



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.127 OF 2016

Bankat Bhawani Kardal
VERSUS
Vishwambhar Shankarrao Mhaske And Another

.....
Mr. Shaikh Mujtaba Gulam Mustafa, Advocate for the Petitioner

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CORAM : SIDDHESHWAR S. THOMBRE, J.

DATE : 4 MAY, 2026

ORDER :

1. Heard the learned advocate for the petitioner.
2. The petitioner is aggrieved by the order dated 14.12.2015 passed by the learned Civil Judge, Junior Division, Kannad, below Exhibit-43 in Regular Civil Suit No.47 of 2009, whereby the application filed by the plaintiff under Order XXVI Rule 9 of the Code of Civil Procedure for appointment of DILR, Aurangabad, as Court Commissioner for measurement of land Gut No.471, came to be rejected.
3. Mr. Sk. Mujtaba Gulam Mustafa, learned counsel for the petitioner, submits that there were separate measurements carried out at the instance of the plaintiff and the defendants in respect of Gut Nos.471 and 470 respectively. He submits that, in order to ascertain the actual position, both the properties were required to be jointly measured, particularly when the suit is for possession of the alleged encroached area. He invited my attention



to the copy of the plaint as well as the order passed by the learned Trial Court and contended that Gut No.471 was measured by Mr. G.D. Tarate, whereas Gut No.470 was measured by Mr. R.D. Bansode. He submits that there are in all three measurement reports on record; however, none of the authorities had jointly measured Gut Nos.471 and 470 together. Therefore, according to him, joint measurement of both the lands was necessary to ascertain the actual position regarding the alleged encroachment. He, therefore, prays that the writ petition be allowed.

4. Per contra, Mr. P.M. Gaikwad, learned counsel for the respondents, vehemently opposed the petition by contending that the said application was filed after the parties had led their evidence and when the matter was posted for arguments. He submits that the respondents, by leading their evidence, had demolished the case of the plaintiff and, therefore, by filing the present application, the plaintiff is attempting to fill up the lacunae in the evidence. He, therefore, submits that the learned Trial Court has rightly rejected the application.

5. Having heard the learned counsel for the respective parties at length, there is no dispute about the factual position in the matter that separate measurements were carried out and evidence was also led by the parties. The fact remains that different measurements are shown in the respective reports. Since the suit is for possession of the alleged encroached area, for proper adjudication of the real controversy, it is always desirable to appoint



a Court Commissioner for measurement of the lands. It is also necessary to note that the plaintiff and the respondents had individually carried out measurements of Gut Nos.471 and 470 respectively and both the gut numbers were not jointly measured. Therefore, it is necessary that both the gut numbers are jointly measured and the boundaries are fixed so as to determine the exact extent of encroachment, if any.

6. This Court in ***Sulemankhan s/o Mumtajkhan and Others v. Smt. Bhagirathibai wd/o Digamber Asalmol and Another*** reported in 2014 (5)

ALL MR 552, has held thus:

"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 the 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 depositing in support of such plan/map, if it is so necessary in the absence of admission for exhibiting the map."

7. In the present case, admittedly, there was no joint measurement of Gut Nos.471 and 470 and the earlier measurements were carried out separately without issuing notice to the other parties. Therefore, the learned Trial Court ought to have exercised powers under Order XXVI Rule 9 of the Code of Civil Procedure for appointment of a competent Court



Commissioner. Merely because the application was filed at a later stage would not by itself be a ground to reject the same, particularly when the dispute pertains to encroachment and fixation of boundaries and proper adjudication of the controversy requires a duly drawn measurement map prepared by a competent Government authority. In fact, in absence of proper joint measurement and a duly drawn map, effective adjudication of the suit for encroachment would not be possible. Therefore, this Court is of the considered view that the learned Trial Court committed an error in rejecting the application below Exhibit-43.

8. In view thereof, I am inclined to allowed the writ petition. Hence, the following order:

ORDER

- (i) The writ petition is allowed.
- (ii) The order dated 14.12.2015 passed by the learned Civil Judge, Junior Division, Kannad below Exhibit-47 in R.C.S. No.43 of 2009, is hereby quashed and set aside.
- (iii) Resultantly, the application below Exhibit-43 is hereby allowed.
- (iv) The learned Trial Court shall appoint a competent officer from the office of DILR/TILR as Court Commissioner for carrying out joint measurement of Gut Nos.471 and 470 after issuing notice to all concerned parties and adjoining holders, in accordance with law.



9. Learned counsel for the parties jointly submit that the suit is of the year 2009 and the proceedings before the Trial Court have remained stayed since the year 2016. They, therefore, request for a direction to the learned Trial Court to decide the suit within a stipulated period.

10. Considering the said request, the learned Trial Court is directed to decide Regular Civil Suit No.47 of 2009 as expeditiously as possible and preferably within a period of one year from the date of receipt of this order.

[SIDDHESHWAR S. THOMBRE]
JUDGE

S P Rane