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

WRIT PETITION NO. 7748 OF 2016

Sunanda w/o Ramesh Shinde,
Age: 46 years, Occ: Agri.,
Through Power of Attorney Holder,
Ramesh s/o Dashratha Shinde,
Age: 50 years, Occ: Agri.,
Both Resident of Pimpalgaon,
Tq. Mudkhed, District Nanded. ..PETITIONER

VERSUS

1. Shivaji s/o Babarao Dhabadge,
Age: 50 years, Occ: Agri.,
R/o. In front of Mudkhed
Police Station, Mudkhed,
Tq. Mudkhed, Dist. Nanded.
2. Kautikabai w/o Devrao Shinde,
Age: 66 years, Occ: Agri.,
R/o. Rohipimpalgaon,
Tq. Mudkhed, Dist. Nanded. ..RESPONDENTS

Mr Amit A. Mukhedkar, Advocate for petitioner;
Mr S.B. Narwade, Advocate for respondent No.1;
Mr M.R. Wagh, Advocate for respondent No.2

CORAM : NITIN W. SAMBRE, J.

DATE : 29th NOVEMBER, 2017

ORAL ORDER :

Heard Mr. Mukhedkar, learned Counsel for
the petitioner.

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2. The petitioner, who was defendant No.1, in Regular Civil Suit No.48 of 2015 initiated by respondent No.1, wherein prayer for measurement, fixation and demarcation of the boundaries of the suit property was made.

3. During pendency of the suit, respondent – plaintiff moved application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Court Commissioner. The said application came to be allowed by order impugned dated 31st July, 2015 appointing Taluka Inspector of Land Records, Mudkhed as Court Commissioner to measure entire land Gat No.424 to ascertain land in the name of plaintiff as depicted in the 7/12 extract in his name.

4. Similar application at Exhibit-31 was also made, on which, common order was passed as is noticed at Exhibit-11.

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5. It appears that another application came to be moved by the defendant-petitioner when the order below Exhibit-11 was passed, same was without hearing him. The Court thereafter maintained order below Exhibit-11 and further rejected the application at Exhibit-34 moved by the petitioner for recalling the order below Exhibit-11, 31 vide order dated 13th July, 2016. All these orders are questioned by the petitioner-defendant.

6. Mr. Mukhedkar, learned Counsel for the petitioner-original defendant would invite attention of this Court to the defence raised by him in response to the allegations in the plaint. According to him, the order of Court Commissioner, measurement of land would amount to granting final decree in the plaint. He would then urge that interim measurement as ordered by learned trial Court will amount to collection of evidence and would rely upon the judgment of this Court in the matter of ***Syed Mushtaque Ahmad s/o Syed Ismail and others vs. Syed Ashique Ali Khan s/o Haidar Ali***

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reported in **2012(1) ALL MR 80**.

7. He sought for allowing the petition in terms of prayer clause (B).

8. Per contra, Mr. Narwade, learned Counsel for the respondents would urge that the petition itself is not maintainable for the reason that same was filed based on the power of attorney. The holder of such power of attorney has already expired and no corrective steps are taken. He would then urge that interim measurement as ordered by learned trial Court is in the line of main prayer made in the plaint and in any case, the report of the Commissioner will not be final as the petitioner-defendant will get opportunity to cross examine the said witness i.e. T.I.L.R. However, his report is to be considered in evidence. He sought dismissal of the petition.

9. The fact remains that the power of attorney holder has expired on 6th February, 2017

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and since then no steps are taken in support of submitting fresh verification/affirmation in support of pleadings in the petition.

10. In the wake of above, the fact remains that the petition remained without verification by person who is alive.

11. Apart from above, what is required to be appreciated is, the appointment of Court Commissioner by learned trial Court is based on the factual matrix as are reflected in the order impugned. The holding of respondent-plaintiff as is reflected in 7/12 extract is prevailed before the Court below to pass the order.

12. The trial Court has not only ordered measurement of land of the plaintiff but entire Gat No.424, on which suit property is located. The object of such order of the trial Court appears to be, if required to consider measurement in the aid of the Court for drawing appropriate and proper conclusion.

13. It is really difficult to appreciate at this stage, particularly in the backdrop of contention of the petitioner-defendant that the order of appointment of Court Commissioner amounts to collection of evidence, particularly when the Court has ordered measurement of entire Gat No.424 and not only disputed property. The Court Commissioner's report will always be subject to scrutiny and is under cross examination by the parties to the suit.

14. In the wake of above, I hardly see any infirmity in the order impugned. The writ petition, as such, fails and stands dismissed.

(NITIN W. SAMBRE, J.)

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