

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3371 OF 2016

1. Laxman s/o. Apparao Bhairat,
Age 85 years, Occu. Agril.,

2. Ganesh s/o. Vishnu Bhairat,
Age 32 years, Occu. Agril.,

Both R/o. Vetat Galli, Gangakhed,
Taluka Gangakhed, District Parbhani

.. Petitioners
(Original Plaintiffs)

Versus

1. Namdeo s/o. Bapurao Bhusnar
Age 68 years, Occu. Agril.,
R/o. Hatkar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani
Since Deceased,
Through Legal Representatives -

1A] Muktabai w/o. Namdeo Bhusnar,
Age 67 years, Occu. Household,

1B] Sunita w/o. Limbaji Bhande,
Age 42 years, Occu. Household,

2. Sambhaji s/o. Shankar Dhembre,
Age 67 years, Occu. Agril.,
R/o. Dhangar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani

3. Tulshiram s/o. Gunaji Dhembre,
Age 74 years, Occu. Agril.,
R/o. Dhangar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani

Since Deceased,
Through Legal Representatives -

- 3A] Radhabai w/o. Tulshiram Dhembre,
Age 70 years, Occu. Household,
- 3B] Pandit s/o. Tulshiram Dhembre,
Age 50 years, Occu. Agriculture,
- 3C] Gangadhar s/o. Tulshiram Dhembre,
Age 55 years, Occu. Agriculture,
- 3D] Prabhakar s/o. Tulshiram Dhembre,
Age 43 years, Occu. Agriculture,

All R/o. Dhangar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani

- 4. Ashroba Kashiram Dhembre,
Age 67 years, Occu. Agril.,
R/o. Dhangar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani
- 5. Hari Limbaji Dhembre,
Age 55 years, Occu. Agril.,
R/o. Dhangar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani
- 6. Vyankati Apparao Bhusnar,
Age 50 years, Occu. Agril.,
R/o. Dhangar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani

Since Deceased,
Through Legal Representative -

- 6A] Sangeeta d/o. Vyankati Bhusnar,
@ Sangeeta w/o. Munjabhau Sadgar,
Age 32 years, Occu. Household,
R/o. Shelgaon, Taluka Sonpeth,
District Parbhani
- 7. Ahilaji Apparao Bhusnar
Age 45 years, Occu. Agril.,
R/o. Dhangar Galli, Gangakhed,
Taluka Gangakhed, District Parbhani

.. Respondents
(Original Defendants)

...
Mr. Mahesh V. Ghatge, Advocate for Petitioners
Mr. Mahesh P. Kale, Advocate for Respondent no.1
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 12-01-2022

JUDGMENT :-

Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Advocates for the appearing parties.

2. This petition takes exception to order dated 16.02.2016 passed below Exhibit-67, in Regular Civil Suit No. 25 of 2007, by the learned Joint Civil Judge, Junior Division, Gangakhed, thereby rejecting the application (Exhibit-67) filed by the petitioners-original plaintiffs seeking measurement of the land by the Taluka Inspector Land Records, Gangakhed (TILR).

3. Petitioners-plaintiffs filed a suit for declaration of ownership and possession of encroached land / suit property. Declaration is sought that they are owners of the suit property and seeking possession of the same from the defendants and an injunction that the defendants shall not obstruct peaceful possession of the plaintiffs in respect of suit property.

. The suit was resisted by the defendants. Issues were

framed on 15.04.2008. Plaintiff no. 1, thereafter, filed application (Exhibit-26) for joint measurement of suit property in possession of plaintiffs and defendants through the TILR. The said application was allowed by the trial Court vide order dated 12.08.2014 and the TILR was appointed as a Court Commissioner for joint measurement of the lands of plaintiffs and defendants, situated in Survey no. 118, Mauje Bhambarwadi, Taluka Gangakhed. He was directed to measure all the lands as per Revenue record of the respective parties and prepare a map to show actual possession of the parties and if he finds that a land of one person is in possession of another, he should show the said portion specifically in the map. Pursuant to the said direction, the Court Commissioner measured the land on 28.01.2015, however, submitted the report in the trial Court on 29.08.2015. The said report is objected by the defendants on the ground that the same is prepared behind their back.

