



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6937 OF 2022

NATWARLAL SHIVAJI PATEL
VERSUS
GANESH ASHOKLAL BHANDARI AND ANOTHER

Mr. N. L. Jadhav, Advocate for the petitioner
Ms. J. R. Nawale h/f Mr. V. D. Salunke, Advocate for respondent No.2.

CORAM : R. M. JOSHI, J.
DATE : 14th JUNE, 2024

PER COURT :-

1. By consent of both sides, heard finally at the stage of admission.
2. This Court is faced peculiar situation where the petitioner has practically called upon the Trial Court to decide the issue as to whether the Court Commissioner's report can be accepted and read in evidence or otherwise, at the stage of recording of evidence.
3. The petitioner/ original plaintiff filed suit against defendants for perpetual injunction in respect of the suit property bearing survey No. 712 situated at Ashti. An application was filed by him vide Exhibit 164 for the appointment of Court Commissioner for ascertainment of the extent

of encroachment. The Trial Court by order dated 2nd August, 2016 directed appointment of the Court Commissioner to measure suit property. The Court Commissioner measured the land and submitted its report. The suit came up to stage of recording of evidence. The surveyor as well as his superior officer were examined as PW Nos. 5 and 6. On the basis of evidence led by these two witnesses, plaintiff filed application Exhibit 247 for remeasurement stating that the evidence led by these witnesses indicate that the measurement report is not admissible and cannot be read in evidence, Since as per the provisions of Section 83 of Evidence Act the accuracy of the measurement and record is absolutely essential. Learned Trial Court after hearing both sides, rejected the application by passing impugned order.

4. Learned counsel for the petitioner raised grievance with regard to the evidence led by the PW 5 and 6 which according to him is more than sufficient to hold that the measurement is not carried out as per the directions of the Court so also map is not as per the actual measurements at the site. Thus, according to him, in such circumstances the defendant was justified in making further application for appointment of another Court Commissioner to carry out re-measurement. It is his submission that the Civil Court exercises discretion in this regard and having regard to the provisions of Order XXVI Rule 10 of the Code of

Civil Procedure the Court has to permit the parties to examine the Court Commissioner. To support his submissions, he placed reliance on the judgment of the Karnataka High Court in case of ***Shadaksharappa Vs. Kumari Vijayalaxmi***, ***LAWS(KAR)-2023-1-1147***. He referred to the paragraph 20 (g), (h) and (i) of the said judgment which reads thus:

"20. ---

g) The report of the Commissioner is not conclusive proof of what is stated therein. The report is only a piece of evidence, that the Court has to examine based on the other materials on record."

h) Report of the Commissioner need not be formally marked for being considered as evidence. Once submitted to the court, the report is part of the court record and can be looked into by the court.

i) The court may in its discretion examine the Commissioner on any matter concerning the report. There is no compulsion to examine the Commissioner. However, if the objection is filed to the report, and the party filing objection seeks to examine the Commissioner then the Commissioner should be examined. In either case, once the Commissioner is examined, the court having due regard to the evidence, may reject or accept the report in its entirety or in part, provided there are materials to justify such a finding on the report. In appropriate cases, the merit of the report can be considered at the final hearing. While considering the report at the final hearing, if the court finds that the report is erroneous and fresh commission is required, the court may pass appropriate order in this regard."

5. In the afore stated circumstances, according to him, it is a fit case wherein the impugned order is deserves to be set aside or at least there may be a direction issued to the Trial Court to consider the

application filed by the petitioner for re-measurement at appropriate stage.

6. Learned counsel for the respondent opposed the said contention by drawing attention of the Court to the impugned order wherein the learned Trial Court has held that unless and until the Court is satisfied with the fact that the Court Commissioner's work is not properly done, further inquiry cannot be made for the same subject matter. It is her further submission that at this stage of recording of the evidence Court cannot be called upon to record findings with regard to the acceptability of the evidence at a premature stage as the same can only be done at the time of final hearing.

7. There cannot be any dispute made with regard to the preposition sought to be canvassed by the learned counsel for the petitioner that as far as the maps are concerned, in view of Section 83 of Evidence Act its accuracy is relevant. For the said purpose the Court Commissioner is appointed and the report of the Court Commissioner is on record before the Trial Court. PW 5 and 6 are examined in support of the said report. However, at this stage it is not open for Trial Court to consider the evidence led by these witnesses and to assess the same qua case sought to be made out by rival parties. The aspect in so far as the

acceptability of their evidence as well as the report would always be subject matter to be decided by the Court at the final hearing. Even the Karnataka High Court in judgment cited supra holds so.

8. Moreover, calling upon the learned Trial Court to record findings at the stage of recording evidence would be *dehors* to procedure of trial contemplated by Code of Civil Procedure. Apart this issuance of such direction would set a wrong precedent whereby practically in all cases the Courts would be required to record its finding on relevancy/ admissibility of evidence the movement it is recorded before it. Such procedure is neither permissible in law nor is advisable too. In these circumstances, this Court finds that the observations made by the learned Trial court while passing impugned order that Court is yet to come to the conclusion of the correctness of the Court Commissioner's report and till then no further inquiry can be made in the same subject matter, are justified.

9. This court is also unable to concede to the submissions of the learned counsel for the petitioner that appropriate direction may be issued to the trial court to consider the said objection if the court finally holds that the court commissioners report is not proper and cannot be relied upon. Issuance of such direction would amount to causing

interference in the judicial discretion of the Trial Court. This Court, therefore, refrains itself from issuing such direction.

10. At this stage, learned counsel for both sides pray for direction to the learned Trial Court for expeditious disposal of the suit. In view of this, Trial Court is directed to decide the R.C.S. No. 259/2010 expeditiously.

11. As a result of above discussion, Court finds no merit in the petition. Hence, it stands dismissed

(R. M. JOSHI, J.)

ssp