

ORDER BELOW EXH. 79 IN R.C.S. NO. 05/2010

(CNR No. MHAK070001502010)

(Passed on 22/11/2019)

- 1) Plaintiffs have filed this application for re-measurement by Dy. S. L. R., Balapur. Defendants opposed by filing say below Exh. 80.
- 2) Perused application and say. Heard both parties.
- 3) It is contended by plaintiffs that initially they filed application for measurement through T.I.L.R., Balapur by filing application Exh.53. It was allowed and T.I.L.R, Balapur carried out measurement and submitted report. However, after the evidence of T.I.L.R, Balapur, it came on record that he has mistaken in measurement. Therefore, vide Exh. 66, re-measurement was ordered on 03.03.2018. On 17.07.2017, he carried out measurement and submitted report. Thereafter, T. I. L. R, Balapur was examined but during cross-examination by defendants, he has admitted that he has not issued notice of measurement to defendants no. 2 and carried out the measurement as per order of his superior authority. Further, he was not having commissioner order of this court. Therefore, he has committed grave mistake which goes to the root of the matter. Due to this, re-measurement is required through Dy. S. L. R, Balapur. It is further submitted that plaintiffs have paid measurement charges twice as per order of this court. However, Dy. S. L. R, Balapur has not carried out measurement as per order. Therefore, costs of measurement shall be borne by Dy. S. L. R, Balapur. Further, previously T. I. L. R, Balapur has not carried out measurement and delegated his employee. Therefore, he has not followed the order of this court. If application is not allowed plaintiff may suffer great amount of loss and on the contrary no prejudice would be cause to defendants. Therefore, application be allowed and Dy. S. L. R, Balapur be directed to re-measure suit property

personally and strictly as per order below Exh. 66 by giving notices to all parties.

4) Defendants opposed the application and contended that application is not tenable in the eye of law. They denied contentions of plaintiffs. In the evidence of commissioner, measurement map was exhibited as Exh. 64. After examination of said witness, an application was moved, which was allowed. Thereafter re-measurement was carried out and commissioner has measured suit property as per the order. Further, plaintiffs have not raised any objection to commissioner map and report. Therefore, plaintiffs have admitted measurement map. Further, till examination-in-chief of said witness, no objection was raised by plaintiffs. During cross-examination, defendants brought some facts from the mouth of said witness. Therefore, to fill-up lacuna and to kill the time, plaintiffs have filed this application. No ground exist to re-measured suit property as there is no merit in the application. Application is filed to harass defendants, and therefore it be rejected.

5) Record reveals that measurement was ordered by this court vide order below Exh. 53. Further, said measurement was incorrect and therefore re-measurement was ordered vide order below Exh. 66. Perusal of order below Exh. 66 reveals that T. I. L. R, Balapur was appointed as court commissioner. He was directed to do following things-

a) *to visit the spot and measure suit property and to prepare measurement map,*

b) *to describe property of both parties, disputed property in his map and to give clear opinion about encroachment, and to show such encroached portion in the map,*

c) *to take into consideration all measurement given in documents provided by both parties while carrying out actual measurement,*

d) *to measure property according to manual and not to commit any mistake as stated in the evidence of T. I. L. R, Balapur below Exh. 64.*

6) Evidence of measurer Shri Pardhi (P. W. 2), below Exh. 64 reveals that he did not carry out measurement in proper ratio and therefore vide order below Exh. 66 re-measurement was ordered. In order below Exh. 66, it has been specifically directed that he shall measure property according to the manual and not to commit any mistake. Thereafter, further evidence of same witness, which has come in the cross-examination, reveals that he did not have copy of measurement order, he did not enquire with plaintiffs about how many defendants are there in present matter, previously notice was issued to secretary, G. P., Sangwi Jomdev and hence notice issued to him for present measurement. He has not enquired as to how many defendants are made in this matter. He did not peruse order of this court about appointment of commissioner he only acted on the direction of his office. He did not peruse documents on which basis re-measurement was to be done. Further, re-measurement order of his office was oral.

