

Order passed below Exh. No. 40 In R.D. No. 2/2015.

Ajay & Othrs. Vs. Geetabai & Anrs.

CNR No.MHGO06-000278-2015

This is an application filed by the Decree holder for appointment of Taluka Inspector of Land Record as court commissioner for execution of decree.

2. It is submitted by decree holder that, as per the order below Exh. 25 legal practitioner Adv. M. N. Bhajipale was appointed as court commissioner in present execution proceeding. He filed his report below Exh. 39. The report submitted by the advocate court commissioner is not admitted by the decree holder. He submitted that report is contrary to the decree. According to him legal practitioner is not a technical person. In present proceeding map was prepared by surveyor. Therefore, legal practitioner will not understand the same. TILR is appropriate person who will show exact encroachment as per the decree. Hence, prayed to allow the application. Per contra, learned advocate of the judgment debtor submitted that as per the order of court below Exh. 25 learned advocate M. N. Bhajipale as a court commissioner submitted his commission report below Exh. 39. Judgment Debtor further submitted that decree holder objected report but report below Exh. 39 is not set aside till date. They further submitted that already court commissioner report is on record. If decree holder has any objection on the commission report then he examine court commissioner. Hence, prayed to reject the application with cost.

3. I have heard the Learned advocate for the parties

and bestow my anxious consideration to the rival contentions. In the instant case, already report of court commission filed by learned advocate M. N. Bhajipale below Exh. 39. Said report is objected by decree holder as it is contrary to the decree. Hence, prayed to appoint TILR as a Court Commissioner. In support of his contention he relied on case of ***Shyamsundar s/o Rambahor Tiwari vrs. Pramilabai w/o Dadarao Ugemuge, 2010 (5) Mh.L.J.*** wherein it was held by the Hon'ble Bombay High Court that "executing court may if it deems necessary appoint city surveyor with a view to execute a decree effectively and properly." He further relied on case of ***Yelora Chemicals and Anothers vrs. Panchvati Co-operative Housing Society Limited, 2010(1) Mh.L.J.*** the Hon'ble Bombay High Court wherein held that the executive court would decide the proceedings under order 21 Rule 22 of the Civil Procedure restricting itself to the executability of the decree in question and not its validity.

As per the observation made in case of ***Shyamsundar s/o Rambahor Tiwari vrs. Pramilabai w/o Dadarao Ugemuge, 2010 (5) Mh.L.J.*** executing court may appoint surveyor with a view to execute a decree effectively.

4. On the other hand, learned advocate of the judgment debtor placed reliance on case of ***Swami Premananda Bharathi vrs. Swami Yogananda Bharathi and Another, AIR 1985 Ker 83*** wherein it was held by Hon'ble Kerla High Court that when court commissioner report is not acceptable or otherwise infirm, then and then alone, it will appoint another court commissioner in accordance with law. She further placed his reliance on case of ***Dr. P. Subramoniam vrs. K. S. E. Board and others, AIR 1988 Ker 169*** wherein it was observed by

Hon'ble Kerla High Court that it would not be appropriate to hold that under no circumstances could a court issue a second commission without setting aside report a first.

5. It would be appropriate to appreciate the facts of present proceeding in view of the above mentioned case laws. The ratio of the above cited judgment by the decree holder is preferably applicable to the case at hand. As per the case of Swami Premananda Bharathi vrs. Swami Yogananda Bharathi and Another, AIR 1985 Ker 83 it is crystal clear that if first report is not acceptable then court can appoint another commission. As per the case of Dr. P. Subramoniam vrs. K. S. E. Board and others, AIR 1988 Ker 169 after setting aside first commission report then and then only second commission may appoint.

6. The case at hand commission report below Exh. 39 is not accepted by learned advocate of the decree holder. In view of Rule 10(2) of Order 26 the report of court commissioner and the evidence taken by him shall be evidence in suit and shall form part of the record but the court or with permission of the court, any parties to the suit may examine the commissioner personally in open court touching any of matters referred to him or mentioned in his report or as to his report or as to the manner in which he has made the investigation. The present proceeding is execution proceeding. Therefore, Rule 10 (2) is not applicable.

7. In order to enjoy fruits of decree I am of the opinion that, no prejudice would be cause to the judgment debtor if another commissioner for execution of decree is appointed. It

is, therefore, always desirable to the suit property measured by a competent public official more so, when oral evidence cannot be help the Court when it is in the form of words against words by the rival parties. Therefore, application deserves to be allowed.

- : ORDER : -

1. The application is allowed.
2. Taluka Inspector of Land Record, Arjuni/Morgaon is appointed as Court Commissioner to carry out measurement.
3. Court commissioner shall make inquiry as may be necessary if any, and after the inquiry if any, shall hand over the possession of encroached portion of land as shown in measurement map below Exh. 87 shown in chartreuse colour (पोपटी रंग) in Land Gat No. 190 situated at Arjuni/Morgaon to the decree holder as per decree passed in Regular Civil suit 82/2007.
4. The Decree holder to bear the necessary expenses of Commissioner and other act.
5. The Commissioner shall then prepare a report and submit the report to this court.
6. The commissioner is directed to issue 7 days prior notice to the concerned parties.

Sd/-

(Pratik .S.Sonkamble)
Civil Judge, Jr. Division,
Arjuni/Morgaon

Dt. 26.06.2021

CERTIFICATE

This is to certify that, the contents of this uploaded judgment/order are same and correct as per the original judgment/ order, signed by the Presiding Officer.

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