



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

14 WRIT PETITION NO. 12307 OF 2024

SULTANA SAYYED MUNIR
VERSUS
DHANAJI LAHANU GAIKWAD AND OTHERS

Mr. N. C. Garud, Advocate for the petitioner

CORAM : R. M. JOSHI, J.

DATE : 18th NOVEMBER, 2024

PER COURT :-

1. Learned counsel for the petitioner was heard extensively on the last of hearing. On the request of learned counsel for the petitioner, time was granted to cite binding precedent on record.
2. Learned counsel for the petitioner has placed reliance on the judgment of this Court in case of *Jamir Khan s/o Amir Khan vs. Dharamchand s/o Roopchand Sawala, 2018(1) Mh.L.J., 174*. There is contention that in view of the said judgment there is no embargo in measurement of the properties at multiple time. He drew attention of the Court to Order 26 Rule 9 of the Code of Civil Procedure to contend that the government surveyor/ measurer only could be appointment as Court Commissioner.
3. There cannot be any dispute with regard to the proposition

laid down by this Court in case of *Jamir Khan* (supra). It is settled law that merely because the measurement is not done in accordance with law, the suit cannot be disposed of on that ground. This Court in paragraph 18 of the said judgment has held that where the Trial Court record positive finding that the measurement carried out by TILR, appointed by the respondent-plaintiff was not according to the procedure, required by the Rules and then refused to believe the same, the re-measurement of the suit property becomes necessary. As far as present case is concerned, admittedly, no such findings are recorded by the Trial Court with regard to the measurement already carried out.

4. In so far as the contention of the learned counsel for the petitioner that measurements carried out by the government measurer of the land can only be accepted to prove enchantment etc. is not supported by the provisions of law. Order 26 Rule 9 of CPC contemplates order of commission for local investigation passed by the Court. Proviso to Rule 9 only states that in case such commission is appointed, it shall be in compliance with the rules framed by the State Government in this regard meaning thereby wherever there is Court Commissioner is appointed for measurement of the land, the same has to be done through TILR or the Authorities concerned only. This would not be construed that parties cannot get the survey done from private

individual/ expert and therefore the said provision would not come to aid of the present petitioner in any manner to support his contention.

5. In this case the suit land has already been measured and the said measurement is relied upon by the plaintiff. There is yet to be a finding recorded by the Trial Court with regard to the correctness of the said measurement. As such at this stage, there cannot be remeasurement of suit land at whims of parties. If such applications are allowed on say of party that measurement is not correct, then no proceeding/ suit can be concluded ever. Thus unless Court records findings that measurement already done is not proper, question of permitting fresh measurement does not arise.

6. In view of above discussion, there is no substance in the petition. Hence, petition stands dismissed.

(R. M. JOSHI, J.)

ssp