

WRIT PETITION NO.10986 OF 2014

Versus

Mr.V.S.Undre advocate for the petitioners

PER COURT :-

1 The application seeking appointment of Court Commissioner
below Exh.17 in RCS No.261/2013 has been rejected by the
impugned order dated 14.10.2014. Recording of evidence has still
not commenced in the said suit.

2 This Court has concluded in Writ Petitions Nos.2749 of 2012 (Coram SS Shinde J) and in Writ Petition No.8877 of 2013 (Coram: and SV Gangapurwala, J) that an application seeking appointment of Court Commissioner before the issues are cast and/or before the application for temporary injunction is decided, amounts to filing such applications at a premature stage.

3. Paragraph No.4 & 5 of judgment in Writ Petition No. 2749/2012 read as under:-

“4. I have given careful consideration to the rival submissions. I find considerable force in the submissions of the learned counsel for the plaintiff that yet the issues are to be framed by the Trial Court and at the threshold of hearing of the suit, application filed by the defendants for

appointment of the Court Commissioner is entertained by the Trial Court. The plaintiffs or defendants case should stand or fall on the evidence led by them. This Court in case of Sanjay Namdeo Khandare Vs. Sahebrao Kacharu Khandare and others, reported in 2001 (20 Mh.L.J. 959 has taken a view that the Court Commissioner cannot be appointed for collecting evidence.

5. *In that view of the matter, in my opinion, the stage of the proceeding for appointment of the Court Commissioner is pre-mature. It is different matter if the Court starts recording the evidence and finds it difficult to locate the correct position about the questions of controversy involved in the matter and at that stage, by involving powers u/s 26 Rule 9 of of the C.P.C. Appoints the Court commissioner. Therefore, in my opinion, the impugned order cannot sustain for the afore stated reasons. Therefore, same is quashed and set aside. However, the parties will have liberty to file an application for appointment of the Court Commissioner at appropriate stage of the proceedings. Setting aside the impugned order will not come int he way of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit. "*

4. