

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
APPELLATE SIDE
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 3947 OF 2014

Bhikaji Rajdhar Solanki Vs. Kisan Kundlik Solanki & Ors.

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Office Notes, Office Memoranda of Coram,
appearances, Court orders or directions
and Registrar's orders

Court's or Judge's Order

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Shri R. G. Kavimandan Adv for petitioner.
Shri N. B. Kalwaghe Adv for respondents.

CORAM: A. S. CHANDURKAR J.

DATED: FEBRUARY 09, 2015.

Challenge in the present Writ Petition is to an interlocutory order dated 26.03.2014 passed by the trial Court below Ex. 105 whereby the petitioner was seeking fresh execution of the commission in terms of order of remand passed by the first appellate Court.

The petitioner is the original plaintiff who has filed suit for removal of encroachment and possession thereafter. The trial Court decreed the suit. The first appellate Court allowing the appeal remanded the proceedings with directions to appoint a qualified Surveyor as Commissioner to measure the lands of the plaintiff and the defendant by following

prescribed procedure.

After the order of remand, the Surveyor was duly appointed who measured the lands in question and submitted his report at Ex. 102 along with the map. Plaintiff thereafter filed application vide Ex. 105 pointing out that the directions of the first appellate Court had not been fully complied with and the measurement had not been carried out in accordance with said directions. The trial Court rejected said application on the ground that the plaintiff could lead evidence to show that measurement as carried out was incorrect.

Learned counsel for the petitioner by relying upon the judgment in *Vijay s/o Shrawan Shende and others Vs. State of Maharashtra and others* 2009(5) *Maharashtra Law Journal* 279, submitted that the measurement as carried out was not in terms of the directions issued by the first appellate Court. The lands in question had not been measured and there was no reference to any Government road though directed. He therefore submitted that the directions of the first appellate Court had not been complied and hence the trial Court ought to have allowed application below Ex. 105.

On the other hand, learned counsel for the

respondent no.5 submitted that the report at Ex. 102 was not conclusive and the same was subject to cross examination of the Commissioner. In this regard reliance was placed on the decision in *Kolhapuri Bandu Lakade Vs. Yallapa Chinappa Lakade since dead through Pooja @ Poojari Y. Lakade and others* 2011(3) *Maharashtra Law Journal* 348.

The matter is presently before the trial Court which is examining the case as made out by the respective parties. The Surveyor who has carried out aforesaid measurements can be cross examined by the plaintiff to prove his case that the measurement carried out was not in accordance with the directions issued by the first appellate Court. Lacuna in the procedure can also be brought to the notice of the trial Court. It has been observed in the impugned order that the plaintiff has to lead evidence to prove as to how the measurement was not done in accordance with law. At this stage it would be futile in these proceedings to record a finding on the basis of oral submissions that measurement carried out as per Ex. 102 was not as per aforesaid directions. Hence, keeping open the plaintiff's challenge to the measurement as carried out vide report at Ex. 102 for being urged before the trial Court there is

no reason to interfere at this interlocutory order. All objections in that regard can be raised before the trial Court. Writ Petition is disposed of with no order as to costs.

JUDGE

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