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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6500 OF 2020

Lahanu Bhikaji Sidankar & anr. ... PETITIONERS

VERSUS

Dileep Shantilal Mehta & anr. ... RESPONDENTS

.....
Shri N.V. Gaware, Advocate for petitioners
Shri D.P. Palodkar, Advocate for respondents
.....

CORAM : R. G. AVACHAT, J.

Date of reserving order : 13th January, 2021

Date of pronouncing order : 27th January, 2021

ORDER :-

The challenge in this Writ Petition is to the order dated 27/2/2020, passed by Civil Judge, Senior Division, Shrigonda below Exh.38 in Regular Civil Suit No.71/2014. By the impugned order, the application preferred by the respondents for appointment of Court Commissioner for measurement of the land Gut Nos.2426 and 2427 has been allowed. Petitioners are the original defendants in Regular Civil Suit No.71/2014.

FACTS:-

2. The subject matter of the suit is land Gut No.2426 admeasuring 2 R. It belongs to the plaintiffs/ respondents. Abutting the said land, to the South, there is land Gut No.2427 belonging to the petitioners/ defendants. It has been averred in the plaint that, to the South of land Gut No.2427, there is a public road. Most of the portion of the land Gut No.2427 has been under the said road. The said land originally admeasured 3 gunthas. In view of the road having been passed through the said land, its area has been substantially reduced. It is now not more than half guntha. The petitioners were in the process of erecting the kiosks (Taparis) on the land Gut No.2427. In the process, they were attempted to encroach on the suit land. The suit, therefore, came to be filed for a relief of perpetual injunction.

3. The petitioners/ defendants disputed almost all the averments in the plaint.

4. The respondents/ plaintiffs had moved an application Exh.7 for appointment of Surveyor as a Court Commissioner for measurement of the lands Gut No.2426 and Gut No.2427. It was allowed. The Surveyor did survey on

18/10/2014 of the lands and submitted the survey map.

5. The respondents/ plaintiffs thereafter again moved application Exh.38 for Nitnama measurement (superior test). Their contentions in the application Exh.38 are that, the survey map prepared by the Surveyor was not reliable one. He has simply shown in the map that both the lands are adjoining each other. While carrying out the measurement, the Surveyor ought to have taken into consideration the existence of southern side road and its boundaries. The original record in the nature of survey map and related papers ought to have been with the Surveyor when he did measure the lands on 18/10/2014. He should have also taken assistance of the officials of Public Works Department. He, however, did not do anything. The plaintiffs/ respondents, therefore, did not accept the measurement map. The application, therefore, was moved for Nitnama measurement.

6. The petitioners/ defendants, resisted the said application, contending that the respondents/ plaintiffs are not experts to suggest the way in which the Surveyor should have done his job. Since the Survey map runs counter to the claim of the respondents/ plaintiffs, the application was moved. The Court machinery was being misused.

7. The trial Court allowed the application and directed to measure the lands Gut Nos.2426 and 2427 along with the southern side road and point out their boundaries.

8. Shri N.V. Gaware, learned counsel for the petitioners would submit that, it is a suit for injunction simplicitor. Court Commissioner cannot be appointed for collection of evidence. The respondents/ plaintiffs have to prove their case. The Surveyor had already measured the respective lands and has submitted the survey map. Unless and until the parties go for trial and it is shown during evidence that the Surveyor's map is incorrect, then and then only Nitnama measurement could be sought. Learned counsel has placed reliance on the following judgments :-

- (i) Dnyandeo Vithal Salke & ors. Vs. Dagdu Kadar Inamdar
[2017 (3) Mh.L.J. 314]
- (ii) Chandrakant Kashinath Dike & ors. Vs.
Smt. Satyabhama Vishwanath Dike & anr.
[Writ Petition No.8877 of 2013]
- (iii) Gangaram Baban Tagad & ors. Vs.
Sarubai Yashwant Tagad & anr.
[Writ Petition No.6700 of 2011]
- (iv) Smt. R. Gayathri w/o Sri Ramakaran Vs.
Sri Bhavanishankar s/o C.K. Subramanya Shetty
(Writ Petition No.58492 of 2014 – Karnataka High Court)

