



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

WRIT PETITION NO. 4323 OF 2023

ANUSAYA RAVSAHEB JADHAV
VERSUS
GULABRAO VITHOBARAO JADHAV

Mr. A. D. Hande, Advocate for petitioner
Mr. G. A. Gadhe, Advocate for respondent

CORAM : R. M. JOSHI, J.

DATE : 06th December , 2024

PER COURT :-

1. This petition takes exception to order passed below Exhibit 52 in R.C.S. No 47/2021 whereby the application filed by the plaintiff/respondent herein for appointment of the Court Commissioner for measurement of the suit land came to be allowed.

2. The petitioner/original defendant raised objection to the said order on the ground that the suit filed by the plaintiff is on the basis of measurement carried by TILR. Learned counsel for the petitioner drew attention of the Court to the averments in Paragraph 5 of the plaint. It is his submission that it is not permissible for the parties to collect evidence through the Courts order and no measurement of the suit land can be directed one after another without deciding that the first measurement carried out is incorrect or not tenable of law.

3. Learned counsel for the respondent/plaintiff supported the impugned order by contending that since in the written statement the defendant has denied the correctness of the said measurement, it was open for the plaintiff to make such application.

4. The law on the point of appointment of Court Commissioner is fairly settled to say that Order XXVI Rule 9 C.P.C. does not contemplate for collecting evidence through the Court. Admittedly, plaintiffs suit is based upon the measurements carried out by TILR on 11.09.2020. It is, therefore, open for the plaintiff to substantiate his case by proving the said measurement. Unless such attempt is made, it was not open for the plaintiff to ask re measurement of the property. In such circumstances, the learned trial Court has committed error in passing the impugned order.

5. In view of above, petition stands allowed. Order dated 04.03.2023 stands set aside. Application Exhibit. 52 stands dismissed.

(R. M. JOSHI, J.)

bsj