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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.13483 OF 2021

Reshma Mahendrakumar Patwa @
Rashmi Mahendra Patwa and Another

PETITIONERS

VERSUS

Hemant Gokuldas Meher and Others

RESPONDENTS

.....
Mr. Abhaykumar D. Ostwal, Advocate for the petitioners
Mr. G. K. Naik – Thigle, Advocate for respondent No.1
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 30th JUNE, 2022

ORDER :

1. This petition, filed under Article 227 of the Constitution of India, is directed against the order passed by the Joint Civil Judge, Junior Division, Ashti, below Exhibit-223 in Regular Civil Suit No. 86 of 2003, thereby appointing Court Commissioner, at the instance of the plaintiff.

2. The petitioners are original defendants No.1 and 2 in Regular Civil Suit No. 86 of 2003, filed by respondent No.1 – original plaintiff for declaration and perpetual injunction in respect of land survey No. 200/A, admeasuring 10 Hectare, 20 Are, situated at Mauje, Kada, Taluka – Ashti, District – Beed (for

short "suit land"), bounded by – East – Land of Ashabai Kale, West – Kada-Dhamangaon Road, South – Land of Patwa / Dilip Lalchand and North – land of Arunkumar Devkar. Respondents No. 2 to 4 in the present petition are defendants No. 3 to 5 in the suit.

3. The defendants resisted the claim of the plaintiff. Application Exhibit-5 filed by the plaintiff is rejected. Thereafter issues are framed on 9th June, 2006. The plaintiff led his evidence and also examined PW-2 Arunkumar Devkar and PW-3 Shital Ramrao Nalawade.

4. Thereafter, the plaintiff filed application Exhibit-223 contending that the plaintiff owns 40 Are land in the disputed land survey No. 200 and the defendants are obstructing to him. Some of the defendants have deliberately entered into a sale deed by wrongly showing the boundaries of the plaintiff's land, for which the suit proceedings are going on. Regular Civil Suit No. 82 of 2003 filed by Arunkumar Devkar PW-2 in the present suit, against the defendants was *subjudice*. In the said suit also Arunkumar Devkar had claimed the same relief, as is claimed in the present suit. Arunkumar Devkar, for his own benefit, compromised Regular Civil Suit No. 82 of 2003 with the defendants by showing different boundaries than the boundaries

mentioned in his sale deed and, thereafter he sold the 40 Are land by sale deed No. 1335 of 2018 to Ramjan Tamboli and Yogesh Chandoliya. From the date of sale of the land by Arunkumar Devkar, the other joint owners in collusion with defendants No.1 and 2, are obstructing the plaintiff's possession. Therefore, if the court directs measurement of the suit land by appointing Court Commissioner through land record department, the dispute between the plaintiff and the defendants can be resolved. It was requested that the land of the plaintiff be directed to be measured, as per the boundaries mentioned in his sale deed, and map of the same be called along with the Commissioner's report. The plaintiff is ready to deposit necessary charges of the court commissioner. He, therefore, prayed for appointment of Court Commissioner.

5. Said application was resisted by defendants No.1 and 2 by filing a detail say contending that, as per the orders of the Tahsildar, Ashti, Taluka Inspector of Land Records, Ashti has measured land survey No. 200 on 22nd August, 2003. Accordingly partition Form No. 4 and record was prepared. Ram Nalawade is owner of share No.1, which is running east-west, on north side of Gut No. 200. When this was the factual position, the plaintiff has mentioned incorrect boundaries in his sale deed. The plaintiff

does not possess the suit property, within the boundaries mentioned in the suit. It is further contended that Arunkumar Devkar, after filing Regular Civil Suit No. 82 of 2003 realized that the boundaries mentioned in his sale deed are incorrect, therefore, he has entered into compromise and mentioned correct boundaries in the compromise deed. The compromise deed in that suit is signed by Arunkumar Devkar and his advocate. The plaintiff has filed the application as he is not sure of success in the suit and only with a view to prolong the matter and collect evidence, the application is filed. Since the suit land is once measured by the TILR, it is not necessary to again measure the same. Hence, they prayed for rejection of the application.

