

MHAU130000052002



ORDER BELOW EXH. 112

1. Present application is made by plaintiffs for appointment of court commissioner under order 26 Rule 9 of the Code of Civil Procedure, 1908. Reads the application and reply of defendant corporation Exh. 112. Heard Ld. Advocates for the rival parties.

2. Ld. Advocate for plaintiffs submitted that, this court had appointed court commissioner as per direction of Hon'ble District Court, Aurangabad in RCA No. 50/2015. The commissioner has filed his report along with map. He is cross-examined by the plaintiff at Exh. 109. It is revealed during his examination that, the commission is not correctly executed by him. Therefore, it is necessary to give direction for fresh execution of the commission in accordance with the directions in RCA No. 50/2015.

3. Ld. Advocate for defendant corporation submitted that, the commissioner has admitted during his evidence that the record of Sub Division of Survey No. 10 is not available at his office and, therefore, he has measured the land as shown by the plaintiffs. Therefore, no purpose will serve in ordering re-measurement. It is for, the plaintiff to take steps to get corrected the record of suit property at the office of Land Records.

Therefore, it is necessary to reject the application.

4. It is to be noted that, an appeal bearing RCA No. 50/2015 was preferred by the plaintiffs against the judgment and decree passed in this suit. Said appeal was partly allowed and the matter was remitted back to this court for fresh decision by following certain guidelines. In said judgment Hon'ble Appellate Court has directed to this court to issue a commission through D.I.L.R. / P.I.L.R. as the instance and costs from both the sides. The purposes of commission so directed to be issued by Hon'ble Appellate Court are laid down in operative part of said judgment at Sr. No. 3 (a) to (f) and those are reproduced below:-

- a) To measure entire survey No.10, divide it as per survey No.10/1 and 10/2 and to refer same in Map/Report
- b) To refer exact area under acquisition as per settlement deed Exh.33 and to mark the same in survey report.
- c) To refer and mark the exact area which respondent corporation utilised from survey No. 10/2 of the appellants and particularly under settlement deed Exh.33.
- d) To refer and point out size of (area) excess utilisation of land than that of acquired land as above in the survey report.
- e) To refer and mark size of (area) road, wall, drain area utilised by respondent corporation out of survey No. 10/1 and 10/2.

5. However, during examination of the commission at Exh. 109 it has come that, he has shown three Sub-Divisions after measurement of survey No. 10 in Map Exh. 111 when he

was supposed to divide it as per survey No. 10/1 and 10/2 i.e. in two Sub-Division. Secondly, he has not demarcated the area utilized by defendant corporation as per settlement deed Exh. 33. Thirdly, the exact area utilized from survey No. 10/2 as per settlement deed Exh.33 is not shown by him. Lastly, the size of exact utilization of land is also not shown by him.

6. It is the settled position of law that, unless the correct map or report of commissioner did not come on record, the court cannot ascertain encroachment and for that purpose it is required to order re-measurement of the suit property by issuance of fresh commission. Therefore, the application needs to be allowed. Hence, I pass the following order.

ORDER

1. Application stands allowed.
2. The Deputy Inspector of Land Record, Aurangabad is appointed as a Court Commissioner for measurement of entire survey No. 10 situated at Mauje Jaswantpur Tq. and Dist. Aurangabad and he is directed to carry out survey as stated below :-
 - a) To measure entire survey No.10, divide it as per survey No.10/1 and 10/2 and to refer same in Map/Report
 - b) To refer exact area under acquisition as per settlement deed Exh.33 and to mark the same in survey report.
 - c) To refer and mark the exact area which respondent corporation utilised from survey No. 10/2 of the appellants and particularly under settlement deed Exh.33.
 - d) To refer and point out size of (area) excess utilisation of

land than that of acquired land as above in the survey report.

- e) To refer and mark size of (area) road, wall, drain area utilised by respondent corporation out of survey No. 10/1 and 10/2.
- f) To file a survey report of the aforesaid factual position along with map before this court at the earliest.

3. The plaintiffs are directed to pay costs of commission directly to the Office of Deputy Inspector of Land Record, Aurangabad.

4. Issue Commissioner Writ accordingly.

Date :- 20.07.2024

(**Shri. N. H. Tikhe**)
Civil Judge Senior Division
(Corporation Court),
Aurangabad.

CERTIFICATE

I affirm that the contents of this P. D.F. file Judgment are same, word to word, as per the original Judgment.

Name of the Stenographer : S.D.Chavan
Court : C.J.S.D. (Corporation Court),
Aurangabad
Date : 20.07.2024
Judgment signed by the
presiding officer on : 20.07.2024
Judgment uploaded on : 20.07.2024