

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

68 WRIT PETITION NO.14483 OF 2019

**MAHADEO MURALIDHAR GOPHANE AND OTHERS
VERSUS
ANKUSH VISHWANATH GOPHANE AND OTHERS**

...
Advocate for Petitioners : Mr. Shoyab Shaikh
Advocate for Respondent Nos.1 & 2 : Mr. A.S. More

...

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 20-02-2023

PER COURT :

. Heard.

2. By this petition, the challenge is to the order dated 28.08.2019 passed by the trial Court below Exh.37 in Regular Civil Suit No. 304 of 2015 issuing the letter to the Court Commissioner directing him to offer explanation on the issues forming part of the order dated 28.08.2019.

3. Regular Civil Suit No.304 of 2015 was instituted by the respondents - plaintiffs seeking an order of permanent injunction. It is the case of the respondents in the plaint that the petitioners who have no concern with the suit property have damaged the boundary marks and have encroached upon the property and as such are interfering with the possession of the respondents over the property. In the said

proceedings an application came to be filed by the respondents – plaintiffs for appointment of the Court Commissioner which was allowed by order dated 05.01.2018. Upon the report being received by the trial Court, an objection was raised that the Court Commissioner has not specifically stated the area of encroachment and the areas encroached by each of the defendants. After considering the report of the Court Commissioner, the trial Court had directed the Court Commissioner to offer an explanation and to place on record the exact situation on the spot with all possible details and also to place on record the unequivocal terms if the Court Commissioner is not be able to locate the spot.

4. Heard the learned counsel appearing for the parties.

5. The learned counsel appearing for the petitioners submits that the impugned order dated 28.08.2019 in fact permits the re-measurement of the area. He further submits that no opportunity of hearing was given to the petitioners and the the impugned order came to be passed. He further submits that Regular Civil Suit No.304 of 2015 was instituted seeking an order of perpetual injunction and as such it is not a case of the boundary dispute.

6. Per contra, learned counsel appearing for the respondents

submits that the order dated 05.01.2018 appointing Court Commissioner has not been challenged by the petitioners and by the subsequent order only an explanation has been sought.

7. Considered the rival submissions of the parties.

8. Perusal of plaint in Regular Civil Suit No.304 of 2015 shows that a positive assertion has been made in the plaint that the defendants i.e. petitioners having no concern with the suit property have encroached upon the property and have dislocated the boundary marks. Based on this case, the present suit has been filed seeking an order of perpetual injunction. The admitted position is that the order dated 05.01.2018 appointing the Court Commissioner has not been challenged by the petitioners. As such, the order has attained finality and the Court commissioner has executed the commission.

9. As far as the impugned order dated 28.08.2019 is concerned, the submission of the learned counsel for the petitioners that opportunity was not given to the petitioners to file reply, cannot be sustained for the reason that the impugned order records that the petitioners have not filed their say in spite of ample opportunity. In my opinion, by impugned order dated 28.08.2019 the trial Court has exercised the power conferred under Order-XXVI, Rule-12 sub-rule (2)

of the CPC which provides that the proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit. In the present case, the trial Court has arrived at a satisfaction that the report of the Court Commissioner requires further explanation inasmuch as the exact situation on the spot with all possible details has not been placed on record. In my opinion, no fault can be found with the impugned order inasmuch as the purpose of appointment of the Court Commissioner is to assist the Court in deciding controversy in issue and in the present case, the trial Court has observed that the report of the Court Commissioner does not satisfy the requirement.

10. The learned counsel for the petitioners relies upon the decision of this Court in the case of **Krushak Education Society vs. Sau Sarojdevi Sunderlal Kela & Others**, Writ Petition No.6098 of 2015 decided on 28.08.2018.

11. As far as the decision which is relied upon by the learned counsel for the petitioners is concerned, the said decision is as regards the stage at which the application for appointment of the Court Commissioner is preferred. In the present case, considering that the Court Commissioner had already been appointed by order dated

05.01.2018 and the commission is already carried out, there is no warrant to interfere with the impugned order seeking an explanation from the Court Commissioner.

12. Writ petition being devoid of merits is liable to be dismissed and is accordingly dismissed.

(SHARMILA U. DESHMUKH, J.)

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