6. The Trial Court allowed the application and appointed Deputy Superintendent of Land Records, Ashti as Court Commissioner for measurement of plaintiff's 40 Are land in survey No. 200 and for fixing the boundaries. This order is impugned in the present writ petition.

7. Learned advocate for the petitioners assailed the impugned order on the ground that without giving opportunity of hearing, the Trial Court has passed the impugned order. Since the earlier measurement of survey No. 200 is carried out, it was not

necessary to again measure the plaintiff's land by appointing Court Commissioner. The plaintiff is prolonging the trial and he is trying to collect evidence through Court Commissioner. He, therefore, submits that the impugned order is liable to be quashed and set aside. In support of his submissions, he relied on following judgments-

I. “Dhondiram Nivrutti Pawar and Others V/s Laxman Khashaba Pawar and others” 2018 (2) Mh.L.J. 225.

II. “Chandraro Hanumantrao Wable V/s Dhondu Fula Patil” 2012 (2) Mh.L.J. 847.

III. “Dnyandeo Vithal Salke and Others V/s Dagdu Kadar Inamdar” 2017 (3) Mh.L.J. 314

IV. “Sanjay Kisan Thorat and Others V/s Ramchandra Parsu Thorat and Another” 2018 (2) Mh.L.J. 954

V. “Maria Pereira and Others V/s Dolorosa Christina Rodrigues” 2015 (5) Mh.L.J. 577

VI. “Dulichand Ganuji Gajbhiye and Others V/s Shankarlal Radhakishan Agrawal” 2018 (5) Mh.L.J. 424

VII. Puttappa V/s Ramappa” ILR 1996 KAR 1443

VIII. “Efigenio Dias and Another V/s Malaquias D’Costa and Others”

2000 (2) Mh.L.J. 209

IX. “Nalubai Narayan Shinde and Others V/s Gopinath Dagdu Shinde”

2011 (2) Mh.L.J. 991.

X. “Sanjay Namdeo Khandare V/s Sahebrao Kachru Khandare and

Others” 2001 (2) Mh.L.J. 959

8. Learned advocate for respondent No.1 supported the impugned order.

9. The suit filed by the plaintiff is for declaration of ownership and for perpetual injunction in respect of the suit land. Admittedly, portion of the land survey No. 200 is sold by PW-2 Arunkumar Devkar to Ramjan Tamboli and Yogesh Chandoliya in the year 2018. The plaintiff has raised the grievance that the defendants are obstructing his peaceful possession. In that view of the matter, to resolve the controversy between the plaintiff and the defendants, measurement of the suit land and fixing its boundaries is necessary. No prejudice is likely to be caused to the defendants, if plaintiff's land is measured.

10. The ratio of the rulings relied on by the learned advocate for the petitioners is that Commissioner cannot be appointed to collect evidence. This is a settled legal position.

11. In the case in hand, the Trial Court has allowed the application of the plaintiff on the ground that for resolving the controversy between the parties, it is necessary to appoint the Court Commissioner to measure the suit land and to fix its boundaries. Hence, in the facts of the present case, rulings relied on by the learned advocate for the petitioners would not help the petitioners.

12. There is no error apparent on the face of record and the discretion exercised by the Trial Court is not found to be perverse. In that view of the matter, this Court is not inclined to exercise its extra ordinary writ jurisdiction in the present case.

13. In the result, writ petition, being devoid of merits, is dismissed.

14. At this stage, learned advocate for the petitioners requests to stay this order so as to enable the petitioners to approach the Hon'ble Apex Court. This order shall not take effect for a period of two weeks from today.

[NITIN B. SURYAWANSHI]
JUDGE