

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9027 OF 2015

BANUBI W/O SYED MIR AND ORS
VERSUS
SYED IBRAHIM S/O SYED MOHAMMAD

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Advocate for Petitioner : SHAIKH MOBIN H..
Advocate for respondent : Mr.V.D.Dalvi h/f Mr.M.G.Mustafa.

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CORAM : N.W.SAMBRE,J.
DATED : 23RD DECEMBER,2015

PER COURT :-

A suit for prohibitory injunction at the behest of present respondent being Regular Civil Suit No.229/87 came to be dismissed by judgment and decree dated 12/3/2013 which is subject matter of challenge in Regular Civil Appeal No.78/13. In the said Appeal, application Exh.19 came to be moved under Order 26 Rule 9 of the Code of Civil Procedure by original plaintiff-respondent to the appeal seeking appointment of Court Commissioner to carry out measurement of land survey no.124-B within the municipal limits of Geverai. The learned lower appellate Court by an order dated July, 30, 2015 has allowed the said application Exh.19 which order is impugned in the present petition.

2] The learned counsel for the petitioner original respondent so as to make out cause for quashing of the order impugned would urge that the basic foundation as was led in the Suit while the issues were framed and the decree for dismissal was passed is only restricted to

the extent of existence of 20 ft, wide 100 ft. length road which is used for the purpose of ingress and outgress. The plaintiff in the Suit claimed that the present petitioner is trying to encroach on the said property by carrying out construction. According to him, even if the contents of application Exh.19 are perused, the pleadings therein speak of the only right of way, its dimensions and no pleadings whatsoever in relation to the measurement or the excess holding of land by the petitioner are made. He would then urge that the order impugned granting measurement of the entire Survey No.124-B is not at all called for in the above referred background. In addition, according to him, by grant of the order of measurement the prayer of the petitioner has to be read down as one permitting collection of evidence in exercise of powers under Order 26 Rule 9 for which he has drawn support from the judgment of this Court in the matter of **Syed. Mushtaque Ahmed S/o Syed Ismail and ors. V/s Syed Ashique Ali Khan s/o Haidar Ali reported in 2012(1) All MR 80.**

3] In addition, he would then urge that the No Objection granted by the petitioner's advocate for allowing the application Exh.19 is misconceived as according to him, the No Objection was given by his lawyer contrary to the interest of his client and without any authority. In support of the same, he would sought to place reliance upon the judgment of Apex Court in the matter of **Press Council of India V/s Union of India and another reported in (2012) 12 S.C.C. 329 and in the matter of Himalayan Coop. Group Housing Society V/s Balwan Singh and others reported in (2015) 7 SCC 373**, so as to canvass submission that such No Objection or concession given by an advocate without any consent of the party and contrary to the interest of the litigant is not binding on such party.

4] According to him, in this background, the order impugned is

not sustainable.

5] While opposing the claim for the rejection of application Exh.19, learned counsel for the respondent would urge that the lower appellate court having been aware about the specific prayer in the application Exh.19 and in the background of the claim in the Suit, No Objection given by the learned counsel for the petitioner has allowed the application not only upon concession but also on merit. He would then urge that the point of giving concession without authority by the counsel was never brought to the notice of the Court below nor in clear terms pleading to that effect is raised in the petition. The learned counsel then submits that what was sought is measurement of the survey no.124-B in relation to which specific pleading in the plaint was made as regards encroachment. According to him, it is for the learned appellate Court to dwell upon the controversy raised. After considering the submissions the Court below has allowed the Application which does not call for interference in extra ordinary jurisdiction and as such sought dismissal of the petition.

6] Having bestowed my thoughts to the submissions made by the respective parties at the outset, it is required to be observed that no specific pleadings are made in the petition, that the lawyer of the petitioner before trial Court was not authorised to give such a concession/consent which has prompted the learned trial Court to pass order below Exh.19 appointing Commissioner. Upon reading of the grounds, as raised in the petition, particularly Ground no.6 in clear terms admits that the consent that was given was towards the measurement of the road and not in relation to the property in question.

7] In my opinion, in view of above, the submissions made by

learned counsel for the petitioner that the learned counsel before the trial Court has made concession without authority is liable to be rejected particularly in absence of any foundation thereto in the petition. It is further required to be noted that for giving finding as to whether the encroachment is on the road, in my opinion the learned lower appellate Court has taken recourse of Order 26 Rule 9/10. The learned lower appellate Court was right in doing so, as the Court is required to also consider as to the holding of the plot area petitioner within permissible limit and that of the width of the road. Apart from above, the provision under Order 26 Rule 9/10 of CPC are in aid of the Court and it is for the Court upon analysis of the expert's evidence as to whether to accept the same or not. One more aspect of which this Court must take note of is that the evidence of Court Commissioner will be always subject to scrutiny and petitioner will get appropriate opportunity to object to the same and such evidence is required to be considered by Court, upon its analysis while dealing with merits of the matter. In this background, the reliance placed by learned counsel for the petitioner on the judgment cited supra, will be of hardly any assistance.

8] In view of above observation no case for interference is made out. Petition fails and dismissed.

9] The trial Court shall proceed with the matter without being influenced by the observations made herein as those are prima facie.

(N.W.SAMBRE,J.)

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