9. Shri Palodkar, learned counsel for respondents/ plaintiffs would, on the other hand, submit that the petitioners/ defendants admit respondents/ plaintiffs' title to the suit land. The petitioners/ defendants' title to the land Gut No.2427 is also not in dispute. Both the lands adjoin each other. The real dispute is regarding intervening boundary of both the lands. The earlier Court Commissioner did not do his job as was expected to have been done. The trial Court has, therefore, rightly allowed the application. According to learned counsel, it is not that in a case of injunction simplicitor no Surveyor could be appointed to measure suit land. He has also relied on the following judgments :-

- (i) Deorao s/o Punjabrao Mohod & anr. Vs.
Janardhan s/o Dhondbaji Mankar
[2014 (5) Mh.L.J. 858]
- (ii) Malhar s/o Ganpat Bokerphod & ors. Vs.
Shivaji s/o Vishwanath Pawal
[2014 (4) Mh.L.J. 237]

10. Admittedly, the suit land bearing Gut No.2426 belongs to the respondents/ plaintiffs. Land Gut No.2427 belongs to the petitioners/ defendants. Both the lands admeasure 2 gunthas and 3 gunthas respectively. The land Gut No.2427 abuts the suit land onto South. Towards further

South, there is Shrigonda-Daund Road. According to the respondents/ plaintiffs, most of the portion of the land Gut No.2427 has been under the said road. Area of Gut No.2427 has thus been reduced to less than one guntha. The petitioners/ defendants had initiated work of placing kiosks/ Taparis on their land. In the process, they have even removed some soil from the suit land. As such, the possession of the respondents/ plaintiffs is threatened.

11. Section 75 of the Code of Civil Procedure gives the discretionary powers to the Court to appoint a Commissioner to make local investigation and/or for other purposes. There can be no dispute over the proposition that Court Commissioner cannot be appointed for collection of evidence, nor could the Commissioner be directed to show which property is in possession of the parties to the suit. The facts in the case of Dnyandeo (supra) indicate that the trial Court therein had given directions to the Surveyor to submit actual report as regards possession and user of the land. In the said case, this Court, therefore, found it to be amounting to collection of evidence. So is not the case herein.

12. The facts of Chandrakant Dike's case (supra) indicate that application for appointment of Commissioner was

moved even before hearing of application for temporary injunction was to take place. The land had already been measured in 1987. So is also not the case herein. It is informed that, the application for temporary injunction has already been decided in this case. It is, however, not known as to whether the issues have been framed.

13. It is reiterated that, the powers to appoint a Commissioner is discretionary. No doubt, the discretion has to be exercised judiciously. From the pleadings, it does appear that there is a boundary dispute. In such a case, the appointment of a Surveyor was a must to measure the respective lands. The application Exh.7 moved by the respondents/ plaintiffs way back in March 2014, was allowed. The Surveyor has submitted the measurement map. The respondents/ plaintiffs did not admit the same. According to them, the Surveyor has not taken into consideration the existence of the southern side road. The same has not been shown in the measurement map. Merely disputing the Surveyor's map is not sufficient. It has to be shown that the Surveyor did not do his job as was directed by the Court or he faulted in his job. Admittedly, recording of evidence has not yet commenced. The matter has, however, traveled some far. The application (Exh.38) was allowed by the Court in February

2020. The said order has been challenged in this Writ Petition in September 2020. There was no stay to the impugned order. When the matter came up before me, the Court Commissioner/ Surveyor had already issued notices regarding the schedule of the proposed survey work. The same was scheduled on the very next day. The Surveyor was, therefore, directed to do his job but not to submit the report till next date. By now, the Surveyor must have done the survey. His report might have been ready. In the given circumstances, it is not desirable to set aside the impugned order. The purpose of filing the petition could be served with a direction to the trial Court not to look into the Commissioner's report and the map drawn by him pursuant to the order passed below Exh.38 unless and until the respondents/ plaintiffs satisfy the Court by adducing evidence in the nature of cross-examination of the earlier Commissioner or otherwise i.e. map and report dated 18/10/2014 is not reliable one.

14. Writ Petition thus stands disposed of in terms of the following order :-

15. The trial Court is directed not to look into the Commissioner's report and the map drawn by him pursuant to the order passed below Exh.38 unless and until the

respondents/ plaintiffs satisfy the Court by adducing evidence in the nature of cross-examination of the earlier Commissioner or otherwise i.e. map and report dated 18/10/2014 is not reliable one.

**(R. G. AVACHAT)
JUDGE**

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