



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1456 OF 2024

DR. KEHKASHAN JUNAID QURESHI W/O JUNAID AHMED QURESHI
VERSUS
MUNEER BAIG S/O HABIB BAIG AND OTHERS

Mr. N. S. Muthiyan, Advocate for the petitioner
Mr. V. I. Tholde, Advocate for the respondents

CORAM : R. M. JOSHI, JJ.

DATE : 20th JUNE, 2024

PER COURT :-

1. The original plaintiff in RCS No. 1138/2013 takes exception to the order dated 08/01/2024 passed below Exhibit 40 by the Trial Court whereby the application filed by the plaintiff for appointment of another Court Commissioner for measurement of the property in question was rejected.

2. In short case of the petitioner/plaintiff is that he is the owner of 40 R land from Gut No. 31 which was purchased by him pursuant to the registered sale deed dated 13/12/1999. He claims to have been handed over the possession of the same by his vendor. It is averred that in the month of May, 2012 private measurement was carried out where it was revealed that the plaintiff is his in possession of 25R land out of 40 R land and remaining 15 R land is in possession of defendants. It is specifically averred that in the said measurement the surveyor did not show encroachment and it is alleged that the same is done in collusion

with defendants. Defendants filed written statement on 27/01/2014 denying the allegations that contentions of the plaint.

3. Suit proceeded by framing of issues. An application Exhibit 40 was filed by the defendants for appointment of Court Commissioner which was allowed by order dated 12/07/2016. After the measurement report and map was filed before the Court, plaintiff examined the surveyor. Evidence of the parties was over thereafter. When the matter came to be posted for final argument before the Trial Court, application Exhibit 40 is filed for the appointment of the Court Commissioner/T.I.L.R for measurement of the suit property. The said application is opposed by the defendants by filing Exhibit 42 it is specifically claimed therein that no encroachment is seen from the report filed by the Court Commissioner and that no objection was raised by the plaintiff to the said report since, the learned Trial Court rejected the said application.

4. Learned counsel for the petitioner/plaintiff submits that considering the nature of the suit and having regard to the fact that earlier this the Trial Court had passed order of appointment of Court Commissioner and therefore later on it is not open for the Court to reject subsequent application. In order to support his submission he placed reliance on the judgment in case of *Yasin Gulab Shikalkar Vs. Maruti Nagnath Aware and others in Writ Petition No. 7278 of 2022*. It is further argued that Trial Court is under legal obligation to decide the objection

raised by the plaintiff with regard to the evidence of surveyor in respect of the measurement in view of Order 26 Rule 10 of the Code of Civil Procedure (for short 'CPC'). It is his submission that if there is evidence which on the fact of it is sufficient to discard the report of the Court Commissioner, such issue needs to be decided first by the Court and the second Commissioner can be appointed. In support of his submission he placed reliance on the judgment of Madras High Court in case of ***Vemba Gounder Vs. Poonchulai Gounder, AIR 1996 MAD 347.***

5. Learned counsel for the respondents/defendants on the other hand opposed the said contention by drawing attention of the Court to the relevant facts of the case. It is his submission that the plaintiff had got the suit property measured from the surveyor before filing of suit and in the said report also no encroachment committed by the defendants was indicated. It is also submitted that even after the appointment of Court Commissioner during the pendency of the suit, the report of the Court Commissioner does not show any encroachment on the part of the defendants to the property of plaintiff. It is his submission that if the plaintiff was aggrieved by the said report, such objection ought to have been raised to the report before the Trial Court which has not been done. It is submitted that once the plaintiff leads evidence of the surveyor, it is not open for him to test the said evidence at any stage prior to the decision of the suit. It is argued that the suit is pending for about 10 years and at the fag end of the trial i.e. at the stage of

argument such application is filed and hence it is rightly rejected by the Trial Court. To substantiate his argument he placed reliance on the judgment of this Court in case of *Shaikh Isak s/o Shaikh Amir Vs. State of Maharashtra and Anr., 2011(3) All MR 361.*

6. Once an order is passed for appointment of Court Commissioner to measure the suit property, no dispute can be made of the fact that such appointment of Commissioner is necessary to decide issues involved in a suit. Provision of Order 26 Rule 10 of CPC permits the parties to raise objection to the report of the Court Commissioner and such objection can be substantiated by leading evidence and that Court would be required to decide such objection. In the instant case, as observed by learned Trial Court, plaintiff after seeking order of appointment of Court Commissioner and the filing of the report of the Court Commissioner did not raise objection to the said report. As such no occasion arose for the Court to decide such objection. On the contrary, the plaintiff led evidence of the surveyor and it is only after his evidence is recorded, at the stage of argument another application is filed for second measurement of the suit property by the same Authority.

7. Now after evidence is led by the party, the Court cannot be called upon to assess the said evidence at this stage of the proceeding. It is open for the Trial Court to consider the evidence of surveyor at the time of the judgment to accept or reject the same. Needless to state that

even it is always open for the Trial Court to *suo moto* direct the appointment of Court Commissioner if the same is found necessary for the decision of the issue is involved in the suit.

8. As far as the impugned order is concerned, the learned Trial Court has taken into consideration the facts of the case and has specifically observed that evidence of both sides is over and the suit is at the stage of final argument and that the suit is pending since 2013. It is observed that any such application filed at this stage cannot be entertained as it would be endless process. The tenor of the order clearly shows that the learned Trial Court was not inclined to consider the application for second measurement at this stage. In the facts and circumstances of the case and having regard to the procedure for conduct of the trial of the suit, no fault can be found if the trial refuses to record any finding on evidence led before it as the stage, where evidence of parties is over and suit is posted for final argument.

9. For want of any perversity, impugned order does not deserve interference. Hence, petition stands dismissed.

(R. M. JOSHI, J.)

ssp