4. Plaintiffs, thereafter, filed application (Exhibit-67) contending that the suit of the plaintiff is filed on the basis of measurement carried out on 28.03.2006, which is objected by the defendants, thereafter, the Court Commissioner was appointed, who had measured the land on 28.01.2015 and the report is submitted showing the respective land in possession of the plaintiffs and

defendants. However, in the said report, encroached portion of 23 R. land is not mentioned in the map as well as in the Commissioner's report. It is, therefore, necessary to carry out joint measurement of Survey No. 118 so as to resolve the dispute between the parties. This application was resisted by the defendants contending that the plaintiffs do not have 23 R land, which the plaintiffs are trying to grab and earlier the measurement is carried out, therefore, the application be rejected.

5. The trial Court, after hearing both the parties, rejected the application, mainly on the ground that the application is belatedly filed after one year. The report is submitted by the Court Commissioner as per the direction of the trial Court and probably because the Commissioner did not find any encroachment, and therefore, he has not shown the encroached portion in the map. The application, therefore, was rejected. This order is impugned in the present petition.

6. Heard learned Advocate for the petitioners and learned Advocate for respondent no. 1.

7. It is not in dispute that the earlier Commissioner's report i.e. dated 28.03.2006 on the basis of which the suit is filed, is objected by the defendants. The present report filed by the Court

Commissioner is also objected by the defendants on the ground that, the same is prepared behind their back. While directing the submission of the Court Commissioner's report, the trial Court has specifically directed to measure the land and prepare the map to show the actual possession and if it is found that land of one person is in possession of another, he shall show the said portion specifically in the map. The direction is given on 12.08.2014 and measurement was carried out by the Commissioner on 28.01.2015. However, the report is submitted belatedly on 29.08.2015. The report and the map do not show as to whether there is encroachment or not.

. The trial Court rejected the application Exhibit-67 filed by the plaintiffs by assuming that since there is no encroachment shown, then probably the commissioner did not find any encroachment. The trial Court has erred in arriving at said conclusion on the basis of assumption. The second ground on which the application is rejected, is that the measurement was carried out on 28.01.2015 and the application is filed by the plaintiff on 05.01.2016. While observing the same, the trial Court has failed to take into consideration the fact that the Commissioner's report was filed in the trial court on 28.01.2015 and after going through the said report immediately the application (Exhibit-67) was filed by the plaintiffs.

8. In terms of Order XXVI, Rule 10(3) of the Code of Civil Procedure, 1908, further inquiry can be directed by the trial Court in respect of Commissioner's report.

. Taking into consideration the peculiar facts of the present case, the trial Court ought to have directed further inquiry by the commissioner, considering the fact that the commissioner's report does not give correct and clear picture as was directed by the trial Court while appointing the Commissioner and the Commissioner's report is objected by the defendants.

9. In *Ram Lal and Others Versus Salig Ram and Others, 2020 (1) Mh.L.J. 170*, the Honourable Apex Court has held that "the Local Commissioner had not carried out demarcation in accordance with applicable instructions. The trial Court is dissatisfied with proceedings of such Local Commissioner, it could direct such further inquiry to be made as considered fit. If report of Local Commissioner was suffering from irregularity i.e., want of following applicable instructions, proper course for High Court was either to issue fresh commission or to remand the matter for reconsideration."

The above ratio is applicable to the facts of the present case and it supports the case of petitioners.

10. For the afore-stated reasons, writ petition is allowed in terms of prayer clause 'B'.

11. The impugned order passed below Exhibit-67 dated 16.02.2016 passed in Regular Civil Suit No. 25 of 2007, by the learned Civil Judge, Junior Division, Gangakhed, is hereby quashed and set-aside.

12 Application Exhibit-67 is allowed.

13. Rule is made absolute with the above terms with no order as to costs.

(NITIN B. SURYAWANSHI)
JUDGE

rrd