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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2353 OF 2015

Damu Arjun Koli
Age - 59 years, Occ - Agriculture
R/o Mhasavad, Taluka - Shahada
District - Nandurbar

PETITIONER

VERSUS

1. Ramdas Arjun Koli
Age - 64 years, Occ - Agriculture
2. Laxman Arjun Koli
Age - 52 years, Occ - Agriculture
3. Subhash Arjun Koli
Age - 64 years, Occ - Agriculture
All R/o Mhasavad, Taluka - Shahada
District - Nandurbar

RESPONDENTS

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Mr. Durgesh M. Pingale, Advocate for the petitioner
Mr. Amit S. Savale, Advocate for respondents No.1 to 3

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 26th APRIL, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. The petitioner had moved application Exhibit-61 in regular civil suit No.71 of 2011 seeking appointment of court

commissioner pursuant to Order XXVI, Rule 9 of the Civil Procedure Code, for measurement of the land and to fix boundaries. The respondents had opposed the application stating that this would tantamount to collection of evidence and that the matter was already fixed for final arguments and only because issues have been recast, it cannot be said that prejudice is caused to the plaintiff and that the application has been moved to fill up the lacunae. Application for such purpose is abhorred by law and is not permissible.

3. The trial court under its order dated 17th January, 2015 rejected application Exhibit-61. The trial court, while rejecting the application has given following reasons -

“10. Perusal of record makes it clear, that the present suit is filed for the simplicitor perpetual injunction. By way of perpetual injunction he prayed for restraining defendants from causing obstruction to him from using water from suit bore well. Before proceeding further it is necessary to mention that, it is admitted fact between parties that partition was taken place between them and accordingly mutation entries are effected to that effect. Furthermore, parties are cultivating their own share as came to be allotted during the partition. In these circumstance the plaintiff is having opportunity to lead necessary evidence to prove exact location of the suit bore well.

11. But, it is settled law that the court should not exercise discretion to assist the plaintiff in collection of evidence or proving disputed facts. Furthermore, perusal of record makes it clear that already sufficient opportunity was granted to parties to lead evidence in support of their respective pleadings. No doubt, at the time of final arguments this court felt necessary to recast the issues framed at Exh.21. But, after recasting of issues considering the overall record and proceeding it appears that by way of present application the plaintiff is seeking help of this Court to fill up the lacuna in the case which is not permissible in the eye of law. In view of above said discussion, the application needs to be rejected.”

4. Having regard to given facts and circumstances, the order appears to be impeccable and does not deserve any meddling with at this stage.

5. Writ petition, as such, stands dismissed with no order as to costs. Rule stands discharged.

[SUNIL P. DESHMUKH, J.]