

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4934 OF 2022

Manoj S/o Prabhakar Borkar
& another

Petitioners

Versus

Anil S/o Murlidhar Borkar
& another

Respondents

Mr. R. R. Karpe, Advocate for the petitioners.

CORAM : M.G. Sewlikar, J.

DATE : 3rd AUGUST, 2022.

PER COURT :

1. Heard learned counsel for the petitioner.
2. Plaintiff – respondent No. 1 herein has filed Regular Civil Suit No. 71/2019 against the defendants – petitioners herein for perpetual injunction. During the pendency of this suit, application for temporary injunction (Exhibit 5) was preferred. Against the order of rejection of said application, respondent No. 1 preferred appeal which was dismissed. Against dismissal of the appeal, respondents preferred Writ Petition No. 2133/2020 in which this Court passed

following order :-

10. Needless to state, if a court commissioner is appointed by the Trial Court in the peculiar facts and circumstances of this case, the court commissioner would not be below the rank of the TILR. The measurement would be carried out on the basis of the revenue records available and the maps in the records of the said office as the factual geographical location of these lands will have to be considered to assess as to whether there was any erroneous mentioning of the boundaries especially on the eastern side, in the sale-deed of the plaintiff dated 14/07/2004.

3. On the basis of this order, the learned trial Court issued following directions :-

As directed by the Hon'ble High court of Bombay at Aurangabad in Writ Petition No. 2133 of 2020 on 02.03.2022, the Deputy Superintendent of Land Records, Newasa shall depute an Officer not below the rank of TILR as Court Commissioner who shall carry on measurement of Block No. 388 (situated at village Newasa Bk.) in order to ascertain the boundaries of Block Nos. 388/2 and 388/, as directed in Para 10 of the Order of Hon'ble High court reproduced at Para 8 of this Order, more particularly for ascertaining the location of commercial shops and other constructions,

if any, made by defendant Nos. 1 and 2 to elucidate whether those constructions are on Block No. 388/2 or Block No. 388/1 or otherwise, in order to resolve dispute between the parties.

The plaintiff as well as defendant Nos. 1 and 2 shall supply requisite documents to the Court Commissioner for the purpose of commission work. Plaintiff shall supply certified or true copy of order of Hon'ble High Court in W.P. No. 2133 of 2020 to the Court Commissioner.

The plaintiff shall deposit measurement fee and bear all necessary charges so directed by the Court Commissioner for the purpose of carrying effective commission work. Measurement Fee shall be deposited in the office of Dy. Superintendent, Land Records, Newasa preferably within 30 days from today.

The work of commission shall be carried within 60 days of deposit of measurement fee.

The commission report shall be submitted along with measurement map (giving details about the location of the constructions made by defendant Nos. 1 and 2) within 30 days of carrying of work of measurement.

4. The Court Commissioner submitted his report. After receipt of the report of the Court Commissioner, it was found that the petitioner had made encroachment over the land of the respondents. Therefore, respondents filed an application for amendment which was allowed by the learned Trial Court. This writ petition is preferred against the said order.

5. I have considered the submissions made by learned counsel Shri Karpe for the petitioners.

6. He submits that the Trial Court exceeded its jurisdiction while giving directions to the Court Commissioner. The directions which this Court did not give have been incorporated in the order by the learned Trial Court. He submits that the learned Trial Court, by the impugned order, has virtually changed the nature of the suit from perpetual injunction to removal of encroachment. He submits that changing the nature of the suit by way of amendment is impermissible.

7. In my opinion, the learned Trial Court did not exceed its

jurisdiction because this Court had directed that the measurement will be carried out on the basis of the revenue records available and the maps in the record of the said office as the factual geographical location of this land will have to be considered to assess as to whether there was any erroneous mentioning of the boundaries especially on the eastern side in the sale-deed of plaintiff. The only direction that was given by the learned Trial Court was about ascertaining the location of commercial shops and other constructions. Now, the Court Commissioner has submitted his report and encroachment is noticed. This being the subsequent event, it can be considered by the Court by way of amendment. The learned Trial Court did not commit any error in allowing the application for amendment. The petition is, therefore, devoid of any substance, hence dismissed. No costs.

(M. G. SEWLIKAR)
Judge