



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

WRIT PETITION NO. 6380 OF 2023

Indramohan Kamalnarayan Awasthi .. Petitioner

Versus

Lakshmibai Balasaheb Deshmukh .. Respondent

Ms. Chaitali V. Sheth, Advocate for the Petitioner.
Shri V. B. Garud, Advocate for the Respondent.

CORAM : SHAILESH P. BRAHME, J.
DATE : 22ND JANUARY, 2024.

FINAL ORDER :

. Heard the learned counsel for the litigating sides finally at the admission stage.

2. An order dated 13.02.2023 passed below Exhibit 29 in R.C.S. No. 266 of 2016 by the learned Civil Judge Junior Division, Paithan rejecting application U/O XXVI Rule 9 of the Code of Civil Procedure (for short 'C.P.C.') preferred by the petitioner is under challenge. The petitioner is the original defendant and the respondent is the original plaintiff in R.C.S. No. 266 of 2016 filed for the relief of injunction.

3. The parties are adjoining land owners. Initially land gut No. 175 admeasuring 3H 72R was belonging to Raosaheb Gidhane. The petitioner purchased land to the extent of 01H 62R, whereas the respondent purchased land admeasuring 2H

10R from land gut No. 175. The obstruction made by the petitioner is cause of action for preferring present suit along with application Exhibit 05 for temporary injunction. The application Exhibit 05 was rejected on merits. Being aggrieved the respondent preferred Misc. Civil Appeal No. 37 of 2017. By judgment and order dated 21.09.2017 it was allowed by modifying the order passed by the Trial Court. The parties were directed to maintain status quo and they were extended opportunity to apply for the joint measurement.

4. In pursuance of the directions issued by the lower Appellate Court, the respondent submitted application Exhibit 19 U/O 26 Rule 9 of the C. P. C. The petitioner consented for appointment of Commissioner vide say below Exhibit 20. Accordingly, application Exhibit 19 was allowed by order dated 03.12.2018. Following are the directions issued by the Trial Court.

- 1) Application at Exh.19 is hereby allowed.
- 2) TILR Paithan is hereby appointed as Court Commissioner.
- 3) He is directed to measure the land of plaintiff and defendant including an area occupied for the roads from northern and eastern side of Gat No.175 as per rules by giving advance notice of measurement to both parties and adjoining land holders/possessors. The missing traverse marks should be firstly fixed and on that basis measurement be carried out. The TILR should

measure the both properties on the basis of at least two traverse marks. The distance between plane table stations is required to be mentioned.

- 4) The TILR is hereby directed to carry out the measurement of suit property and to fix its boundaries. He is also directed to specifically ascertain and show the encroachment if any in his map and report.
- 5) TILR, Paithan is directed to submit his map and report on or before 03.01.2019.
- 6) Plaintiff is directed to deposit requisite charges and fees in the TILR office, Paithan as early as possible and place its receipt on record.
- 7) Both parties are hereby directed to give copy of plaint, written statement, copies of all relevant revenue/public/private record and other necessary documents to the TILR before measurement without fail and TILR should take into consideration all such documents before measurement of the lands accordingly.
- 8) Issue commission writ accordingly to TILR Office, Paithan.

5. The measurement was conducted on 13.02.2020 by the Taluka Inspector of Land Records. Panchanama was submitted on 29.07.2020 along with map. The grievance of the petitioner was that the directions issued by the Trial Court vide order dated 03.12.2018 were not being followed meticulously. The land of the petitioner was not being measured. Land occupied by Eastern

side road and a road on northern side were not being measured. In view of the defect which crept up in the execution of the commission, the petitioner submitted application at Exhibit 29 U/O XXVI Rule 9 of the C. P. C. By the impugned order the application Exhibit 29 is rejected.

6. The learned counsel for the petitioner submits that map produced on record prepared by the Commissioner and the panchanama do not show measurement of the land occupied by the petitioner as well as land occupied by the roads on northern and eastern sides. She would submit that while rejecting the application Exhibit 05, the Trial Court recorded finding that without there being joint measurement it would not be possible to resolve the dispute. The lower Appellate Court by order dated 21st September, 2017 also granted liberty to the parties to apply for joint measurement. In the wake of these orders, it was expected of the Commissioner to meticulously follow the directions.

