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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7935 OF 2017

Gorakshnath Laxman Lokhande
Age – 76 years, Occ – Agril
R/o Ranmala, Newasa (Kh)
Taluka – Newasa, District - Ahmednagar

PETITIONER

VERSUS

Abasaheb Maruti Lokhande
Age – 62 years, Occ – Agril
R/o Ranmala, Newasa (Kh),
Taluka – Newasa, District – Ahmednagar

RESPONDENT

.....

Mr. Rahul R. Karpe, Advocate for the petitioner
Mr. V. S. Bedre, Advocate for the respondent

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 17th AUGUST, 2023

ORDER :

1. Leave to correct prayer clause. Correction be carried out forthwith.
2. Orders dated 3rd March, 2017, passed below Exhibits-118 and 120 in Regular Civil Suit No. 154 of 2015, by the learned Civil Judge, Senior Division, Newasa, are challenged in the present petition, filed under Article 227 of the Constitution of India.

3. The petitioner – plaintiff filed the suit for removal of encroachment and possession. The respondent – defendant appeared and opposed the suit, by filing written statement. The Trial Court framed issues on 14th September, 2011. The plaintiff commenced his evidence on 25th August, 2015 and completed it on 2nd December, 2015. Since the plaintiff failed to lead further evidence, the Trial Court closed his evidence by order dated 8th June, 2016.

4. The plaintiff then moved application Exhibit-98 for setting aside the evidence closure order. The said application was allowed and the plaintiff was directed to file list of the remaining witnesses and to lead further evidence. Since even thereafter the plaintiff failed to lead evidence, again "*evidence close*" order was passed by the Trial Court. Hence, the plaintiff filed application Exhibit-103, which was allowed on 18th October, 2016 and the plaintiff was called upon to comply with the order passed below Exhibit-98. The plaintiff then called surveyor but failed to give list of witnesses. In these circumstances, the plaintiff filed application Exhibit-118 claiming that his evidence is partly recorded, he and his witness, surveyor have deposed in the Court, however, since the plaintiff could not get necessary information, documents and witness, therefore, it is necessary

for him to give more evidence and he may be given an opportunity to lead his evidence. This application is rejected by the Trial Court holding that the plaintiff has failed to give witness list and though application Exhibit-98 is decided on 16th July, 2016, the plaintiff has failed to comply with the said order.

5. By filing application Exhibit-120, the plaintiff has contended that he is litigating the matter since 1996. Regular Civil Suit No. 377 of 1996 and Regular Civil Appeal Nos. 56 of 2002 and 57 of 2002 were decided and thereafter the plaintiff applied for measurement to Taluka Inspector of Land Records. In the said measurement, 18 *Are* encroachment of the defendant is shown. He, therefore, instituted the present suit and called the surveyor to give evidence. The Surveyor was also recalled for clarification. The plaintiff has found that the measurement conducted by the surveyor is suspicious and there is difference between measurement of Tipan extract and Sakhali. There is also error while recording the Tipan. The plaintiff apprehended that due to the error in the measurement, he will not get justice and, therefore, the plaintiff prayed for appointment of Nimtanadar as Court Commissioner. Said application was opposed by the defendant, by filing say and the Trial Court has rejected the application. Both these orders passed below Exhibit-

118 and Exhibit-120 are impugned in the present petition.

6. Heard learned advocate for the petitioner and the learned advocate for the respondent. Perused the memo of writ petition, annexures and the impugned orders.

7. It appears from the record that the plaintiff has failed to diligently prosecute the suit instituted by him and has committed lapses in prosecuting the matter. In spite of specific order passed below Exhibit-98, the petitioner has failed to give witness list and lead his evidence. However, since the petitioner is prosecuting the matter since 1996, in the interest of justice and with a view to give fair opportunity to the plaintiff to lead evidence, in support of his case, this Court is inclined to entertain the prayer of the petitioner. The second challenge of the petitioner in respect of appointment of Court Commissioner, cannot be considered at this stage and the same can only be considered after conclusion of recording of evidence of the parties, as per the settled legal position.

8. In the result, following order -

ORDER

A. Writ Petition is partly allowed.

B. Impugned order dated 3rd March, 2017 passed below

Exhibit-118 in Regular Civil Suit No. 54 of 2015 is quashed and set aside, subject to the petitioner paying cost of Rs.25,000/- to the defendant in the Trial Court, within a period of two weeks from the date of receipt of writ of this order.

- C. Hearing of Regular Civil Suit No. 54 of 2015 is expedited.
- D. Petitioner – plaintiff shall furnish list of witnesses within a period of two weeks from the date of receipt of writ of this order and shall lead his evidence within four weeks thereafter. On failure to do so, the order passed by the Trial Court, forfeiting the right of the plaintiff to lead further evidence shall stand revived.
- E. Impugned order dated 3rd March, 2017 passed below Exhibit-120 in Regular Civil Suit No. 54 of 2015 is maintained. However, the parties are at liberty to apply for appointment of Court Commissioner, after conclusion of recording of evidence. If such application is filed, the Trial Court shall consider it on its own merits, without being influenced by the order passed below Exhibit-120.

[NITIN B. SURYAWANSHI]
JUDGE