



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Writ Petition (WP) No. 578 of 2024

Bhagwant Ganplat Hend and others

Versus

Ganpat Namdeo Thorat and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri A.S.Manohar, Advocate for the petitioners.

Shri A.J.Thakkar, Advocate for the respondent nos. 1
and 2.

CORAM : ANIL S. KILOR, J.

DATED : 29th JANUARY, 2024.

Heard.

2. The order dated 27th November, 2023 for appointment of the Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure passed by the 2nd Joint Civil Judge, Junior Division, Akot in Regular Civil Suit No. 45 of 2023 at the instance of plaintiff, is under challenge by way of this writ petition petition filed by the defendant.

3. Shri Manohar, learned counsel for the petitioners argues that earlier the land surveyor has already measured the land and filed the map on record. Thereafter, he was entered into witness box as a witness of the plaintiff and he was cross-examined by the defendants. Therefore, there is no occasion for the Court to re-direct the measurement through the Deputy Superintendent of Land Record. In support of his submission, he has placed reliance on the judgments of the Co-ordinate Bench of this Court in a case of *Sau. Vijaya Narendra Kene @ Vijaya Gangadhar Bhope (Dead through legal representatives Vs. Smt. Kamalabai Gangadhar Bhope (Dead through legal representatives))*¹ and *Ramarai Rammilan Rai Vs. State of Maharashtra and others*²

4. On the other hand Shri Thakkar, learned counsel for the respondents opposed the present writ petition on the ground that the defendants have not agreed with the earlier measurement and disputed the same.

5. Shri Thakkar, learned counsel for the respondents has drawn attention of this Court to the cross-examination of the surveyor and submits that it is in the interest of both the parties in the given facts and

1 2011(3) ALL MR 363

2 2012(2) Mh.L.J 849

circumstances to get the land measured by carrying out fresh measurement. In support of his submission, he has placed reliance on the Co-ordinate Bench of this Court in the case of *Kashinath S/o Ramkrishna Chopade Vs. Purushottam Tulshiram Tekade and another*³ and *Girish Vasantrao Bhoyar and another Vs. Nimbaji Warluji Bamba*⁴

6. In light of rival contentions of the parties, I have perused the record and the impugned order.

7. There is no doubt earlier the land was measured through the surveyor and he was entered into witness box as a witness of the plaintiff and he was cross-examined in detailed by the defendants.

8. From the cross-examination, it is evident that the defendants have challenged the validity of the said measurement by giving numerous suggestions.

9. In the application Exhibit 178 moved by the plaintiffs under Order XXVI Rule 9 of the Code of Civil Procedure, for the appointment of the Court Commissioner, it has categorically pleaded that since the defendants have not agreed with the earlier map re-measurement is necessary.

3 2005(4) Mh.L.J 471

4 2009(4) Mh.L.J 371

10. The learned trial Court allowed the said application and thereby Deputy Superintendent of Land Record is appointed as Court Commissioner.

11. The Coordinate Bench of this Court in a case of *Kashinath S/o Ramkrishna Chopade Vs. Purushottam Tulshiram Tekade and others* (supra) has observed thus:

10. I may usefully refer the decision of this Court in the case of *Krishnarao v. Mahadeorao*, 1953 N.L.J. Note 230 at page 72 wherein it has been observed as under:

"3. The trial Court rejected the application stating that the question of encroachment by the defendant on a particular date is to be proved by positive evidence by the plaintiff and, therefore, it did not think it desirable to appoint a Commissioner. It is against this order that the plaintiff has come up in revision.

4. Order 26, Rule 9 of the Civil Procedure Code is as follows :

"In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

5. Under the above rule, the Court has a discretion to order local investigation or not. The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot. Cases of boundary disputes and

disputes about the identity of lands are instances when a Court should order a local investigation under this rule. *Po Gyi v. Maung Paw and Anr.*, 12 I.C. 347."

6. In order to determine whether there has been an encroachment. It is always desirable to get the fields measured by an expert and find out the exact area encroached upon. Oral evidence cannot conclusively prove such an issue. The order of the lower Court refusing to appoint a Commissioner amount to a refusal in exercise jurisdiction. It is set aside. The plaintiffs application under Order 26, Rule 9 of the Civil Procedure Code for appointment of Commissioner is allowed."

12. The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot. Cases of boundary disputes and disputes about the identity of lands are instances when a Court should order a local investigation under Order XXVI Rule 9 of the Code of Civil Procedure. Thus, in order to determine whether there is any encroachment and particularly in the backdrop of dispute raised by the defendants in the earlier measurement, it would be appropriate to both the lands measured to avoid further multiplicity of proceeding.

13. Thus, considering the purpose of Order XXVI Rule 9 of the Code of Civil Procedure and the facts of the present case, I am of the view that no error

has been committed by the learned trial Court in allowing application Exhibit 178.

14. The judgments cited by the learned counsel for the petitioner are distinguishable on facts and therefore it is of no help and assistance to the petitioner. In the circumstances, the writ petition is dismissed.

[ANIL S. KILOR, J.]