



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

904 WRIT PETITION NO. 3237 OF 2024

Machindra Vithal Jadhav

....Petitioner

VERSUS

Kailas Murlidharrao Suslade

.....Respondent

.....

Mr. P. P. Patni, Advocate holding for Mr. P. F. Patni, Advocate for the
Petitioner.

Mr. A. R. Devkate, Advocate for the Respondent.

CORAM : R. M. JOSHI, J.

DATE : 30th JANUARY, 2025.

PER COURT :

1. This petition takes exception to the order passed by the Trial Court rejecting prayer of the petitioner/plaintiff of cross-examining the surveyor who was appointed pursuant to the joint application filed by the parties.

2. The District Superintendent of Land Record (DSLRL) was appointed as Court Commissioner. He measured the land and submitted report along with map on 29.10.2018. Defendant admitted the said report whereas Plaintiff disputed it. In this backdrop, application Exhibit 108 was moved before the Trial Court

to call DSLR as Court witness. Learned Trial Court passed order with following observations :

आदेश

१. वादीचा यांचा निशाणी क्र. १०८ कडील अर्ज परिक्षण भुमापन श्री. एस.जे. बोरडे भुमी अभिलेख कार्यालय कन्नड यांची साक्षा नोंदविण्याचा व मोजणी अहवालावरील पुराव्याचे खंडण करण्याचा अधिकार राखून सदर अर्ज नामंजूर करण्यात येत आहे.

3. Learned counsel for Petitioner submits that having regard to the provisions of Order 26 Rule 10(2) of Code of Civil Procedure, Petitioner/Plaintiff is within his right to take exception to the report of the Court Commissioner. It is his submission that the Court Commissioner is not being appointed only at the instance of the Plaintiff, he cannot be called as a witness but can be only cross examined. In any case, it is his submission that the Trial Court has not recorded any reason for not calling the said witness as Court witness.

4. Learned counsel for Respondent supported the impugned order and placed reliance on the judgment of Madras High Court in case of S. K. Krishnan vs. Ambal Traders and others, **2007-2-L.W.**

292. He stressed on the observations made in paragraph No. 16 of the judgment which read thus :-

“16. In the above case an application has been filed for appointment of advocate commissioner, was allowed by the trial court but the trial court declined to examine the Commissioner as a court witness and directed that the commissioner be examined as a witness on the petitioner side. Aggrieved by the said order, revision petition was filed before this court and this court held as follows :-

15. The position could be summed up as under :-

(i) Under Or.26 R. 10(2) CPC, the Report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall part of the record;

(ii) The Court itself could examine the Commissioner and in such cases, the Commissioner is to be invariably examined as a Court Witness;

(iii) When Application is filed by any of the parties to the Suit to examine the Commissioner, it is the discretion of the Court to allow the Application. But permission should not be withheld arbitrarily. If permission is declined it must be by a reasoned order. When the Court grants permission to the party to examine the Commissioner, it is the discretion of the Court either to examine the Commissioner as a Court Witness or as that of the party's witness :

(iv) In the facts and circumstances of the case, the Court has to judicially determine whether the Commissioner is to be examined as Court witness or the Party's Witness:

(v) The contention that in all the instances the Commissioner is to be examined only as Court witness, is unacceptable. Protection is afforded to the Commissioner from any vexatious examination by either of the party."

5. At the outset, it would be relevant to take note of provisions of Order 26 Rule 10 of Code of Civil Procedure, which read thus :-

10. Procedure of Commissioner—

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and deposition to be evidence in suit. Commissioner may be examined in person—The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to suit may examine the Commissioner personally in

open Court touching any part of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

6. Order 26 Rule 10(2) of Code of Civil Procedure provides that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. Thus, the report and measurement map become evidence, which could be relied upon. However, it further provides that with the permission of the Court any of the party to the suit may examine the Commissioner in the open Court touching the matter referred to him. It is thus clear that the party who has not admitted the Commissioner's report is within his right to examine the Commissioner by calling him personally in the Court. It is pertinent to note that the term 'examination' has been referred in this provision unlike specific reference of examination-in-chief under Order 18 Rule 4 of Code of Civil Procedure. Thus, there is no justification to say that the party which disputes the report of the Court Commissioner can not cross examine such witness to disprove the report/map. In

the light of these facts, the Trial Court is not justified in deferment of the right of the plaintiff to dispute the said evidence by cross-examining the Commissioner.

7. Undeniably, Trial Court has not recorded any reason for not calling this witness as a Court witness. In clause No. (iii) of the judgment of Madras High Court referred hereinabove it is specifically held that when the application is filed by any of the parties to the suit to examine the Commissioner, it is the discretion of the Court to allow the application but the permission should not be withheld arbitrarily. If the permission is declined, it must be by a reasoned order. Since perusal of the order impugned does not show any reasons recorded for not calling the Court Commissioner as a witness for the purpose of cross-examination, it cannot sustain.

8. Having regard to the provisions of Order 26 Rule 10(2) of Code of Civil Procedure and right of the plaintiff to take exception to the report of the Court Commissioner, the order impugned is set aside. The Trial Court is directed to decide application Exhibit 109 afresh by keeping in mind right of the plaintiff to take exception to the measurement report and map and provisions of Code of Civil

Procedure. The Court also to take into consideration the fact that appointment of Court Commissioner was not on the basis of application filed by plaintiff only but it was on the joint application made by both the sides.

9. In view of above, petition is allowed. Impugned order passed below Exhibit 108 in Regular Civil Suit No. 189/2009 is set aside. Application Exhibit 108 is remanded back to the Trial Court for decision afresh.

(R. M. JOSHI)
Judge

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