

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7304 OF 2014

BHAGWAN TATYABA BHAND AND ANOTHER
VERSUS
ASHOK TATYABA BHAND AND ANOTHER

Advocate for Petitioner : Shri V.S. Bedre.
Advocate for Respondent No. 1 : Shri D.N. Patil-Bankar.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 12th December, 2017

PER COURT :

1. The petitioners, by this petition seeks to challenge the order dated 23/06/2014, passed by the Trial Court below Exhibit 61 in Regular Civil Suit No. 319/2006, thereby declining to appoint the T.I.L.R. as Court Commissioner for the second time under Order XXVI Rule 9 of the Civil Procedure Code.

2. Shri Bedre, learned advocate for the original plaintiffs has strenuously criticized the impugned order. He submits that when the suit was filed on 10/10/2006, application Exhibit 7,

was preferred on the same day for appointment of the Court Commissioner. After hearing the litigating sides, Exhibit 7, was allowed and the Surveyor from the office of the T.I.L.R., Rahuri, was appointed as a Court Commissioner for measurement of the suit land described in paragraph No. 1 of the plaint.

3. Specific directions were issued to the Surveyor vide the said order which read as under :

- “1. The application is allowed.
2. Surveyor from the office of T.I.L.R. Rahuri is appointed as Commissioner for measuring the suit land described in plaint para 1 of the suit.
3. The commissioner to show the exact and precise area belonging to the plaintiffs and defendants and further to point out any encroachment made by either of the party to the suit and to point out whether the defendants house is constructed upon the plaintiffs land.
4. The Commissioner shall submit his report alongwith the map within two months after payment of necessary Government fees as per rules by the plaintiffs.
5. Issue commission writ forthwith accordingly to the T.I.L.R. Rahuri.
6. The commissioner's fee be paid by challan counter signed by the officer from T.I.L.R. Office Rahuri as per

rules in that regard.”

4. It is not in dispute that the concerned Court Commissioner has, accordingly, carried out the measurement and has submitted his report as well as the map.

5. After recording of the oral evidence was commenced, the plaintiff No. 1 was examined and that was followed by the examination of the Surveyor who had measured the suit lands. Grievance of the petitioner is that in cross-examination, the Surveyor has stated that the Falni record was not before him and therefore, he could not measure the Pot Hissa with reference to the suit property. The examination and cross-examination of the Surveyor is in details, running into about six pages.

6. The plaintiffs preferred Exhibit 61, again seeking appointment of the T.I.L.R. as a Court Commissioner for re-measurement of suit land and after considering the Falni record. By the impugned order, Exhibit 61 was rejected

concluding that after the defendants brought out certain deficiencies in the case of the plaintiffs, that the plaintiffs are now desirous of seeking the second appointment of the Court Commissioner.

7. Shri Bedre, has relied upon the judgment delivered by this Court in the matter of Vijay Shrawan Shende and others Versus State of Maharashtra and others [2009 (5) Mh.L.J. 279]. He specifically relies upon conclusions of this Court in paragraph Nos. 34 to 37, 41 and 42 which read as under :

“34. In absence of such records being in hands of the Cadesteral Surveyor – the Court Commissioner or otherwise, the extent of encroachment is a matter which is incapable of adjudication.

35. The Cadesteral Surveyor, therefore, will have first to ascertain the boundary marks and boundaries of undisputed and unencroached area of the land, based on undisputed boundary marks, as seen in the public record, and thereafter measure the extent of encroachment.

36. If such report of the Commissioner is proved, as rendered, keeping in view the requirements of rules

relating to measurement and if it withstands the test of cross-examination, unless admitted document, alone can be the foundation as to proof of fact and of extent of encroachment.

37. In the present case, the procedure, as emerging from foregoing discussion, has not admittedly been adopted.

41. The impugned Judgment and Decree of First Appellate Court is set aside. Special Civil Suit No. 88 of 2006 is remanded to the Court of Civil Judge (Senior Division), Yavatmal, for appointment of a qualified Surveyor as a Commissioner, afresh from the Office of the District Inspector of Land Records, or Taluka Inspector of Land Records, who shall secure public record relating to the survey numbers, subject-matter, ascertain undisputed or settled boundaries, measure both, and, if necessary, surrounding survey numbers in the light of foregoing discussion, and decide as to whether the plea of encroachment made by the plaintiffs is factually correct.

42. The Commissioner shall follow the procedure of such measurement as prescribed by rules, and furnish his report to the trial Court within six months of the receipt of writ of trial Court. The Taluka Inspector of

Land Records or District Inspector of Land Records and all higher level officers should make available requisite public records and/or certified copies thereof for execution of Commission.”

8. Based on the above factors, Shri Bedre, strenuously submits that unless the exercise of measurements of land is not properly conducted, the report of the Court Commissioner as is placed on record earlier, would be of no consequence and would not assist any side. He, therefore, submits that it would be necessary to have the Cadesteral Surveyor measure the land as a Court Commissioner in order to meet the ends of justice.

9. Shri Patil, learned advocate appearing on behalf of the defendants submits that the plaintiff has admitted the map that is prepared by the Court Commissioner and which is on record. The map clears a doubt about the position of the suit land and its measurement and its boundaries. Merely because the plaintiffs are aggrieved by the extractions by the defendants from the cross-examination of the Court Commissioner, it would not be a ground for carrying out a second measurement by

appointing the Court Commissioner for second time. He submits that if such requests are entertained, it would be an un-ending exercise of appointing the Court Commissioner because either of the parties are bound to be aggrieved by the report of the Court Commissioner and his map.

10. I have considered the submissions of the learned advocate as have been recorded above and have gone through the petition paper book and the judgment cited with their assistance.

11. It requires no debate that the appointment of a Court Commissioner for the second time is to be permitted in 'rarest of rare' situation. If for the second time, the appointment of Court Commissioner is to be made, after recording of oral evidence, it has to be established that the report of the first Court Commissioner and the map placed on record would not assist any side, in as much as, it would not render any assistance to the Trial Court in adjudicating over the suit. Once the Trial Court forms an opinion that the report of the Court Commissioner is insignificant or useless, it may itself appoint a

Court Commissioner for elucidating further information, if it deems it necessary or if any side prays for such an order.

12. I do not find from the record, since, the recording of oral evidence is yet to be computed, that the Trial Court has enough material before it to come to a conclusion that the measurement carried out by the first Court Commissioner is of no assistance. No measurement of the suit property would always be foolproof . It gives no ground to any litigating side to seek appointment of a second Court Commissioner merely because the cross-examination of a Court Commissioner is likely to create a disadvantage to the litigating side. In Exhibit 61, while putting forth a request for the appointment of a second Court Commissioner, the petitioners have mentioned that the Cross-examination of the Court Commissioner is likely to create some confusion and the plaintiffs have developed a doubt about his deposition. In Exhibit 61, the plaintiffs agree with the map produced on record by the Court Commissioner.

13. In this backdrop, I do not find that the impugned order

could be termed as being perverse or erroneous. This petition being devoid of merits, is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

S.P.C.