



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

52 WRIT PETITION NO. 3566 OF 2015

Venkubai Dhondiba Naik & others

....Petitioners

VERSUS

Arjun Madhu Gaikwad & others

.....Respondents

.....

Mrs. Smita Kulkarni, Advocate holding for Mr. K. M. Nagarkar,
Advocate for the Petitioner.

Mr. G. G. Suryawanshi, Advocate for Respondent Nos. 2 to 11.

CORAM : R. M. JOSHI, J.

DATE : 18th JUNE, 2024.

PER COURT :

1. By consent of both sides, heard finally at admission stage.

2. Petitioners are Plaintiffs in Regular Civil Suit No. 36/2007 which was filed against Defendants/Respondents herein seeking injunction. This suit was dismissed by judgment dated 06.04.2009. Against dismissal of suit, plaintiffs preferred appeal being Regular Civil Appeal No. 15/2009. Since application filed by Petitioners/Plaintiffs before Appellate Court being Exhibit 39 is rejected, this Petition.

3. Learned counsel for the Petitioners submits that the dispute between the parties is boundary dispute and the same could never be decided without measurement of the respective lands. It is her further contention that the Defendants had measured the land before the Plaintiffs could file the suit and that the said measurement (measurement map Exhibit 69) was sought to be proved by Plaintiffs by examining the Surveyor Mr. Sayyed. It is her further contention that the learned Trial Court has committed error in not considering the said measurement map and has dismissed the suit. It is also brought to the notice of this Court that during the pendency of the suit, an application was filed for appointment of Court Commissioner however, since the same was filed at premature stage, said request was refused. Said order passed by the Trial Court was unsuccessfully challenged before this Court. It is her further submission that application for re-measurement of suit property ought to have been allowed by First Appellate Court as having regard to the nature of the suit, the dispute between the parties cannot be decided unless there is measurement of the lands.

4. Learned counsel for Respondents/Defendants supported the impugned order.

5. Perusal of the record indicates that Defendants had carried out measurement before the Plaintiffs filed the suit in question. Interestingly, Plaintiffs examined the Surveyor Mr. Sayyed in order to prove said measurement map Exhibit 69. The Trial Court, however, has refused to accept the said map to be correct and dismissed the suit. During the pendency of the appeal, present application Exhibit 39 came to be filed under Order 28 Rule 9 of the Code of Civil Procedure for appointment of TILR as Court Commissioner for measurement of the suit property. Perusal of the impugned order shows that the learned First Appellate Court has not outrightly/finally rejected the contention of the Petitioners. Relevant observations of the Appellate Court are quoted below :

“The point of measurement is already decided by the learned trial Court. Therefore, it does not require any other order of measurement which will delay the proceeding. The framing of issues, and deciding that issues that is adjudication and that issues are finally decided by the trial Court. Therefore, question of measurement does not open at this stage.”

These observations indicate that the First Appellate Court is of the view that unless some findings are recorded on the

evidence already led before the Trial Court, and findings recorded therein are tested, there is no propriety in further enquiry on the same subject. Apparently, Petitioners' contention therefore is not totally rejected.

6. Having regard to the stage at which the order has been passed and since at present stage, prayer for measurement is not considered, this indicates that the right of the Petitioners to raise such issue at appropriate stage has not been taken away. Having regard to aforestated facts, this Court does not find any perversity in the order in order to cause any interference therein. Needless to record that it is permissible for Petitioners to prefer such application at appropriate stage, in accordance with law and that this order shall not come in their way in any manner whatsoever.

7. Petition stands disposed of in above terms.

(R. M. JOSHI)
Judge

dyb