

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1630 OF 2016

Madhukar Pandhari Patil and others ... Petitioners
Vs.
Karnataka Lingayat Education Society through its
Trustees and Members Shivanand H. Koujalgi and others ... Respondents

Mr. Rahul S. Kadam for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : APRIL 28, 2016

P.C. :

Heard Mr. Kadam, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 03.08.2015 passed by the learned Civil Judge Senior Division, Solapur below exhibit-99 in Special Civil Suit No.827 of 2012. By that order, the learned trial Judge appointed District Inspector of Land Records, Solapur (D.I.L.R.) as Court Commissioner and directed the Commissioner to complete the cadastral survey of the suit land in the presence of the defendants, adjacent cultivators and the persons who had made encroachment over the suit land, by issuing notices in advance. The learned trial Judge directed D.I.L.R., Solapur to follow the rules of cadastral surveyor minutely and submit the report on or before 30.09.2015.

3. Respondents, hereinafter referred to as plaintiffs, have instituted Suit inter alia praying for direction to defendants No.1 to 3 to demolish the structures, more particularly described in paragraph 1-B of the plaint and hand over possession of the open land to the plaintiffs and for

damages. During the pendency of the Suit, plaintiffs filed application exhibit-90 for appointment of the Court Commissioner, which was resisted by the defendants by filing reply dated 03.11.2014. After hearing both sides, the learned trial Judge rejected the application on 17.12.2014. It is thereafter plaintiffs filed application at exhibit-99 on 06.07.2015 for appointment of the Court Commissioner. That was resisted by the defendants by filing reply dated 30.07.2015. By the impugned order, the learned trial Judge has allowed that application. It is against this order, defendants have instituted the present Petition.

4. Mr. Kadam strenuously contended that the Suit is for declaration of ownership and for possession. In other words, the Suit is not for recovery of the encroached portion. He submitted that the application made by the plaintiffs at exhibit-90 was rejected by the learned trial Judge on 17.12.2014. In paragraph 6, the learned trial Judge specifically recorded a finding that P.W.3 Lingraj Nadgeri had issued notices to the adjacent land holders and accordingly, the measurement was carried out. The learned trial Judge, therefore, held that there is no necessity to issue commission on that ground. The learned trial Judge also came to the conclusion that appointment of commissioner will amount to collection of evidence, and therefore, did not find any propriety in the application. He submitted that plaintiffs did not challenge that order. Apart from that, he submitted that earlier Court Commissioner was appointed to carry out the measurement, and therefore, also there is no necessity for appointing the Court Commissioner. Despite that, plaintiffs filed application exhibit-99 on 06.07.2015. He submitted that once the application for appointment of Court Commissioner is rejected, plaintiffs are precluded from filing application for the same relief. That apart, as the plaintiffs did not file objections to the report submitted by the Commissioner. In support of these submissions, he relied upon the

decision of this Court in the case of ***Chandrarao Vs. Dhondu, 2012 (2) Mh.L.J. 847***. He further submitted that the evidence of the plaintiff is almost over and at the fag end, present application is made for the same relief.

5. I have considered the submissions advanced by Mr. Kadam. It is not in dispute that the Court Commissioner was appointed earlier. It is, therefore, not open to the defendants now to contend that as the Suit is not for recovery of the encroached portion, plaintiffs cannot make application for appointment of Court Commissioner. It is no doubt true that earlier plaintiff had made application at exhibit-90 under Order 26, Rule 9 of the Code of Civil Procedure, 1908 and that application was rejected by the learned trial Judge on 17.12.2014. It also appears that P.W.3 Lingraj Nadgeri, surveyor was examined as a witness. P.W.3 had prepared measurement sketch on 24.03.2008 in pursuance of the measurement carried out by him. In paragraph 6 of the order, the learned trial Judge observed thus,

“6. It is true that in the present suit, there is no appointment of commissioner. The measurement sketch submitted by the plaintiff below Exh.19 is private measurement sketch prepared by him. However said measurement is conducted by an independent agency. In the evidence of P.W.3 Lingraj Nadgeri it is appeared that he had issued notices to the adjacent land holders. Accordingly, the measurement is conducted. Thus, there is no cause to issue the commission on the said ground.”

6. Perusal of this paragraph shows that the learned trial Judge observed that in the present Suit, there was no appointment of Court Commissioner. Mr. Kadam conceded that this statement is factually incorrect and contrary to record. Perusal of paragraph 6 further shows that the learned trial Judge observed that P.W.3 deposed that he had issued notices to the adjacent land holders and accordingly, measurement was conducted. The learned trial Judge further recorded a

finding that issuing commission amounts to collection of evidence. In view thereof, if the present application filed at exhibit 99 and the reply by the defendants is considered, in my opinion, the order dated 17.12.2014 rejecting the application at exhibit-90 will not come in the way of the plaintiffs. In the present application at exhibit-99, plaintiffs specifically asserted that while carrying out measurement on 24.03.2008, the Commissioner did not give notice to the defendants. Perusal of the reply filed by the defendants and in particular paragraph 4 also shows that the defendants were not served with the notice of the measurement. It further records that during the course of cross-examination, P.W.3 deposed that he issued notices to the persons whose names were provided by the plaintiffs. Plaintiffs did not provide names of defendants before carrying out the commission work. Mr. Kadam submitted that merely because of the default committed by the plaintiffs in not furnishing the names of the defendants, defendants should not suffer.

7. In paragraph 5 of the reply, defendants contended that D.I.L.R. never entered or visited the area in possession of defendants while carrying out the measurement. The fact of the matter remains that the defendants were not served with the notice before carrying out commission work. In the impugned order, the learned trial Judge observed in paragraph 5 that it is necessary for the Commissioner to issue notices to the adjacent cultivators / owners of land in dispute and the persons against whom the encroachment is alleged. In the present case, plaintiffs made out a case that notices were not issued against the encroachers and therefore, the very work of cadastral surveyor is bad in the eyes of law. Perusal of paragraphs 4 and 5 of the reply of the defendants dated 30.07.2015 substantiates a finding of the learned trial Judge namely, before carrying out the commissioner work, notice was

not served on the defendants. In view thereof, I do not find that the learned trial Judge has committed any error in allowing the application.

8. Mr. Kadam relied upon the decision of this Court in the case of **Chandrarao** (*supra*) to contend that once the measurement is carried out by the Commissioner and plaintiffs did not make any grievance in that report, the Court cannot appoint Commissioner for re-measurement, that too, when recording of evidence is almost complete. In that case, the Court did not record a finding as to whether the report submitted by the Court Commissioner was defective for not issuing notice to the affected parties. In the present case, the Suit is instituted by the plaintiffs against the defendants for recovery of possession on the allegation that defendants have committed encroachment on their property. Thus, the defendants are vitally affected with the work of Commissioner and therefore, the least that was expected from the Commissioner was to issue notices to them. As the notices were not issued by the Commissioner before carrying out the measurement, it has to be held that the said report is defective. The learned trial Judge was, therefore, fully justified in allowing the application. Hence, Petition fails and the same is dismissed.

9. It is expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)