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wp3943.25

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.3943 OF 2025

M/s. Manikchand Babulal Rathor,
A Partnership Firm Through its Partner
Shri Jawaharlal S/o. Satyapal Rathor,
Age- 62 years, Occu- Business,
R/o. Opp. Vidyut Bhawan, Samarth Nagar,
Nanded, Dist. Nanded

...PETITIONER
[Ori. Defendant
/appellant]

VERSUS

1. Syed Arfuddin Syed Ziyauddin, **...RESPONDENTS**
Age- 64 years, Occu-Agril, [Resp No.1 is original
R/o. Dargah Sharif, Degloor, plaintiff contesting party]
Tq. Degloor, Dist. Nanded
and others

Mr. V. D. Hon, Senior Advocate i/b Mr. A. V. Hon, Advocate for
the petitioner
Mr. Rajendra Deshmukh, Senior Advocate i/b Mr. Avinash Hande
A/w Mr. Nimish More, Advocate for respondent No.1

CORAM : KISHORE C. SANT, J.

RESERVED ON : 24th APRIL, 2025

PRONOUNCED ON : 13th JUNE, 2025

P. C.

1. The petitioner-original defendant in the suit has filed
this petition challenging an order dated 27-02-2025 passed by
the learned Civil Judge Senior Division, Biloli below Exh. 236 in

Special Civil Suit No. 32-2007 rejecting the application of the petitioner for appointment of Court Commissioner.

2. Respondent No.1 is the plaintiff. Respondent No.3,4, 7, & 8 are the formal parties and no notices therefore need be issued, since the plaintiff is only contesting party. By consent of the parties, this matter is taken up for final disposal at the stage of admission.

3. Facts in short are that the plaintiff had filed a Special Civil Suit No. 32 of 2007 and the same came to be decreed. An appeal was preferred by the petitioner. In the appeal the petitioner filed an application for amendment of written statement. The said amendment was rejected. The petitioner, therefore, filed writ petition No.6499/2016. This court, in writ petition allowed the application for amendment subject to cost of Rs. 50,000/- to be paid to respondent No.1 therein. After amendment in appeal No.36/2013, the learned District Judge remanded the matter back for fresh decision by framing issue

‘1/A as whether the plaintiff has described the suit property correctly?’ The burden about the correctness of the property is thus placed on the plaintiff- respondent No.1.

4. After remand, the petitioner filed an application for appointment of Court Commissioner below Exh.153. Said application came to be rejected by the learned trial court. The petitioner again approached this court by filing writ petition No. 12337/2024. This court by order dated 18-11-2024, disposed off the writ petition holding that trial court was justified in rejecting the application. However, liberty was granted to move the application at appropriate stage that is after evidence is over.

5. In view of above, the petitioner again filed an application after his evidence was over for appointment of Court Commissioner. The learned trial judge by way of impugned order rejected the application below Exh. 236 by order dated 27-02-2025. It is this order which is under challenge.

6. The learned Senior Advocate Mr. Hon vehemently submits that respondent filed a suit against the petitioner praying for a decree of possession of the land adm. 15 Gunthas of old Survey No.60/2 now Gut No. 297 situated at village Degloor, Nanded. The Description was given in the plaint. Claim of the possession is thus of 15 Gunthas. Further relief is also prayed for payment of damages. In view of newly framed issue, it is necessary to ascertain the property by appointing Court Commissioner. The learned trial court has erred in rejecting this application. The property is stated to be adm. 15 Gunthas, whereas in 7/12 extract the property shows land only of 9 Gunthas in land survey No. 60/2. In this view, it is clear that the property in the plaint is not correctly described and it is therefore, necessary to appoint Court Commissioner. He, thus, submits that the petition deserves to be allowed by allowing the application filed by the present petitioner.

7. The learned Senior Advocate Mr. Deshmukh for the respondent No.1 submits that the learned trial court has rightly

passed an order. There is no dispute about description of the property. In the written statement, the petitioner has clearly admitted the description. No dispute is raised in the suit. The suit was therefore, rightly decreed. In the Regular Civil Appeal for the first time, the petitioner sought amendment in his written statement which is allowed in the writ petition. The defense is only about the possession and not about the measurement or identification of the property. The petitioner has accepted lease deed and that on the basis of that lease deed the petitioner was put in possession. In the cross-examination the petitioner has accepted at two places in para Nos. 6,8 that in the written statement and counter claim, the petitioner has admitted the boundaries and the measurement of the land. In such circumstances, now it is not open to dispute area of the property. He further submits that on the suit property, there is a Petrol Pump and this fact is also accepted and is also recorded in 7/12 in the name of the petitioner. In any case, burden is placed upon the defendant to prove that the property is properly described in the suit. Burden is thus on respondent No.1. Earlier

conduct of the petitioner in filing the amendment application in the appeal for the first time shows that the petitioner is interested only in prolonging the proceeding. He, thus, prays for rejection of the writ petition.

8. In the application the petitioner has given reason that in the plaint identity of the land is not pleaded and proved by respondent No.1. Four boundaries mentioned in the plaint are from the Survey No. 60/2 i.e. Gut No. 297 by giving reference of various documents, it is stated in the application, that identity of the property cannot be ascertained and therefore, appointment of Court Commissioner to make local inspection is necessary. The respondent has filed said application. It is therefore for the respondents to prove that the description is correct. Evidence is already given by the plaintiff and in view of that no appointment of the Court Commissioner is necessary.

9. The learned trial court recorded that the petitioner himself has admitted the contents regarding lease hold property.

He has also already claimed adverse possession over the property. In such circumstances, the application would only amount to prolonging the proceeding of the suit. The description of the suit property is already brought on record to make it identifiable. It is already admitted that the suit property is taken on lease by the petitioner. The court, thus rejected the application.

10. Though the matter is strenuously argued, this court finds that when the record is very much clear and order is well reasoned, no observations of the trial court is shown to be perverse or illegal. This court finds that in such circumstances, no case is made out calling for interference in the impugned order. The writ petition, therefore, stands dismissed. No order as to costs.

[KISHORE C. SANT, J.]