

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

11 WRIT PETITION NO.1407 OF 2020

VITHAL ASARAM KADBANE AND ANOTHER
VERSUS
SADASHIV RAJABHAU SALUNKHE

...

Mr. H.V. Tungar, Advocate for the petitioners.

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CORAM : **Rohit B. Deo, J.**

DATE : 31st January 2020.

ORDER :-

. The petitioners are the original plaintiffs, who have brought the suit for removal of encroachment.

2. At the instance of the petitioners Cadastral Surveyor is appointed to measure the suit property in order to ascertain the extent of encroachment, if any. The Court Commissioner submitted his report in which the finding is that there is no encroachment committed by the defendant.

3. The Court Commissioner was not cross-examined on behalf of the plaintiffs. The Court Commissioner has been examined by the plaintiffs as their witness. It is the case of the plaintiffs that since certain admissions came on record demonstrating that the Court Commissioner did not follow

established protocol in conducting the measurement, the application was preferred for appointment of another Commissioner to remeasure the land. By the order impugned, the said application is rejected.

4. Having scrutinized the reasons recorded in the order impugned, I am not inclined to interfere in writ jurisdiction. The issue is considered by the trial Court in paragraphs 4, 5, 6 and 7 of the order impugned thus :

“4. Now the question arises as to whether this application can be allowed and the direction can be issued to remeasure land. it is the case of plaintiffs that the surveyor has not properly conducted measurement. But pertinent to note that, the plaintiffs have conducted examination-in-chief of surveyor. Obviously, a party who calls the witness is supposed to conduct examination-in-chief as per Section 137 of Indian Evidence Act. However, what is required to be noted is the fact that the plaintiffs have not denied the said measurement map at Exh.33 and the panchanama at Exh.34. On the contrary, they have got proved those documents. Though, it is true that the plaintiffs have endorsed on the report of surveyor that they have not admitted the said report. But it will make no difference.

5. The Ld. Advocate for plaintiffs invited the attention of this court towards cross-examination of the said witness, wherein he has admitted that he has not shown the encroachment in the map. He also argued that the same surveyor has not carried out the proper measurement. Rather, he has carried out the measurement without

having fixed points. It seems that the surveyor has stated in his examination-in-chief, that he did not find the fix points. He has also stated that the measurement can be carried out by finding out the fixed points of adjacent block number which he did not take search. He has also stated that unless the fix points are traced out, the boundaries cannot be fixed. However, the Ld. advocate for defendant invited the attention of this Court towards his cross-examination, wherein he has admitted that the measurement can be carried out even if, the fixed points are not traced out. Such measurement can be carried out on the basis of original record and old maps.

6. *The Ld. advocate for plaintiffs has relied upon the judgment in **Sanjay Shankar Umale Vs. Ruprao Atmaramji Babade in Second Appeal No. 561/2004**, wherein it is observed that where the surveyor has not carried out proper measurement without following due procedure, such measurement report cannot be accepted. However, in that case, the surveyor had not issued the notices to the defendant, so also, permanent marks were not stated in the map. However, in case on hand, the surveyor has shown the fixed points in the map at Exh.32. Thus, the surveyor though has stated that he did not find fix points, he has carried out measurement with the help of some other methods available with him. The plaintiffs have not shown anywhere as to how he has carried out measurement improperly. He has also fixed the boundaries as shown in the map. He has specifically stated that he did not find any encroachment. Hence, with due respect, the facts in the above judgment are not identical with the facts of this case. Therefore, it is not applicable.*

7. *Record shows that the plaintiffs have examined the said surveyor. At the cost of*

repetition, it can be noted that the plaintiffs were having every opportunity to cross-examine this witness if he was not supporting the case of plaintiffs. But he has only conducted examination-in-chief of this witness. It cannot be overlooked that the plaintiffs have got proved the measurement map as well as panchanama. When it is come on record that, those documents are got proved by plaintiffs themselves, once again direction to the surveyor to measure the land cannot be issued. Accordingly, I found no substance in the application”.

5. The report of the Court Commissioner clearly showed that there is no encroachment. In essence, although the Court Commissioner was appointed at the behest of the plaintiffs, the report was not favourable to the plaintiffs. However, instead of objecting to the report and seeking permission to cross-examine the Court Commissioner, the Court Commissioner has been examined as a witness of the plaintiffs and only examination-in-chief is recorded. That apart, the learned trial Court has observed that even if it is assumed that fixed points were not traceable, no inference of inaccurate measurement can be drawn since there are other methods of measuring the land.

6. I am not inclined to interfere in writ jurisdiction.

7. However, it is made clear that the plaintiffs shall

be entitled to demonstrate that the report of the Court Commissioner is flawed and suffers from error which are substantive and procedural. This liberty is granted in view of the observation of learned trial Court that no specific irregularity or flaw is pointed out. It is further clarified that if the trial Court, after conclusion of the evidence, is of the opinion that the report of Court Commissioner is flawed, the trial Court shall consider the prayer of the plaintiffs to conduct re-measurement by appointing another Court Commissioner, on its own merits.

8. The petition is disposed of.

(ROHIT B. DEO, J.)

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