



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7688 OF 2016

. Ramdas s/o. Santoba Bodke,
Age: 58 years, Occu.: Agri.,
R/o.: Dhankar Galli, Loha,
Taluka – Loha,
Distirct – Nanded

.. Petitioner

Versus

1. Sow. Sandhya w/o Mukhteshwar Dhondge,
Age: 38 years, Occcu.: Household,
2. Purshottam s/o Keshavrao Dhondge,
Age: 34 years, Occu.: Service,
3. Sow. Manisha w/o Purshottam Dhondge,
Age: 28 years, Occu.: Household,

All R/o.: Bahadarpura, Kandhar,
Taluka: Kandhar, District: Nanded

4. Bhanudas s/o Santoba Bodke,
Age: 53 years, Occu.: Service,
R/o.: Dhankar Galli, Loha,
Taluka: Loha, District: Nanded

.. Respondents

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Advocate for the Petitioner : Mr. Shailendra S. Gangakhedkar
Advocate for Respondents No.1 to 3 : Mr. Rajendrraa Deshmukkh,
Senior Advocate a/w. Mr. S. V. Deshmukh i/b. Mr. D. R. Deshmukh

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CORAM : ARUN R. PEDNEKER, J.

Reserved On : 18.04.2024

Pronounced On : 08.05.2024

JUDGMENT:

1. Heard.
2. By the present petition, the petitioner is challenging the orders passed on exhibits 7 and 43, dated 02.05.2013 and 10.09.2015, passed in Regular Civil Suit No.81 of 2010, filed for declaration of ownership and perpetual injunction respectively, whereby the application filed by the plaintiffs seeking appointment of the court commissioner for the measurement of the suit property admeasuring 2 Hecter was allowed and the court commissioner was directed to measure the suit land. The petitioner is the defendant in R.C.S. No.81 of 2010.
3. Brief facts leading to the filing of the petition can be summarised as under. The plaintiffs have filed a suit for declaration and ownership and possession with perpetual injunction restraining the defendant from causing any obstruction over survey no.90/4 and 90/8 admeasuring 1 Hecter each. The defendants also filed counter claim Exhibit 16 against the plaintiffs claiming injunction from obstruction in survey no. 90 as well as alienating the suit property of original suit. The application for temporary injunction filed by the defendants / counters claimants is partly allowed and the plaintiffs are restrained from alienating any suit property 90/4 and 90/8 admeasuring 1 Hecter each. Another suit is also filed by the defendants against the

plaintiffs challenging the sale deed in favour of the plaintiff towards sale of 2 Hectar of lands bearing special civil suit no.26 of 2012.

4. The application is moved by the plaintiff at Exhibit 7 for appointment of the court commissioner which was allowed by order dated 02.05.2013. The petitioner filed an appeal against the said order before the District Court bearing RJE No.17 of 2013, however, it was dismissed for default. Thereafter, the plaintiff again moved an application on 02.07.2015 at Exhibit 43 for issuance of writ to the TILR for measurement of the suit property in view of the order below Exhibit 7. Considering the dismissal of the proceedings in RJE No.17 of 2013 filed by the present petitioner, the said application at Exhibit 43 is allowed by order dated 10.09.2015. The application Exhibit 43 was not opposed by the defendant / petitioner and on account of his ill health he could not file say to the Exhibit 43 and the fresh writ was issued to the court commissioner for measurement of the suit property directing submission of report before 30.10.2015. In the order at Exhibit 43 it is observed that despite of repeated opportunities granted to the defendant he has not filed his say and it is also observed that since there was an order of the District Court which was shown to the court commissioner the commissioner could not carry out the measurement in pursuance of the order at Exhibit 7, as such, therefore fresh writ to the commissioner was

issued after dismissal of the RJE No.17 of 2013, by order dated 10.09.2015. It appears from the record that the writ is also carried out and the map is prepared and the report is also submitted to the court by the court commissioner. Thus, the orders on Exhibits 7 and 43 are challenged in the present writ petition.

5. It is the contention of the petitioner that the TILR appointed to measure the suit property amounts to collection of evidence for the plaintiffs. It is the contention of the defendant that where relief claimed is of removal of encroachment and no relief of demarcation of boundaries and recovery of possession is prayed the court commissioner cannot be appointed. It is further the case of the petitioner that the appointment of the court commissioner in the present case would mean that it is for collecting evidence, as there is no dispute of boundaries as regards encroachment. It is further contended by the petitioner that the suit in question did not contain any boundary dispute, encroachment or relief of fixation of boundaries, wherein appointment of the court commissioner would have facilitated the issue in controversy. However, the same is not in the instant case, as such, the court commissioner ought not to have been appointed.

6. It can be seen from the pleadings that the plaintiffs have filed the suit against the defendants for declaration of ownership and

possession for survey no.90/4 and 90/8, both admeasuring 1H each, situated at village Loha. The defendants have filed counter claim and sought temporary injunction and the defendants claimed that they become owner and possessor of survey no.90 total admeasuring 15 Acres by way of registered sale deed and revenue entries are also taken in that respect. Defendant no.2 has converted the land for non-agricultural purpose by order dated 05.03.1997. They never sold any land to Baliram Gaute. The defendant contend that the plaintiffs have prepared false sale deed no.1518/2000 and 1519/2000 dated 25.05.2000 in respect of land survey no.90/3 admeasuring 1H each in favour of Baliram Gaute. Baliram Gaute has executed further sale deeds in favour of the plaintiffs in respect of the above lands. Baliram Gaute was never owner and possessor of the lands mentioned in the sale deeds, as such, the plaintiffs have no ownership over the said properties.

7. From the pleadings of the parties, it is apparent that both the parties claim title over the suit properties and also claim possession over the properties. The application for appointment of the court commissioner filed by the plaintiffs is allowed on the ground that it would be just to measure survey no.90 admeasuring 2 Hecter in order to decide the real controversy between the parties. Thus, the trial court was of the view that

by appointing the court commissioner the suit properties are required to be measured. The exercise is already carried out by the court commissioner and there is huge delay in challenging the same in this court i.e. challenging the order passed in original application on Exhibit 7. The TILR has also carried out its investigation and accordingly filed its report and the same is on record.

8. As regards the appointment of the court commissioner under Order 26 Rule 9 of the CPC, it is a settled law that the court commissioner cannot be appointed for collection of the evidence at the instance of the parties. The trial court can appoint the court commissioner for elucidating the issue at hand.

9. In the instant case, the commissioner is appointed and the report is already on record. There is huge delay in challenging order on Exhibit 7, so also, the order at Exhibit 43 was not contested by the petitioner. Thus, I deem it fit to direct the trial court to consider the evidence of the parties and only if it is found necessary on the application of either of the party or suo-motu may consider the report of the court commissioner by permitting the parties to cross-examine the court commissioner, if necessary. All contentions as regards necessity of evidence of court commissioner are left open.

10. With the above observations, the writ petition stands disposed of.

[ARUN R. PEDNEKER, J.]

11. At this juncture, the learned counsel for the petitioner seeks stay to the present order for four (04) weeks. However, the petitioner himself has challenged the impugned order at Exhibit 7 after a huge delay, so also, I do not see how prejudice would be caused to the petitioner if the order is not stayed for four (04) weeks as prayed. Hence, the prayer for continuation of the interim relief is rejected.

[ARUN R. PEDNEKER, J.]

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