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

WRIT PETITION NO.1114 OF 2015

Vitthal Kishanrao Shelke and others.

..Petitioners

-Versus-

The Samata Sahakari Graha Nirman
Sanstha Maryadit, Latur and others.

..Respondents

.....
Mr.Amit S. Deshpande, Advocate for the Petitioners.

.....

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 02nd March, 2015

Per Court:

1 Leave to correct the date in prayer clause (B). Correction be carried out forthwith.

2 The Petitioners are aggrieved by the impugned order dated 24.09.2014 passed by the Trial Court in RCS No.184/1999 thereby allowing the application Exhibit-191 for appointing the Deputy Superintendent of Land Records, Latur as a Court Commissioner.

3 The Petitioners have primarily based their challenge on the ground that there was a measurement of the land conducted by the Surveyor prior to the institution of the suit on 30.06.1998. The suit was

filed on 24.08.1999. The concerned Surveyor had supplied the copies of the report to the Plaintiff as "Copy-C". It is contended that three copies in Form A, B and C were prepared by the Taluka Inspector of Land Records Office.

4 Mr.Deshpande, learned Advocate appearing for the Petitioners, has submitted that the Plaintiff has produced the Copy-C on record. As such, merely because the Surveyor, who was a witness, states that the original record of measurement of the suit land is not traceable, cannot be a ground for appointing a Court Commissioner for measurement of the suit land.

5 Mr.Deshpande has further submitted that in the cross-examination of the Surveyor, certain admissions are given in favour of the Petitioners. To nullify the said admissions, the Plaintiff has filed application Exhibit-191 for seeking appointment of a Court Commissioner.

6 Mr.Deshpande has placed reliance upon the order passed by this Court dated 09.12.2014 in **Writ Petition No.10495/2014** (*Rajendra Dnyanoba Rankhamb v/s Murlidhar Santram Kadam*), to contend that this Court has rejected the second appointment of the Court Commissioner.

7 Having heard the learned Advocate for the Petitioners, I have gone through the petition paper book with his assistance as well as the order dated 09.12.2014 passed in the case of Rajendra Dyanoba Rankhamb (supra).

8 In the instant case, the facts are that the Surveyor has earlier measured the suit land on 30.06.1998. The said Surveyor was summoned as a witness in these proceedings. He has stated on oath that the original record of measurement of the suit land is not traceable. After the said statement was made, the Plaintiff has filed an application Exhibit-191 on 25.07.2014. The prayer made in the said application is as follows:-

“Application may kindly be allowed and Deputy Superintendent Land Record, Latur may be appointed as Court Commissioner to measure the suit land in presence of the parties and submit his report.”

9 As such, the request of the Plaintiff was merely to measure the suit land in the presence of the parties and submit a report.

10 By the impugned order, the Trial Court has issued the following directions:-

- “1. Application at Exh.191 is allowed.*
- 2. Deputy Superintendent, Land Record, Latur is hereby appointed as Court Commissioner to measure the suit land as given in para no.1 of the plaint.*

3. *The Court Commissioner is directed to submit his report with map as early as possible.*
4. *The plaintiff shall deposit Commissioner's fees according to law, till next date.*
5. *Issue letter to Court Commissioner accordingly.”*

11 It is thus, clear that the Deputy Superintendent of Land Records, Latur is directed to measure the suit land as is described in the first paragraph of the plaint. The land is said to have been measured earlier prior to the institution of the suit. The original record of measurement is missing. Neither of the parties have made efforts as regards leading secondary evidence as is permissible under the Evidence Act. In this backdrop, the Trial Court found it just and proper to take assistance from the Court Commissioner who was directed to measure the suit land.

12 It is a settled position of law that seeking measurement of the suit land for fixing of boundaries and preparing a sketch map, does not amount to collecting the evidence.

13 This Court in the case of Rajendra Rankhamb (supra) has recorded the contentions of the parties in paragraphs 2, 3, 4, 5 and 6 which read thus:-

- “2. *On 24-06-2011, the petitioner got his plot measured through a Surveyor and it was noticed, post*

measurement, that there was an encroachment of 14 sq. meters by the respondent. Thereafter the petitioner has preferred the suit for seeking reliefs.

3. Upon hearing the learned Advocate for the petitioner and upon going through the petition paper book, it is revealed that earlier a Court Commissioner was appointed by order below Exhibit 30. The T.I.L.R. as per the orders of the Trial Court, completed the joint measurement and filed his report at Exhibit 52. Deposition of the Court Commissioner before the Trial Court is recorded at Exhibit 51.
4. In cross-examination, the Court Commissioner has stated that the measurement was carried out with the aid and assistance of an ATS machine. The Court Commissioner did not personally operate the machine since he was assisted by one Mr. Sonkamble for operating the said machine. It is only based on these answers that the petitioner became suddenly apprehensive, and moved an application Exhibit 55 invoking Rule 10 of Order XXVI seeking remeasurement. That request has been turned down by the impugned order.
5. I have gone through the conclusion of the Trial Court in the impugned order. The Court has adverted to Rule 10 (3) of Order XXVI and considered the contentions of the petitioner. The fact is that the petitioner had earlier admitted Exhibit 33 the Court Commissioner's report as well his map as being correct. It is only after cross-examination, wherein the T.I.L.R. has informed the Court that the operator of the ATS machine assisted the T.I.L.R., that has prompted the petitioner to question the report as well as the map.
6. The Trial Court has concluded that merely because such answers have been given, would not dent the legality and validity of the report and the map. It is also observed that the Trial Court would consider the merits and demerits of the report and the map of the Court Commissioner at the final stage and also consider its probative value."

14 As such, it is clear that in the case of Rajendra Rankhamb (supra), the report of the Court Commissioner was infact admitted. The grievance was as regards the Operator of ATS Machine, who had assisted the TILR while measuring the land. Therefore, the Court Commissioner has stated in his deposition that he did not personally operate the ATS Machine since he was assisted by a person to operate the machine. It was based on this answer, the Petitioners became apprehensive about the report and therefore, took a stand that the report cannot be relied upon and had no probative value. Based on this apprehension, an appointment of a Court Commissioner for the second time was sought. That was turned down by the Trial Court and the petition filed by Rajendra Rankhamb was rejected.

15 It is thus, clear that the facts emerging from Rajendra Rankhamb (supra) are different than those emerging in this case, wherein the original measurement record itself is not traceable.

16 In the light of the above, I do not find that the impugned order could be termed as perverse or erroneous so as to cause any interference in my writ jurisdiction.

17 However, considering the fact that RCS No.184/1999 is pending adjudication for the past about 16 years, ends of justice would be met by directing the Trial Court to decide RCS No.184/1999 as expeditiously as possible and preferably on or before 31.12.2015.

(RAVINDRA V. GHUGE, J.)