



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

Writ Petition No.7346/22
Madhukar and others V Dinkar and another

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. M.P. Khajanchi, Adv for petitioners.
Mr. N.R. Bhishikar, Adv for resp. no.1.

CORAM : R.M. Joshi, J.
DATE : 25-06-2025.

This petition takes exception to the order passed by the trial Court below Exhibit-580 dated 09-11-2022 Spl.C.S. No.97/1985, rejecting the application filed by the plaintiffs for appointment of Court Commissioner i.e. Deputy Director of Inspector Learned Records to measure the suit property, under Order 26 Rule 9 of the Code of Civil Procedure.

2. The facts in this case which has led to the filing of this petition are not in dispute. The petitioners/plaintiffs filed suit for possession and injunction against the defendants in respect of the suit property. suit came to be filed in the year 1984. after completion of pleadings issues were framed and application was filed and during the evidence application came to be filed by the plaintiff vide Exhibits-200 and 241 for appointment of Court Commissioner to measure the suit property. These applications

came to be rejected by the trial Court. The orders passed therein are not challenged and have attained finality. It is the case of the plaintiffs that amendment came to be carried out to the plaint and pursuant thereto in view of the change in circumstances, application exhibit- 580 was filed before the trial Court for the relief of appointment of Court Commissioner under Order 26 Rule 9 of the CPC. This application was opposed by the defendant, which came to be rejected by the impugned order. Hence, this petition.

3. Learned Counsel for the petitioners submits that the application exhibit-200 was rejected merely on technicalities without touching to the merits of the contention of the plaintiffs. It is his submission that though application exhibit-241 is rejected by the trial Court, present application i.e. exhibit-580 came to be filed in view of change in circumstances. It is his contention that the trial Court ought not to have rejected the application only on the ground that previously these applications were rejected. In order to substantiate the case that there exist a dispute with regard to the boundary of the measurements of the suit property, he

drew attention of the Court the written statement filed by the defendants.

4. Learned Counsel for the defendants supported the impugned order. It is his contention that the order passed below exhibit-241 can be said to have been passed on merits and since it is not challenged by the plaintiffs, the said order has become final and that now it is not open for the trial court to entertain any other application for the similar relief. It is his submission that it is not a case of encroachment nor of a boundary dispute. It is also argued that the plaintiff had got the suit property measured through the surveyor and the said surveyor has been examined before the trial Court and the map prepared by the surveyor is also sought to be proved. It is his contention that merely because the cross examination of the surveyor indicates that he has given admissions against the case of the plaintiffs, there would not accrue any right in favour of the plaintiffs to file fresh application for appointment of Court Commissioner.

5. *Prima facie*, perusal of the pleadings indicates that defendants have specifically raised objection and denied the measurement of the suit property and its boundaries. Thus, the

issue of the measurement of the property and the correctness thereof is certainly involved in this case. It is open for the parties to prove the map prepared in respect of the suit property and such map in view of Section 83 of the Indian Evidence Act deserves to be proved accurately. The plaintiffs have already got the said measurement done from the surveyor and also led evidence to prove the map prepared by him.

6. Even if it is accepted that in the instant case the measurement of the suit property would be relevant for the determination of the case, the plaintiffs have already got the suit property measured from the surveyor and sought to prove the said measurement and map by examining the said surveyor before the trial Court.

7. At this stage it would be relevant to take note of provision of Order 26 Rule 9 of CPC which permits the Court to appoint Court Commissioner in order to elucidate any matter in dispute. For elucidating the matter in dispute, there has to be dispute made in regard to the fact in question. The elucidation means clarification and not the proof by itself. In the backdrop of this provision, the plaintiffs have already examined surveyor to

prove the map prepared by him. The trial Court is yet to decide the accuracy of the map prepared by the surveyor under Section 83 of the Indian Evidence Act.

Thus, unless it is held that the said map is not accurate and cannot be relied upon for proving the measurement of the suit property, question of permitting the parties to seek appointment of Court Commissioner to remeasure the suit property. If such course of action is permitted to be adopted then there would not be any end to the litigation as every party if feels that the measurement is not done to his satisfaction, application would be filed one after another for appointment of Court Commissioners. Needless to say that it should be for trial Court to access the evidence at appropriate stage to accept or not proof a fact, on available evidence on record. Learned Counsel for the petitioner/plaintiffs submits that the trial Court be directed to decide the issue of acceptability of the evidence of the surveyor. Considering the stage of the suit which is for recording of the evidence, to call upon the trial Court to decide the correctness of the evidence by assessing the same to now is de hors to the procedure of trial as contemplated by Code of Civil Procedure.

Similarly, issuance of such directions to the trial Court would also set a wrong precedent whereby the practically in all cases the Courts would be required to record it's findings on correctness of the evidence, at the moment it is recorded before it. Such procedure is neither permissible in law nor is advisable. Suffice it to say that till the Court decides the correctness or otherwise of the previous measurement, it would not be open for the party to seek appointment of another Court Commissioner for the measurement of the suit property.

8. Having regard to the above discussion, this Court finds no reason to cause interference in the impugned order.

9. Petition stands dismissed.

(R.M. Joshi, J.)