

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 5288 OF 2014

Bhausahab S/o Bajaba More,
Age: 58 years, Occu: Agril,
R/o : Morewadi, Post: Vombori,
Tq. : Rahuri, Dist : Ahmednagar

...PETITIONER

VERSUS

Manohar S/o Vitthal More,
Age: 28 years, Occu: Agril.,
R/o : Morewadi, Post : Vombori,
Tq. : Rahuri, Dist : Ahmednagar

...RESPONDENT

Mr Hemant U. Dhage, Advocate for petitioner;
Mr R. R. Karpe, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 3rd March, 2015

ORAL ORDER

By the present petition, the petitioner/original defendant challenges the legality and validity of the order dated 27th February, 2014, passed by 2nd Joint Civil Judge Junior Division, Rahuri, below Exh.36, in Regular Civil Suit No.75 of 2007, whereby prayer for appointment of Court Commissioner came to be turned down.

2. Respondent/original plaintiff has instituted Regular Civil Suit No.75 of 2007 for measurement of suit land through Taluka Inspector of Land Records, determination of boundaries, possession of encroached portion and perpetual injunction.

3. In the said suit, the petitioner/defendant filed application Exh.36, seeking appointment of Taluka Inspector of Land Records as Court Commissioner, under Order XXVI, Rule 9 of the Code of Civil Procedure, for measurement of his land bearing Gat No.1209, which came to be turned down by the order impugned herein. Thus, the present petition.

4. Learned Counsel appearing on behalf of the petitioner/defendant would urge that he is owner of land Gat No.1209, whereas respondent/plaintiff owns land Gat No.1208. The learned Trial Court, on earlier occasion, had passed an order of measurement of the suit property. While giving effect to the said order, when Taluka Inspector of Land Records carried out the measurement, the present petitioner/defendant whole heartedly participated in the said proceedings. According to him, though he is a party to the said proceedings, still land Gat No.1209 owned by him was not measured, which prompted him to move the subsequent application Exh.36. According to him, no prejudice will be caused to the plaintiff if the lands of the defendant and the plaintiff are re-measured.

5. Learned Counsel appearing on behalf of the petitioner has sought to place reliance on the judgment of this Court in the matter of **Bhupendra s/o Bhagwat Turkar vs. Homraj s/o Zituji Meshram**, reported in **2014 (4) Mh.L.J. 231**, so as to canvass that in case of boundary dispute, the measurement of the suit property under Order XXVI, Rule 9 of the Code of Civil Procedure, is required to be granted for the proper adjudication of the issue. He has also placed reliance on the other similar judgments.

6. Learned Counsel appearing on behalf of the petitioner would urge that for proper adjudication of the issue as regards the claim of the respondent about encroachment, it is necessary that the land of the petitioner is also measured.

7. Mr Karpe, learned Counsel appearing on behalf of the respondent would urge that it is a case of consensus order, as the petitioner has never objected to the application for appointment of the Court Commissioner moved by respondent and in compliance thereof the measurement was carried out by the Taluka Inspector of Land Records. He would further urge that the application Exh.36 is hit by the principle of *res judicata* as the said principle is applicable even at interlocutory stage.

8. In support of his contention, he has invited my attention to the application Exh.21, dated 6th April, 2010 (paper-book page 49) filed by the petitioner seeking correction in Exh.20 report submitted by Court Commissioner so as to mention his Gat No., boundaries, area, details of contents in land and area of encroachment and the 'Say' thereto filed on behalf of the respondent, however, the said application was not pressed. Neither any liberty or leave of the Court was sought for moving this application.

9. Learned Counsel appearing on behalf of the respondent submits that the suit has been filed in 2007 and the same is not decided for last eight years because of the conduct of the petitioner.

10. Having considered rival contentions of the parties, it is required to be noted that the suit is filed by the plaintiff for removal of encroachment and possession of the suit property. *Prima facie*, it is for the plaintiff to prove his case as regards the encroachment and possession thereof. While doing so, if he relies upon the report of the Taluka Inspector of Land Records, i.e. Court Commissioner, the report of the Taluka Inspector of Land Records is always subject to the scrutiny by the Court, in accordance with the provisions of the Evidence Act. In view thereof, in my opinion, the petitioner having whole heartedly participated in the measurement process after giving no objection to the measurement of the

land of the plaintiff and having regard to the fact that subsequent application moved by the petitioner/defendant, seeking measurement of the property was not pressed by him on 14th February, 2007, prompts this Court to take a view that the said application at the behest of the present petitioner, was rightly rejected by the Court below.

11. The law (cited supra) on which the present petitioner has placed reliance though contemplates measurement of the suit property, this Court cannot lose sight of the fact that already measurement of the suit property was ordered on 30th September, 2008, which order was taken to its logical end.

12. In that view of the matter, no case for interference is made out. Thus, the writ petition stands dismissed with no order as to costs.

(N.W. SAMBRE, J.)

amj