7. The learned counsel for the petitioner further submits that the appointment of the Commissioner is necessary to rectify the defect. The inspection and measurement is necessary to resolve the controversy involved in the suit. It is an error of jurisdiction to reject the application by the impugned order. It is further submitted that it is perversity committed by the learned Trial Judge to hold that there was no specific order to measure area acquired for the road.

8. Per contra, the learned counsel for the respondent supports the impugned order. The learned counsel has invited my attention to order below Exhibit 05 as well as the judgment and order passed in Misc. Civil Appeal No. 37 of 2017. He would submit that the directions issued by the Trial Court vide order dated 03.12.2018 below Exhibit 19 have been scrupulously followed. The map produced on record reveals the necessary details for which the Commissioner was appointed. Even the encroached portion has also been mentioned. He would submit that there is no necessity for the appointment of Commissioner again for the same purpose.

9. The learned counsel for the respondent further submits that application Exhibit 29 is an attempt to collect the evidence. The conduct of the petitioner is objectionable. The report/panchanama was submitted on 29.07.2020 and the present application Exhibit 29 is filed on 02.09.2021 belatedly. He would urge to dismiss the petition.

10. I have considered rival submissions of the parties. There is controversy between the parties in respect of the measurement, area occupied by them and the alleged encroachment. Application Exhibit 05 was rejected by order dated 01.02.2017. It's para 14 reveals that the Trial Court was of the opinion that joint measurement was necessary to be conducted to resolve the controversy. The lower Appellate Court in Misc. Civil Appeal No. 37 of 2017 while allowing the appeal, granted liberty to the parties for joint measurement. In the wake of these undisputed

facts, the application Exhibit 19 was submitted by the respondent. It was not opposed by the petitioner.

11. On 03.12.2018 application Exhibit 19 was allowed with specific directions. Clause 3(i) shows direction to measure land of plaintiff as well as defendant. Clause 3(ii) shows direction to measure land occupied by road of Northern and Eastern sides of gut No. 175. Clause 3(iii) directs to fix the boundaries. Clause 3(iv) directs to show the encroachment. The measurement appears to be conducted on 13.02.2020. The map which is produced on record indicates that land occupied by the respondent is mentioned as 1H 99R, when as per the claim it should be 2H 10R. The area occupied by the petitioner has not been mentioned. The land in possession of the petitioner has not been measured. The roads are shown in the map, but the area of land gut No. 175 occupied by both the roads has not been shown. The commission has not been executed strictly in the terms stipulated by order dated 03.12.2018.

12. Considering the controversy involved in the matter, the petitioner is justified in raising grievance by filing application Exhibit 29 that the Commissioner failed to measure his land and the land occupied by both the roads. This aspect of the matter is relevant for adjudicating the controversy involved in the matter. The factual details directed by the Trial Court in the earlier order dated 03.12.2018 have not been brought on record.

13. For the reasons stated above, following order is passed.

O R D E R

- i) Order dated 13.02.2023 below Exhibit 29 passed by the learned Civil Judge Junior Division, Paithan in R.C.S. No. 266 of 2016 is quashed and set aside.
- ii) Application Exhibit 29 shall stand allowed by directing appointment of Court Commissioner for measurement of land in possession of both the parties as well as land gut No. 175, occupied by Northern and Eastern side roads.
- iii) It is further directed that a separate map be drawn in consonance with the present minutes of the order and be placed on record within the stipulated period.
- iv) The map shall show encroachment if any.
- v) Both the parties are directed to bear the expenses which are to be determined by the Trial Court.
- vi) T. I. L. R. Paithan is directed to carry out work of commission within a period of four (04) weeks from today.
- vii) The writ petition is allowed in above terms.

[SHAILESH P. BRAHME, J.]

bsb/Jan. 24