



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

917 WRIT PETITION NO. 1828 OF 2016

RAOSAHEB KISAN VIDHATE

VERSUS

MITTU VASU ALTE

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Advocate for the Petitioner : Mr. A. B. Tele

None present for respondent

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CORAM : MANJUSHA DESHPANDE, J.

Dated : February 26, 2025

PER COURT :-

1. Petitioner is challenging the order dated 29.12.2015 passed below Exh. 52 in Regular Civil Suit No. 26 of 2011 by Civil Judge Junior Division, Kallam (Trial Court) on the application seeking appointment of Court Commissioner to measure the land in Gat No. 189 to the extent of 2H - 17R of village Watwada, Tq. Kallam, Dist. Osmanabad.

2. It is the contention of petitioner that he is the original plaintiff and has filed Regular Civil Suit No. 26 of 2011 for declaration of ownership and injunction against the respondent. It the contention of the petitioner that by way of registered sale-deed dated 19.03.2009, he has purchased the suit land from Gat No. 189 ad-measuring 2A - 17G out of 11H – 65R.

3. It is further contended by the petitioner there is an averment made an application in the suit below Exh. 52 contending that he has filed an application to the Tahsildar, Kallam, under Section 136 of the Maharashtra Land Revenue Code for measurement of the land. Accordingly, the Circle Inspector had conducted the panchanama and submitted it to the Tahsildar. The Tahsildar has passed an order directing the Office of Land Record to conduct the measurement of the suit land.

4. Learned Advocate for the petitioner relies on the application on which Tahsildar has directed to conduct the measurement of the land to the extent of 2H-17R. It is his contention that it was directed to conduct the measurement to the extent of 2H-17R. The Surveyor has measured the land only to the extent of 1H - 49R. In measurement map prepared by Office of Land Record annexed with the petition at Exh. C, it is stated by the Surveyor that he has measured the land to the extent of 1H-49R which was found in the possession of the present petitioner. The measurement was not carried out in accordance with the application given by the petitioner and the directions given by Tahsildar.

5. When the petitioner had filed the suit for declaration and

injunction, respondent has appeared in the suit and filed his written statement, he has denied all the contentions of the petitioner and alleged that present petitioner has purchased land only to the extent of 1H – 17R.

6. On the basis of the pleadings of the parties, the Trial Court has framed the issues. Issues No. 1 to 3 involve the subject of ownership and possession over the suit land. Though the registered sale-deed has been executed to the extent of 2H -17R, the defendant is denying possession of the present petitioner. Therefore, in order to enable the Trial Court to decide the issue, petitioner had filed an application for appointment of Court Commissioner for measurement of the land in accordance with the sale-deed which was executed in his favour. The application filed by the petitioner was rejected on 29.12.2015.

7. However, after recording the evidence of the Surveyor which is at Exh. 46, it has become necessary to carry out the measurement by appointing the Court Commissioner. In the deposition of the Surveyor, he has admitted that though the Tahsildar had directed to carry out measurement of 2H – 17R from Gat No. 189 however, he has carried out measurement of 1H – 49R land only and he has not conducted the measurement of 2H – 17R land. He has also

admitted that when he had conducted the measurement of 1H-49R land, he is not knowing as to who is in possession of the remaining 68R land. Therefore, he has not mentioned it in the map. He has not conducted the measurement of 2H – 17R land as per order passed below Exh. 48.

8. In cross-examination, it is stated by the Surveyor that during the measurement, it is found that the land of the plaintiff has been encroached upon. However, he is not able to state as to who has encroached upon the suit land and to what extent. He cannot state the exact encroached portion in the suit land. He has further stated that in order to ascertain the exact portion of encroachment on the land, measurement is required to be conducted, unless there is an order of the Court, he cannot carry out such measurement.

9. Learned Advocate for the petitioner submits that therefore, it is necessary to carry out the measurement of land by appointing Court Commissioner. Though he had filed an application for appointment of Court Commissioner which has been rejected by the Trial Court on the ground that even previously, he had filed an application for appointment of Court Commissioner. The earlier application was rejected observing that there was already a report of the Surveyor on record therefore, there is no necessity to again

conduct the measurement.

10. In spite of the fact that though the vakalat-nama was filed on record, on behalf of respondent on last two dates, nobody has caused appearance for the respondent. The reply affidavit has been filed on record by the respondent. In the reply affidavit, it is stated that the plaintiff should not be allowed to collect evidence by appointing a Court Commissioner. The plaintiff is trying to prolong the matter by making such application and there is no substance in the grounds raised by the petitioner in the present writ petition. Therefore, the impugned order does not need any interference.

