

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

WRIT PETITION NO.3418 OF 2015

Vilas s/o Kalyan Shitole,
Age 55 years, Occu. Agri.,
R/o Kautha, Taluka Shrigonda,
District Ahmednagar

.. Petitioner
(Orig. Plaintiff)

Versus

1. Baban s/o Haribhau Shitole,
Age 55 years, Occu. Agri.,
2. Arun s/o Shivaji Shitole,
Age 44 years, Occu. Agri.,
3. Netaji s/o Shivaji Shitole,
Age 39 years, Occu. Agri.,
All R/o Kautha, Taluka Shrigonda,
District Ahmednagar

.. Respondents
(Orig. Defendants)

Mr Dilip B. Rode, Advocate for petitioner
Mr Yogesh Kale, Advocate h/f Mr R.R. Karpe, Advocate for petitioner

CORAM : N.W. SAMBRE, J.

DATE : 22nd December 2015

PER COURT

Heard.

2. Regular Civil Suit No.294 of 2006 preferred under Section 96 of the Code of Civil Procedure against the judgment and decree dated 4th September 2006 passed by 2nd Joint Civil Judge, Junior Division, Shrigonda in Regular Civil Suit No.153 of 1998 came to be partly allowed on 16th December 2010 with following observations :

- “1. The appeal is partly allowed.
2. The impugned judgment and decree is hereby set aside.
3. The matter is remanded to the Trial Court with a direction that the Trial Court shall allow both the parties to get their respective lands measured by applying for joint measurement at the costs of both the parties and shall allow the parties to adduce any additional evidence, if necessary and shall decide the suit afresh having regard to the discussion made in the body of this judgment.
4. Under the given circumstances, the parties shall bear their own costs throughout.
5. Record and Proceedings be sent back to the Trial Court forthwith.
6. The Trial Court shall decide the suit as expeditiously as possible.
7. The parties shall appear before the Trial Court on 17th January 2011 without requiring any further notice.
8. Decree be drawn accordingly.”

3. As a consequence, application Exh.17 for joint measurement, moved before the learned trial Court came to be allowed by order dated 1st February 2012.

4. Thereafter, the respondents moved another application Exh.73 for carrying out superior measurement, which was granted by the learned trial Court by order dated 22nd October 2012,

5. After these two measurements, the evidence in the matter was recorded and according to petitioner, since superior measurement was to be carried out by the competent Officer in tune with the prescribed procedure, which was not complied in accordance with Court's order, same prompted him to move application Exh.128, for appointment of Deputy Superintendent of Land Records as Court Commissioner. The said application came to be rejected by the learned Civil Judge, Senior Division, Shrigonda, vide order dated 23rd February 2015, as such present petition.

6. Learned Counsel for the petitioner would urge that from the expert's evidence which is brought on record, it could be inferred that the order passed by learned trial Court appointing the superior measurer, as is reflected in the order dated 22nd October 2012, was not taken to its logical end, as the measurement was carried out by incompetent Officer and not by Superintendent of Land Records. According to him, as the measurement carried out pursuant thereto was not in tune with the prescribed procedure, the said measurement shall cause prejudice to the petitioner and as such, sought setting aside of the order impugned refusing to appoint Court Commissioner.

7. Mr Karpe, learned Counsel for the respondents would urge that already there are two measurements in the matter, one after the remand order passed by the lower appellate Court and second at the behest of respondents, when the order was passed below Exh.73 appointing authority, i.e. Superintendent of Land Records to carry out

superior measurement. He would then urge that just because the measurement reports or the evidence of the Cadastral Surveyor, who is an expert if not supporting the petitioner, same cannot be a ground for appointing Court Commissioner for re-measuring the encroached portion. According to him, whether the order passed below Exh.73 was rightly complied with or not by the Superintendent of Land Records, could be an issue to be canvassed at the stage of final hearing of the suit to which the trial Court would apply its mind.

8. Having bestowed my thoughts to the submissions made, it is required to be noted in the background of scheme of Order XXVI, Rule 9, 10, 10-A of the Code of Civil Procedure, the expert should be appointed as Court Commissioner whose evidence, upon scrutiny may assist the Court for reaching to a proper conclusion. Pursuant thereto, the learned lower appellate Court, having noted that the Court Commissioner is required to be appointed and accordingly remanded the appeal. As such, by the joint request of the parties, the Court Commissioner was appointed, who has already submitted his report. The respondents then moved application Exh.73 seeking appointment of Superintendent of Land Records for superior measurement, which was granted and measurement was carried out. Pursuant thereto, the evidence in the matter was recorded and it is at that point of time, the petitioner discovered that the measurement was not as per the order passed below Exh.73. According to the petitioner, the measurement was carried out by sub-ordinate Officer and not by the Superintendent of Land Records, who was directed to carry out the superior measurement. In my opinion, the issue of measurement, the report of

the expert can be taken consideration for a collateral purpose for drawing appropriate inference by the Court below, however, it cannot be taken that report submitted by the Cadastral Surveyor or an expert's opinion is binding on the Court. The Court is require to evaluate such expert's evidence while dealing with the issue for which the expert was appointed as Court Commissioner. The said issue, as such, in my opinion can be gone into by the learned trial Court, particularly as regards whether the measurement was carried out by the competent Officer, as was directed while passing the order below Exh.73 or not. By moving application for appointment of Court Commissioner for third time cannot appears to be a solution to the issue, as the expert is bound to give report adverse to the interest of either of the parties.

9. In view of above, having noted the observations made by the trial Court, in my opinion, no interference is called for in extra-ordinary jurisdiction of this Court. The petition fails, as such stands dismissed. However, it is observed that it shall be open for the petitioner to canvass the issue as regards whether the expert, who was appointed pursuant to the order passed below Exh.73 has carried out superior measurement in a proper manner or not, at the time of final hearing of the suit, which issue if raised, it is expected of the trial Court to deal with the same in accordance with law.

(N.W. SAMBRE, J.)

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