

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3598 OF 2020
A/W
IA NO.3802 OF 2020**

Rafiq Mohammad Sayyed and Others Petitioners.
V/s
Sikandar Gani Sayyed (Fakir) and Ors. Respondents.

Mr. Dadhichi S. Mhaispurkar for the Petitioners.
Mr. Dayanand C. Awari for Respondent Nos. 1 to 4.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 19, 2021

P.C.:-

1] This Petition is by original Defendant to regular civil suit No.48 of 2019 which is for decree in the nature of directions to measure suit property described in paras 1A and 1B of the Plaint.

2] Having regard to the rival pleadings in the suit and the Written Statement, Trial Court framed issues at Exhibit-18, which read thus:-

“1] Whether plaintiffs proves that they acquired suit schedule property 1-A, 1-B in family partition and it is their separate property?

2] Whether plaintiffs are entitled for fixation of boundaries as per their possession and share?

3] Whether defendants No.1 to 4 proves that suit schedule property 1-A and 1-B are not partitioned by meets and bounds?

4] Whether defendants No.1 to 4 are entitled for compensatory costs of Rs 40,000/- from plaintiffs?

5] What order and decree?"

3] Thereafter, the Respondent-Plaintiff moved an application-Exhibit-18 for carrying out measurement of the suit property which came to be allowed vide impugned order dated 12/3/2020. As such, this Petition.

4] The submissions of the learned Counsel for the Petitioner are, considering the issues which are sought to be adjudicated upon by the learned Civil Court, indulgence shown in granting prayer for appointment of Court Commissioner is virtually amounting to

decreeing the suit. According to him, Trial Court cannot adopt a short-cut method for disposing of the suit when there are material issues which are required to be adjudicated upon.

5] Per contra, learned Counsel for the Respondents/Plaintiffs submits that proceedings for measurement before initiation of the suit were objected by the Petitioners/Defendants. According to him, even if Court Commissioner is appointed, Report shall be subjected to judicial scrutiny and that being so, order impugned is justified and as such prayer for dismissal of the Petition is made.

6] Considered rival submissions.

7] It is an admitted position that the Petitioners initiated regular civil Suit No.48 of 2019 on the file of Civil Judge, Junior Division, Karmala wherein a decree for direction to measure the property described in para 1A and 1B is prayed so also demarcation of the said property is sought.

8] By way of impugned order, Trial Court has granted very same

relief and has lost sight of the fact that prayer in the plaint is required to be adjudicated upon after scrutiny of the evidence in the backdrop of pleadings based and the issues framed.

9] In the aforesaid backdrop, exercise of jurisdiction by the learned Trial Court for appointment of Court Commissioner under Order 26 Rule 9 of the CPC was very much uncalled for and unjustified in the aforesaid factual background.

10] As such, order impugned is hereby quashed and set aside. Application-Exhibit-18 for appointment of Court Commissioner stands rejected. Suit to proceed.

11] As a consequence of above, pending Application also stands disposed of.

(NITIN W. SAMBRE, J.)