11. I have heard learned Advocate for petitioner and also gone through the order impugned alongwith other documents which are annexed with the writ petition. It is not in dispute that pursuant to the application made by the petitioner who is original plaintiff, the Tahsildar had directed to conduct the measurement of the land to the extent of 2H – 17R, as per the area mentioned in the sale-deed which has been executed in favour of the petitioner. Though Tahsildar had directed to conduct the measurement of land to the extent of 2H – 17R, the Surveyor has conducted measurement of land only to the extent of possession, which is not in accordance with the order passed

by the Tahsildar.

12. Admittedly, there was an application filed by the present petitioner for appointment of Court Commissioner which is at Exh. 29 which has been rejected by the Trial Court vide order dated 25.06.2013 on the ground that, on the basis of application made by the plaintiff himself, there is a measurement report which is placed on record. Therefore, there is no necessity of undertaking the same exercise again.

13. As pointed out by the learned Advocate for the petitioner, after rejection of earlier application of the petitioner, the evidence has been lead by the plaintiff. In the deposition dated 16.10.2014 of the witness of plaintiff who is the Surveyor, he has admitted that he has not carried out measurement as per the order of Tahsildar and he has carried out measurement only to the extent of 1H – 49R land which is in possession of the present petitioner. The Surveyor has further admitted that while conducting the measurement, it is found that there is an encroachment on the land of plaintiff but he is unable to state as to who has encroached upon the said land and to what extent.

14. On above background, subsequent application has been

filed by the petitioner. As far as encroachment is concerned, it is undoubtedly clear that unless there is a measurement carried out by the Competent Authority, the encroachment cannot be proved or decided. The petitioner has filed present application after leading the evidence and admission given by the Surveyor.

15. Learned Advocate for the petitioner has relied upon the order dated 16.03.2021 passed by this Court in **Writ Petition No. 215 of 2019 (Mahadeo Kondiba Shinde Vs. Nitin Sakharam Shinde and Another)** wherein the issue of appointment of Court Commissioner for local inspection was subject matter of challenge before this Court. While deciding the issue, this Court has observed that to elucidate something means to make it clear and easy to understand. The word elucidate used in Order XXVI Rule 9 of C.P.C. has been interpreted and explained at length by this Court in the above referred writ petition. In view of the same, after the parties led the evidence, to make the issue involved easy to understand or to bring more clarity, discretion is conferred upon the Court in terms of the provisions of Order XXVI Rule 9 of C.P.C. Order XXVI Rule 9 of the C.P.C. reads thus :

“Order XXVI : Commissions.

9. Commissions to make local investigations – 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.

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

16. So far as present matter is concerned, in view of issues framed by the Trial Court, it would be necessary to decide the claim of ownership and possession of the plaintiff within the boundaries mentioned in the plaint on the basis of sale-deed. In view of the evidence, it is necessary to appoint the Court Commissioner. It is only a Court Commissioner who can throw light on the actual possession of the parties as well as the extent of encroachment made on the land as per the deposition of the Surveyor recorded in the evidence of the petitioner.

17. Though it is the discretion of the Court to assess whether the appointment of Court Commissioner is necessary, however, considering the issue involved in the present suit wherein the plaintiff is seeking declaration and possession of the suit land on the basis of the registered sale-deed, in order to establish the boundaries and asserting as to who is in possession on the basis of boundaries

mentioned in the sale-deed, it is necessary to appoint the Court Commissioner. More so, in view of the admissions given by the Surveyor that there is an encroachment on the land of which the declaration is prayed by the petitioner. It is also settled position of law that dispute relating to boundary and encroachment needs to be effectively decided on the basis of appointment of Court Commissioner as provided under Order XXVI Rule 9 of C.P.C. by making local investigation.

18. Though there is a report by the Surveyor on record, however, in view of the admissions given by the Surveyor himself that he has not carried the measurement in accordance with the order of Tahsildar, it is necessary to direct Court Commissioner to carry out the exact measurement of the land of the petitioner and also ascertain the encroachment, if any, made on the land, as has been admitted by the Surveyor in his cross-examination.

19. Therefore, in my opinion, the impugned order passed by the Trial Court needs to be interfered since, it has been passed without taking into consideration that the earlier measurement has been carried out prior to the leading the evidence by the plaintiff. After leading the evidence, the issue has been clarified by the witness

by giving admission that the measurement is not conducted properly.

Hence, the subsequent application should have been allowed.

20. The order dated 29.12.2015 passed below Exh. 52 in Regular Civil Suit No. 26 of 2011 by the Civil Judge Junior Division, Kallam, stand quashed and set aside.

21. It is further directed to appoint the Court Commissioner to measure the land in Gat No. 189 to the extent of 2H – 17R of village Watwada, Tq. Kallam, Dist. Osmanabad and submit the report to the Trial Court. The exercise of measurement of land by the Court Commissioner be concluded within a period of 8 weeks and the report be submitted to the Trial Court within a period of 4 weeks.

22. In view of the above directions, writ petition is allowed and disposed of accordingly.

(MANJUSHA DESHPANDE, J.)

Omkar Joshi