and no interference is required in writ jurisdiction.

11. In the background above, it would not be proper to disturb the well-reasoned impugned order. As a result, the petition, being bereft of merit, stands dismissed with no order as to cost.

12. As a sequel, the stay order is vacated. Inform the trial Court accordingly.

(ABHAY J. MANTRI, J.)

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