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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2530 OF 2018

Prithviraj D. Patil, since deceased
through legal Guardian D.D. Patil ...Petitioner
V/s.
Hon'ble Chief Secretary, Maharashtra State & Ors. ...Respondents

Mr.V.S. Talkute for the Petitioner.
Mr.J.A. Madane, A.G.P. for the State – Respondent Nos.1 to 7.
Mr.Ajay Joshi for the Respondent No.8.

CORAM : R.D. DHANUKA, J.
DATE : 21ST AUGUST, 2018.

P.C. :-

1. By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 27th September, 2017 passed below Exhibit – 60 in Special Civil Suit No.258 of 2001 rejecting the application filed by the petitioner for appointment of the Court Commissioner.

2. The petitioner had filed a suit in respect of the property bearing Gat No.104/3 admeasuring 1 – H, 22 – R, situated at village Karole, Taluka Pandharpur, District Solapur. The land admeasuring 1 – H, 62 – R out of Gat No.104 which was acquired in the year 1971 was allotted to Mr.Tukaram Bhagwan Arkile by an order dated 13th August, 2003 passed by the learned Deputy Director / Collector

Rehabilitation, Solapur.

3. There is serious dispute about the exact location and boundaries of the suit property raised between the parties before the Revenue Authorities.

4. The petitioner accordingly filed an application (Exhibit – 60) for appointment of the Superintendent of Land Records / Commissioner for visiting the site and to submit a report before this Court. The said application was vehemently opposed by the respondents on various grounds. Learned Civil Judge, Senior Division however, rejected the said application on the ground that the petitioner is seeking to collect the evidence by seeking an appointment of the Court Commissioner for taking measurement of the plot and for pointing out the location of the land in question.

5. Mr. Talkute, learned counsel appearing for the petitioner invited my attention to the averments made in the plaint and also the application made by the petitioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908 and would submit that in view of serious dispute about location and boundaries of the plots in question, the application under Order 26 Rule 9 of the Code of Civil Procedure was maintainable and could not have been rejected by the learned Civil Judge, Senior Division. He submits that the said application if would have been allowed by the learned Civil Judge, Senior Division, the

entire dispute arising between the parties would have been resolved. The respondents are thus not prejudiced in any manner whatsoever if the said application would have been allowed by the learned trial Judge.

6. Mr.Joshi, learned counsel appearing for the respondent no.8 on the other hand invited my attention to the prayer clause and also the averments made in the application under Order 26 Rule 9 of the Code of Civil Procedure made by the petitioner before the learned trial Court and would submit that there was no dispute about the boundaries and location. He submits that the petitioner was indirectly seeking to collect the evidence which aspect has been rightly considered by the learned trial Court and has rightly rejected the application filed by the petitioner. He submits that the petitioner can lead appropriate evidence at the stage of final hearing and cannot collect the evidence by making an application under Order 26 Rule 9 of the Code of Civil Procedure.

7. A perusal of the record *prima-facie* indicates that both the parties have raised a dispute in respect of the boundaries and location of the property in question. Various applications were made before the Appellate Authority in that regard.

8. The petitioner had accordingly made an application under Order 26 Rule 9 of the Code of Civil Procedure before the learned

trial Court for appointment of the Superintendent of Land Records / Commissioner for taking measurement and to ascertain the boundaries and location of the plot in question.

9. In view of the disputed boundaries and location in the manner set out in the application filed by the petitioner under Order 26 Rule 9 of the Code of Civil Procedure, the said application was maintainable. Even if the Superintendent of Land Records is appointed as the Court Commissioner, the said report is not binding and conclusive on any of the parties. The said report shall be subject to further scrutiny and proof at the stage of trial. It is for the petitioner to decide whether to examine the Commissioner as a witness or not and if examined would be subject to cross-examination by the defendants.

10. In my view, the learned Civil Judge, Senior Division was thus not right in rendering a finding that the petitioner had filed the said application for the purpose of collecting evidence.

11. The impugned order passed by the learned trial Judge on 27th September, 2017 is accordingly set aside. The application made by the petitioner under Order 26 Rule 9 of the Code of Civil Procedure is allowed. Learned Superintendent of Land Records is appointed as a Court Commissioner as prayed in the application. The expenses and fees of the learned Superintendent of Land Records, if any, shall

be borne by the petitioner exclusively. The fees and expenses shall be paid by the petitioner within one week from the date of such demand. The fees and expenses of the Learned Superintendent of Land Records shall be decided by the learned trial Court.

12. It is made clear that the learned Court Commissioner shall visit the suit property after advance notice to both the parties. Both the parties shall remain present at the time of visit of the learned Court Commissioner without fail. If any of the party remains absent at the time of visit of the learned Court Commissioner inspite of the notice, the learned Court Commissioner shall proceed with the execution of commission and shall submit a report.

13. The report shall be submitted by the learned Court Commissioner within six weeks from today.

14. It is made clear that merely because the said report is submitted, the same would not be conclusive unless the contents thereof are proved at the stage of trial.

15. The writ petition is disposed of in aforesaid terms. There shall be no order as to costs..

16. All the parties, learned trial Judge as well as the learned Court Commissioner to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)