



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

926 WRIT PETITION NO. 6193 OF 2022

KUSUM VITTHAL GUND AND ANOTHER
VERSUS
DIGAMBAR VAMAN SHINDE THROUGH HIS LRS MALATI DIGAMBAR
SHINDE AND OTHERS

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Mr. P. S. Dighe h/f Mr. V. R. Dhorde, Advocate for the petitioners
Mr. Sanket Kulkarni a/w Mr. D. B. Rode, Advocate for respondent no.7

CORAM : R. M. JOSHI, J.

DATE : 28th JANUARY, 2025

PER COURT :-

1. The petitioners are the original defendants in R.C.S. No. 29/2004 and being aggrieved by order passed below Exhibit 1 by the Trial Court suo moto appointing Court Commissioner to measure Gut No.52 as well as Gut No. 52/1 through the TILR for the purpose of fixing the boundaries of the land belonging to plaintiffs and defendants.

2. There is no dispute about the fact that the suit is filed by the respondents/plaintiffs for declaration as well as removal of encroachment against the defendants. There is specific pleading with regard to the area which was allotted by the Government to the concerned parties of the land which was earlier forest land. The suit is filed on the basis of the measurement which was carried out before filing of the suit. The defendants filed written statement and denied the contentions of the

plaintiffs.

3. Admittedly the evidence of both sides is over and after hearing the arguments the matter was reserved for judgment. At this stage impugned order came to be passed by the Trial Court.

4. Learned counsel for the petitioners/original defendants submits that it was the burden on the plaintiffs to prove the case and on the basis of the admissions given by the plaintiffs in the cross-examination so also the admissions of the surveyor, it was necessary for the plaintiffs to file an application for appointment of Court Commissioner to measure the property. It is his submission that the Trial Court has committed error in suo moto exercising the powers under Order 26 Rule 9 of the Code of Civil Procedure (for short 'CPC') and thereby has appointed the measurer for the said purpose. To support his submission he placed reliance on the judgment of this Court in case of *Chandrarao s/o Hanumantrao Wable Vs. Dhondu s/o Fula Patil, 2012(2) Mh.L.J., 847.*

5. Learned counsel for the respondents/plaintiffs supported the impugned order.

6. There cannot be dispute with regard to the proposition of law that the issue of the dispute of the boundaries and encroachment cannot

be decided on the basis of oral evidence of the parties and the evidence with regard to the measurements of the respective land is imperative. With regard to the exercise of the powers under Order 26 Rule 9 of CPC the same can not be permitted to be exercised for the purpose of collecting evidence. However, for the elucidating any matter it can be exercise. Meaning thereby the party is required to prove his case first by leading his evidence and in case the Court Commissioner is required to be appointed for explanation thereof, if it is permissible to appoint so. Similarly, there cannot be more than one measurement of land in a suit, unless Court holds that measurement carried is not as per rules and it is only thereafter fresh appointment of Court Commissioner can be done.

7. In the instant case the suit is filed on the basis of the measurement carried out by the TILR. Thus until the Trial Court comes to the conclusion that the said measurement is incorrect, it was not open for the plaintiffs to make an application to that effect. As rightly done by the Trial Court, when the matter was for the final judgment and after considering the the evidence on record as well as the submissions of the parties when the Court came to the conclusion that the earlier measurement is not in accordance with the rules, the Court was left with no other option but to direct fresh measurement of the land in question. Needless to say that if the Trial Court could not have passed order of

fresh measurement on the say of plaintiffs, without holding first measurement to be not legal. Thus, no fault can be found with the order passed by the Trial Court to exercise in the said powers at this stage.

8. As far as the judgment in case of *Chandrarao s/o Hanumantrao Wable* (cited supra) is concerned, perusal of the same indicates that the order impugned was not passed after holding that previous measurement is incorrect/illegal. Thus, the facts in both cases materially differ to make the said judgment not applicable to the present case.

9. Having regard to the afore stated facts and the stage at which the order impugned is passed after holding previous measurement being not as per rules and in view of the issue of encroachment of land involved between the parties, order does not suffer infirmity. On the contrary considering nature of issue involved in the suit, such order is absolutely essential. Since, there is no perversity in the order impugned, petition stands dismissed.

(R. M. JOSHI, J.)

ssp