

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4501 OF 2019
WITH
WRIT PETITION NO. 6242 OF 2019

Sow. Sangita w/o. Prafulkumar Jain & Ors

...Petitioners

VERSUS

Bhairavnath Govindrao More (Deshmukh)
& Ors.

...Respondents

Mr. S.V. Kurundkar, Advocate for the Petitioner in Writ Petition No. 4501/2019 and Respondents No. 2 and 3 in Writ Petition No. 6242/2019.

Mr. V.B. Dhage, Advocate for Respondent No. 1.

Mr. M.D. Narwadkar, Advocate for Respondent No. 2 in Writ Petition No. 4501/2019 and for Petitioner in Writ Petition No. 6242/2019.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 24th AUGUST, 2022

ORDER :

1. By this petition filed under Article 227 of Constitution of India, the petitioners have challenged the order passed by the learned Civil Judge, Junior Division, Loha, Nanded below Exhibit-49 in Regular Civil Suit No. 101/2015.

2. The plaintiff has filed a suit for injunction against the defendants that they should not interfere in the peaceful possession of the plaintiff in the suit property. The plaintiff also prayed for measurement of his portion of 71 Are area out of gut

no. 463, admeasuring 3 Hectare 53 Are, situated at Sonkhed, Taluka- Loha, Dist. Nanded, and fixing the boundaries. The defendants by filing written statement resisted the suit.

3. By filing application Exhibit-35, plaintiff sought measurement of his portion of 71 Are land i.e. the suit land contending that defendants are in no way concerned with the suit land. The plaintiff requested defendants for measurement, however, defendants denied the same. The plaintiff filed application to the concerned department for measurement. He was asked to bring consent of co-sharer of block no. 463. He claimed that there is boundary dispute between the parties, therefore, Deputy Superintendent of Land Record be appointed for measurement of the suit land.

4. By filing say to this application defendants No. 1 to 3/petitioners contended that they have no objection for measurement, but notices to the adjacent land owners of land block no. 463 be given and exact possession of plaintiff and defendants and the encroachment be shown. They gave no objection for appointment of Court Commissioner, subject to certain conditions.

5. The Trial Court has allowed the application in following terms:

ORDER

- 1- *Application is allowed.*
- 2- *Deputy Superintendent Land Record, Loha is appointed as Court Commissioner for the measurement of the entire land block no. 463 with the specific direction to show the land of plaintiff to the extent of 71R of village Sonkhed, Tq. Loha.*
- 3- *The Court Commissioner shall issue the notices to the adjacent land holders of the block and he shall file the report after measurement showing the encroachment, if any.*
- 4- *The plaintiff is directed to deposit the amount of Rs. 2,000/- (Rs. Two Thousand Only) provisionally.*
- 5- *Issue writ accordingly.*

6. Pursuant to this order Court Commissioner has submitted his report. The plaintiff thereafter filed application Exhibit-49 contending that pursuant to the order passed below Exhibit-35, Court Commissioner has measured the land and submitted measurement map, panchnama and his report in the Court. In the measurement map, Commissioner has shown that suit land admeasuring 71 Are of block no. 463 is in possession of the plaintiff. However, the Court Commissioner has not fixed the

boundaries of the suit land. The plaintiff therefore prayed that by allowing the application the Commissioner be directed to fix the boundaries of the suit land. This application is opposed by the defendants contending that the map prepared by the Court Commissioner is not acceptable to them and the map is against the contentions in the plaint. The defendants also opposed the measurement map, panchnama and the Commissioner's report. According to the petitioners map is faulty one and cannot be accepted. They therefore, claimed that the application deserves to be dismissed.

7. The Trial Court has allowed the application Exhibit-49. Hence, the present petition.

8. Heard the learned advocate for the petitioners and learned advocates for the respondents.

9. The grievance of the petitioners is that though the plaintiff has pleaded in the plaint and in application Exhibit-35 that defendant No. 4 is encroaching from northern side, this aspect is ignored by the Trial Court while appointing the Court Commissioner and giving directions to him. It is the contention

of the petitioner that though notices were given to petitioners other adjacent land owners were not given notices by the Court Commissioner. The petitioners assailed the Court Commissioner's report on the ground that it is factually incorrect and does not show the exact position of the site. The petitioners claimed that before examination of Court Commissioner, the Court has allowed the application filed by the plaintiffs/respondents thereby partly allowing the suit and the prayer for fixing the boundaries is granted by the Trial Court at preliminary stage, which is not permissible.

10. The learned advocates for the respondents on the other hand supported the impugned order.

11. Record indicates that by order passed below Exhibit-35, Trial Court appointed the Deputy Superintendent of Land Record, Loha as Court Commissioner for measurement of entire land block no. 463, with a specific direction to show the land of plaintiff to the extent of 71R of village Sonkhed, Taluka- Loha. The Court Commissioner was directed to issue notices to all the adjacent land owners of the block and to file report showing the encroachment, if any. Pursuant to this direction, the Court

Commissioner has filed his report along with measurement map, panchnama etc. The measurement map, panchnama and Commissioner's report is not acceptable to the petitioners. According to them, said report is factually incorrect. In that view of the matter, the Trial Court is not justified in allowing application Exhibit-49 by misinterpreting the order passed below Exhibit-35. By the said order Trial Court directed to show land of plaintiff to the extent of 71 Are, however, there is no direction to fix the boundaries. In this view of the matter, the Trial Court has erred in allowing application Exhibit-49.

12. Taking into consideration the objection raised by the petitioners to the Court Commissioner's report, measurement map and panchnama, the Trial Court ought to have waited till recording of evidence of Court Commissioner. At preliminary stage Trial Court has partly allowed the suit by granting prayer for fixing the boundaries of suit land, which is not proper. The impugned order therefore is unsustainable and is liable to be quashed and set aside.

13. In the result, writ petition is allowed.

14. The impugned order dated 21.02.2019 passed by the Civil Judge Junior Division, Loha, Dist. Nanded, below Exhibit-49 in Regular Civil Suit No. 101/2015, is hereby quashed and set aside.

15. The petitioners are entitled to challenge the Court Commissioner's report, measurement map and panchnama at the time of Court Commissioner's evidence.

16. The petitioners are also at liberty to seek appointment of Court Commissioner, if so advised, after the parties conclude their oral evidence.

17. In view of this order, Writ Petition No. 6242/2019 stands disposed of.

[NITIN B. SURYAWANSHI, J.]