

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

WRIT PETITION NO. 3006 OF 2014

Ashok s/o Daulatrao More
Age 55 years, occupation : Agril.
R/of Sonkhed, Tq. Loha, .. Petitioner/Original
Dist. Nanded Defendant No.1

Versus

1. Raosaheb s/o Vithalrao More,
Age 63 years, occupation: Agril.,
2. Tukaram s/o Mohan More,
Age 45 years, occup. : Agril .. Respondents/
Both are R/o Sonkhed, Tq. Loha Resp. No. 1 is
Dist. Nanded Orig. Plaintiff

Mr. G.R. Ingole, Advocate i/b Mr. Dhananjay M.Shinde,
Advocate for petitioner
Mr. A. M. Gaikwad, Advocate for respondent no. 1

CORAM : SUNIL P. DESHMUKH, J.
DATE : 9th August, 2016

ORAL JUDGMENT :

1. Respondent No. 2 despite notice is not appearing.
2. Rule. Rule made returnable forthwith.
3. Heard learned counsel for parties finally, by consent.

4. Petitioner–original defendant no. 1, purportedly aggrieved by order on Exhibit–35 filed by him in regular civil suit No. 72 of 2010 passed on 16-07-2013 by Civil Judge, Junior Division, Loha, rejecting the request for appointment of court commissioner for the purpose as mentioned in Exhibit-35, is before this court.

5. During the course of submissions, learned counsel for the parties fairly pointed out that respondent no. 1 herein – original plaintiff in the suit had applied under Exhibit – 28 for appointment of court commissioner with reference to Order XXVI, rule 9 of the Code of Civil Procedure, 1908 for measuring two gram panchayat properties bearing no. 804/1 and 804/2.

6. Regular civil suit no. 72 of 2010 has been preferred by respondent no. 1, seeking injunction in respect of property bearing no. 804/1 situated at Sonkhed, Tq. Loha, District Nanded, stated to be admeasuring 1642 square ft. having boundaries as are more particularly described in the plaint, whereas, it appears that present petitioner is purchaser of property bearing no. 804/2 claiming the same to be measuring 540 square ft having boundaries as referred to in

the sale deed executed in his favour by respondent no.2 herein.

7. Having regard to rival contentions and having regard to the request on behalf of original plaintiff, trial court had granted Exhibit-28 under order dated 28-03-2011 which reads :

"1. City surver, Sonkhed is hereby appointed as Court Commissioner.

2. The Court Commissioner is directed to measure the house property no. 804/1 and 804/2 and submit the report with measurement, boundaries fixed and encroachment if any made by parties in the each other property with map on or before 28-6-2011.

3. The plaintiff to deposit the necessary charges of Court Commissioner as per the rule.

4. The plaintiff to give PF and necessary documents.

5. Issue writ accordingly. "

8. However, subsequently, respondent no. 1 expressed that his economic condition may not be able to bear burden of fees required for execution of court commission and as such had not pressed said application Exhibit-28, under application Exhibit-32 filed on 12-08-2011.

9. Petitioner, who is original defendant no. 1 in aforesaid suit had also filed counterclaim seeking injunction. In that, he had filed application Exhibit – 35 praying for measurement of both the aforesaid gram panchayat properties and

additionally, requesting to have report in respect of possession and ownership of the properties. Said application came to be rejected under impugned order dated 16-07-2013 holding that a commissioner cannot be appointed to ascertain possession, relying on a decision of the Andhra Pradesh High Court in the case *Mohammed Mahmood Ali vs. Municipal Council, Suryapet*, reported in *AIR 2008 (NOC) 2725 (A.P)*

10. Learned counsel for the petitioner resiles to the situation, submitting that the situation can be met with by treating application Exhibit-35 filed by defendant-counter claimant in the suit praying to appoint court commissioner pursuant to Exhibit-28 as had been filed by plaintiff and as such requests that order on Exhibit-28 appointing taluka inspector of land lords as commissioner for the purpose referred to in the order quoted hereinabove, be directed to be an order on Exhibit-35.

11. Learned counsel for respondent no.1 – plaintiff, however, submits that a separate application by petitioner -defendant no.1 may serve the purpose since he is showing willingness to bear the burden of payment of fees for execution of commission by taluka inspector of land record.

12. Since the arguments are being advanced on the basis of instructions and the very purpose for which Exhibit-28 had been filed by plaintiff could well be served under the circumstances, it appears that it would be expedient that Exhibit – 35 by present petitioner be treated as an application for the purpose for which Exhibit – 28 had been filed by respondent no. 1-plaintiff and the order passed by the trial court on Exhibit – 28 be maintained and shall be deemed as if such a relief has been granted under Exhibit – 35 filed by present petitioner.

13. Since the parties have resiled to a situation whereby treatment to Exhibit-35 filed by petitioner-defendant no.1 can be given as if it is an application for the very purpose or Exhibit-28 filed by respondent no.1-plaintiff, order passed on 28-3-2011 allowing Exhibit-28 shall be deemed to have been passed on Exhibit-35 as if it is on Exhibit with the only alteration that expenses for measurement, however, shall be borne by petitioner-defendant with modification *mutatis mutandis* in respect of the date for execution of commission from today.

13. In view of the same, impugned order may be substituted by following order :

Treatment to Exhibit-35 filed by petitioner-defendant no.1 be given as if it is an application for the very purpose or Exhibit-28 filed by respondent no.1-plaintiff and order passed on 28-3-2011 allowing Exhibit-28 shall be deemed as if to have been passed on Exhibit-35 with the only alteration that expenses for measurement, however, shall be borne by petitioner-defendant with modification *mutatis mutandis* in respect of the date for execution of commission from today.

14. Writ petition stands accordingly disposed of. Rule made absolute in terms of aforesaid.

SUNIL P. DESHMUKH,
JUDGE

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