

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

930 WRIT PETITION NO.8404 OF 2018

Sudhakar s/o Ganpatrao Shinde,
Age 45 years, Occu: Business
r/o Latur Dist. Latur

...Petitioner

Versus

1. M/ Bhikamchand Jain and Company,
a registered partnership firm Head Office
at Jalgaon and branch office at Latur
through its managing partner Sureshkumar
s/o Bhikamhan Jain Age 74 years,
Occ. Business r/o Jalgaon Dist. Jalgaon.

2. The Municipal Council
through its chief officer,
Municipal Council Latur at now
(Municipal Corporation, Latur)

...Respondents

Mr Rajiv B. Deshmukh, Advocate for Petitioner
Mr V.D. Gunale, Advocate for Respondent No.1
Mr Ashwin V. Hon, Advocate for Respondent No. 2

CORAM : SHRIKANT D. KULKARNI, J.

Reserved on : 16th DECEMBER, 2021
Pronounced on : 20th DECEMBER, 2021

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally at the stage of admission with the consent of both the sides.

2. Brief facts leading to this petition are as under :-

(a) Respondent No.1/M/s Bhikamchand Jain and Company has filed Regular Civil Suit No. 381 of 2008 in the Court of 5th Joint Civil Judge, Junior Division at Latur for possession of suit plot with mesne

profits. The suit came to be partly decreed. The petitioner/defendant was directed to handover the possession of the suit property as described in the plaint within two months.

(b) Feeling aggrieved by the impugned Judgment and decree passed by the 5th Joint Civil Judge, Junior Division, Latur, original defendant has preferred Regular Civil Appeal No. 126/2014 in the District Court at Latur.

(c) During pendency of the appeal, the appellant/petitioner moved an application vide Exh. 58 for appointment of Court Commissioner (D.I.L.R. or T.I.L.R. Latur) for the joint measurement of survey No. 205/F and 205-E situated at Latur in order to bring on record the location of the suit property.

(d) The learned Adhoc District Judge-1, Latur after hearing both the sides was pleased to reject that application by reasoned order.

(e) Being aggrieved by the order of rejection of application for appointment of Court Commissioner, the petitioner has approached this Court by filing writ petition.

3. Heard Mr Raju Deshmukh, learned counsel for the petitioner, Mr V.D. Gunale, learned counsel for respondent No.1 and Mr Ashwin V. Hon, learned counsel for respondent No.2.

4. Perused the copy of plaint in Regular Civil Suit No. 381/2008, copy of written statement filed in the said suit, copy of Judgment passed in

Regular Civil Suit No. 381/2008, copy of application for appointment of Court commissioner filed in Regular Civil Appeal No. 126/2014 and order passed thereon vide Exh. 31.

5. Mr Deshmukh, learned counsel for the petitioner vehemently submitted that the learned Adhoc District Judge-1, Latur has committed an error in rejecting the application for Court Commissioner. It is very much necessary to bring on record the location of the suit property by taking aid of Court Commissioner. It would facilitate to resolve the dispute between the parties completely and finally.

6. According to Mr Deshmukh, the suit property is situated in the corner of Survey No. 205/F and Survey No. 205/E. The order of rejection of application for Court Commissioner has resulted in serious miscarriage of justice. He submitted that impugned order is liable to be quashed and set aside and application for appointment of Court needs to be allowed.

7. Mr V.D. Gunale, learned counsel for respondent No. 1 and Mr Ashwin Hon, learned counsel for respondent No. 2 supported to the order passed by the learned Adhoc District Judge. Both of them have submitted that there is no boundary dispute. There is no question of any encroachment. The location of the suit property has been clearly described in the plaint which is very much sufficient to locate the suit property. The application is devoid of any merit. The learned Adhoc District Judge had rightly passed the order vide Exh. 31 and there is no need to interfere with the impugned order.

8. Having regard to the pleadings of both the sides, it is very much clear that there is no boundary dispute or any dispute as regards any encroachment whereby a report of the Court Commissioner would facilitate the District Court to arrive at a proper decision. The suit property can be identified with the boundaries. There is no dispute of demarcation of the suit property. When there is no dispute as regards the identity of the suit property and no case of encroachment on the suit property, certainly, there is no question for appointment of Court Commissioner for local investigation as contemplated under Order 26 Rule 9 of CPC.

9. Having regard to the facts of the case, the appointment of the Court Commissioner is totally unwarranted.

10. On going through the impugned order passed by the learned Adhoc District Judge vide Exh. 58 more particularly, para No. 10, the learned Adhoc District Judge has rightly held that there is no need to appoint the Court Commissioner for joint measurement of the suit property. It is further opined by the learned Adhoc District Judge that if occasion arises, the prayer for appointment of Court Commissioner would be considered at the time of final hearing of the appeal.

11. Having regard to the reasons assigned by the learned Adhoc District Judge and in view of the provisions of Order 26 Rule 9 of CPC, I do not find any merit in the writ petition. No need to interfere with the impugned order passed by the learned Adhoc District Judge rejecting the application for appointment of Court Commissioner vide Exh. 31.

ORDER

- (I) The Writ Petition stands dismissed.
- (II) Rule is discharged.
- (III) No order as to costs.
- (IV) The observations made by this Court are *prima facie* for deciding this petition.
- (V) The learned First Appellate Court shall not get influenced by the observations made by this Court.
- (V) The Writ Petition is accordingly disposed of.

[SHRIKANT D. KULKARNI, J.]

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