

(2010) 11 BOM CK 0078
In the Bombay High Court
Case No : Writ Petition No. 2921 of 2010

Shaikh Isak

APPELLANT

Vs

The State of Maharashtra and Raosaheb Rathod

RESPONDENT

Date of Decision : 15-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9

Citation : (2011) 1 KLT 420

Hon'ble Judges : A.A. Sayed, J

Bench : Single Bench

Advocate : M.A. Kulkarni, for the Appellant; V.G. Shelke, A.G.P. for State and M.K. Deshpande, for the Respondent

Judgement

A.A. Sayed, J.—Rule. Rule made returnable forthwith and heard finally by consent.

2. The Petitioner takes exception to the order dated 06.03.2010 passed by the Civil Judge, J.D., Parli Vaijnath. By that order, the application filed by the Respondent/original Plaintiff to measure the land bearing Gat No. 83 including the disputed area of 37 R, by appointing a Cadestral Surveyor or T.I.L.R. as a Court Commissioner, came to be allowed.

3. The suit being R.C.S. No. 180 of 2007 is filed by the Respondent No. 2/original Plaintiff against the Petitioner/original Defendant for recovery of an area of 37 R from the land Gat No. 83. The learned Counsel for the Petitioner/original Defendant submitted that the trial of the suit is virtually complete and written arguments are filed and the matter is reserved for judgment by the learned Judge and it is thereafter at this belated stage, the application for appointment of Court Commissioner to measure the disputed land, has been filed by the Respondent No. 2. Alluding to para 3 of the plaint, learned Counsel for the Petitioner submitted that the Respondent No. 2 has himself described the suit land with measurements in the plaint and has also examined one Cadestral Surveyor working under T.I.L.R. in evidence. The learned Counsel has placed

reliance upon case of Sanjay S/o. Namdeo Khandare v. Sahebrao S/o. Kachru Khandare 2001 (1) BCR 800, wherein a learned Single Judge of this Court, has held that the appointment of Court Commissioner to submit report regarding actual possession of suit field would tantamount to collecting evidence, which is not permissible.

4. Learned Counsel for Respondent No. 2 on the other hand submitted that the order of the Court Commissioner has been passed under Order 26 Rule 9 of the Code of Civil Procedure, whereunder it is discretion of the Court to order local investigation for the purpose of elucidating any matter in dispute and such investigation is always permissible. The learned Counsel for Respondent No. 2 has relied upon the following three judgments viz. (1) Kisanlal Maniklal Rathi Vs. Dinkar Yashwant Patil, , and Girish Vasantrao Bhoyar and Anr. v. Nimbaji Warluji Bambal 2009 (4) ALL MR 761, wherein the learned Single Judges of this Court held that the appointment of Court Commissioner in cases of boundary disputes and dispute about identity of land, was permissible.

5. Since the controversy centres around Rule 9 of Order XXVI, it would be appropriate to extract the said provision. It reads thus:

9. Commissioner 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 marketvalue 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.

6. Having heard learned Counsel for the parties and on perusal of the material on record and the aforementioned provision, in my view the matter warrants interference. The stage at which the application is filed by Respondent No. 2, would assume significance. It is an admitted position that evidence is already recorded in the suit and written arguments have also been filed by the parties. In these circumstances, the possibility of filing such an application to fill up certain lacunae, which are left out in the evidence, cannot be ruled out. Possibly, a cue may have been taken from the written arguments that has been filed by the Petitioner in the suit and realizing that he may be on a sticky wicket, is what may have prompted the Respondent No. 2 to file the aforesaid application. Allowing such an application at this stage, may result in prejudice being caused to a party inasmuch as there would be no opportunity for the affected party to dispute the Court Commissioner's report and to cross examine him. No doubt, it would be open to such affected party to apply to the Court to cross examine the Court Commissioner on his report, but that would be reopening the evidence which is already closed. Unless an exceptional case is made out, such a eventuality needs to be eschewed.

7. It is significant to note that in the present case, there is not a whisper in the application as to why such application was not made at an earlier stage of the suit. In the facts and circumstances of present case, this ground was sufficient in itself to reject the application. Insofar as the decisions cited by the learned Counsel for the Respondent are concerned, it is noticed that in all the aforesaid decisions, the stage of the suit at which the application was allowed, was not a stage as is in the present case and the said decisions would therefore not be of any assistance to the Respondent No. 2.

8. For the reasons stated above, I find that the learned Trial Judge fell in error in allowing application at such a belated stage when the evidence was closed, written arguments were filed and the judgment is reserved. The petition deserves to be allowed and is accordingly allowed. The impugned order is quashed & set aside and rule is made absolute in terms of prayer Clause (C). In the facts and circumstances of the case, there shall be no order as to costs.

9. It may however be clarified that this order will not preclude the Appeal Court, in the event such Appeal is filed against the final decision in the suit, in passing such orders as it may think necessary and appropriate in respect of the controversy involved in this petition.