

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10216 OF 2018

Dilip Raghunath Nalawade

..... Petitioner

VERSUS

Babasaheb Dadaso Nalawade & Ors.

..... Respondents

Mr.Aditya Desai for the Petitioner.

Mr.Bhushan Walimbe for the Respondents.

CORAM : R.D. DHANUKA, J.

DATE : 18th SEPTEMBER, 2018

P.C.

By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 17th July, 2018 passed by the learned Civil Judge, Junior Division, Shirala below Ex.138 filed by the petitioner (original plaintiff) *inter alia* praying for appointment of D.I.L.R. as the court commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908. Some of the relevant facts for the purpose of deciding this writ petition are as under :-

2. The petitioner (original plaintiff) had filed a suit for perpetual injunction, recovery of encroach area and fixation of boundaries. By an order dated 28th July, 2015 passed by the learned District Judge – 1, Islampur in Regular Civil Appeal No.104 of 2008, the matter was remanded back to the D.I.L.R. to conduct commission in respect of the suit property and to submit a report.

3. The D.I.L.R. directed the T.I.L.R. to conduct the said survey and

to submit a report in accordance with the directions issued by the learned District Judge. The T.I.L.R. accordingly conducted a commission and submitted a report. The petitioner thereafter filed an application (Ex.138) *inter alia* praying for appointment of D.I.L.R. as a court commissioner under Order 26 Rule 9 of the Code of Civil Procedure, 1908.

4. Learned counsel appearing for the petitioner submits that the D.I.L.R. was directed to carry out commission by the learned District Judge in the said order dated 28th July, 2015 with various specific directions and thus the D.I.L.R. could not have delegated such powers to the T.I.L.R.. He submits that the said report thus submitted by the T.I.L.R. could not be accepted.

5. Learned counsel for the respondent (original defendant) however invited my attention to various findings of fact rendered by the learned Civil Judge, Junior Division, in the impugned order while rejecting the application below Ex.138. He submits that as per circular 100/568/L-3/78 dated 7th December, 1976, the T.I.L.R. has been invested with the powers to conduct Nimtana commission. The petitioner had objected that T.I.L.R. had conducted commission as per the settlement of land in the year 1935. He submits that in the year 1935, the settlement of the land had not taken place. Learned counsel submits that since 1997, three times the measurement of the property was done and in those reports, it transpired that the petitioner had encroached upon the lands of the respondents. He submits that the suit is filed in the year 1997 and the petitioner has been delaying the outcome of the suit on one or

the other ground. He submits that the learned T.I.L.R. has carried out all the directions issued by the learned District Judge in the said order dated 28th July, 2015 and thus no interference with the impugned order passed by the learned trial court rejecting the application below Ex.138 is warranted. He submits that insofar as the correctness of the said report is concerned, the said issue can be agitated as and when the said commissioner is examined by the respondents as a witness.

6. A perusal of the record indicates that the suit was filed by the petitioner in the year 1997 inter alia praying for perpetual injunction, recovery of encroach area and fixation of boundaries. The learned District Judge had passed an order on 28th July, 2015 in the appeal preferred by the petitioner and remanded the matter to the D.I.L.R. for re-measurement of the suit property and the property of the respondents. The land was re-measured on 13th and 14th March, 2018.

7. A perusal of the impugned order indicates that the learned trial judge considered the circular dated 7th December, 1976 thereby vesting the powers in the T.I.L.R. to conduct the Nimitana commission. It appears that in view of the said circular, the D.I.L.R. had instructed the T.I.L.R. to carry out the measurement and to comply with the directions issued by the learned District Judge. A perusal of the said order also indicates that the learned T.I.L.R. has submitted his report in compliance with the specific directions issued by the District Judge while remanding the matter back by an order dated 28th July, 2015.

8. The learned trial judge has dealt with various objections raised by the petitioner in great detail in the impugned order and has held that *prima facie*, the learned commissioner had complied with all the directions of the learned District Judge. The learned trial judge has also held that on the grounds raised by the petitioner in the application (Ex.138), the petitioner could not imagine that the commission report was bad and illegal. The learned trial judge also rightly rejected the application filed by the petitioner on the ground that since 1997, three times measurement of the property had been already done and in those reports, it was transpired that the petitioner had encroached upon the lands of the respondents.

9. I am thus not inclined to accept the submission of the learned counsel for the petitioner that the D.I.L.R. could not have instructed the T.I.L.R. to carry out the measurement and to comply with various directions issued by the learned trial judge in the order dated 28th July, 2015. The suit is filed by the petitioner in the year 1997 and the same is pending till date. The correctness of the said report submitted by the T.I.L.R. can be gone into as and when any of these parties examines the said T.I.L.R. as a witness to prove the contents of the said report. If any such witness is examined, he would be obviously subjected to the cross examination. No prejudice is thus caused to the petitioner of any nature whatsoever. I do not find any infirmity in the impugned order dated 17th July, 2018, passed by the learned trial judge.

10. All contentions on the correctness of the said report are kept open. It is made clear that the petitioner will not be allowed to agitate

the issue that the report was submitted by the T.I.L.R. and not by the D.I.L.R. and is thus not valid.

11. Writ petition is devoid of merits and is accordingly dismissed. There shall be no order as to costs.

[R.D. DHANUKA, J.]