7) After above nature of evidence of said measurer, plaintiffs filed application below Exh. 75 to adjourn the matter. Said application was allowed and the further cross-examination of said witness was adjourned and witness was discharged. Thereafter, present application came to be filed by plaintiffs.

8) Although, plaintiffs have indirectly admitted measurement map, that cannot be the ground to reject present application. This is because plaintiffs had no idea as to what was done prior to carrying out the measurement and the record was also not before the court at that time. This was only revealed in the cross-examination of said measurer. Further, perusal of examination-in-chief of said measurer does not have any missing facts. It was conducted as if the measurer has carried out measurement in proper way. To arrive at a conclusion about re-measurement demanded by present application, whole evidence of said measurer will have to be considered. Considering the admissions in

cross-examination, it is clear that measurer has not issued prior notice to defendants no. 2. Further, he has not perused measurement order below Exh. 66. Both these circumstances show that he has not carried out measurement properly and fairly. It was incumbent upon the measurer to issue prior notice to all concerned. Further, as there were specific directions about what to be done and what not to be done, in order below Exh. 66, not perusing the same prior to measurement is a defect which goes to the root of the measurement. In absence of above circumstances, the measurement carried out by him is neither fair nor proper.

9) If re-measurement is also carried out improperly and without giving opportunity to all concerned for participating in the process, it would be necessary to have re-measurement again in the interest of justice. To resolve the origin of dispute between the parties and for elucidating the matter in dispute, this may take time but it is just and necessary. If application is not allowed, it will be injustice to plaintiffs as well as defendants no. 2, to whom no notice was issued. It is necessary to have a clear, unambiguous and complete measurement. Therefore, proper course would be to appoint Dy. S. L. R, Balapur for re-measurement. Further, plaintiffs have paid measurement fees twice. However, despite specific directions, T. I. L. R, Balapur has not followed order and filed either incorrect, improper or incomplete report and map. Therefore, while ordering re-measurement, it would not be proper to burden plaintiff with costs of measurement again. Charges of such re-measurement may be recovered by said office from Shri N. U. Pardhi, who has erred twice as noted above. Application is thus, deserves to be allowed. Hence, the order.

: O R D E R :

- 1) Application Exh. 79 is hereby allowed.
- 2) Dy. S. L. R., Balapur is hereby appointed as court commissioner

for re-measurement.

- 3) **Dy. S. L. R., Balapur himself** to carry out re-measurement.
- 4) Court commissioner shall issue prior notice of measurement to all concerned including both parties in this suit.
- 5) Court commissioner shall strictly carry out re-measurement as per order below Exh. 66.
- 6) Court commissioner shall file detail report as directed alongwith map within 1 month from the date of receipt of writ.
- 7) Both parties to supply all relevant documents within 7 days from the date of this order. They shall file pursis with that effect on expiry of said time.
- 8) Dy. S. L. R., Balapur shall not charge any fees from either parties for re-measurement. He is at liberty to recover charges from Shri N. U. Pardhi.
- 9) If court commissioner is unable to comply within stipulated time, he shall forward written cause of delay within 3 days of expiry of time without fail.
- 10) Both parties shall cooperate court commissioner for completion of work within time.
- 11) Issue writ accordingly with whole copy of this order and copy of order below Exh. 66. Concerned clerk of this court is directed to send writ within 2 days from the date of this order.
- 12) Costs on applicants.

Sd/-

Balapur
Date:- 22.11.2019

(C. P. Raghuvanshi)
Civil Judge, J. D., Balapur.

Certificate

I affirm that the contents of this P.D.F. file are same word for word as per original order.

Name of Steno : Shaikh Rafique
Court Name : C.J.J.D. & J.M.F.C., Balapur.
Date : 22/11/2019.
Signed by Presiding
Officer on : 22/11/2019.
Uploaded on : 22/11/2019.
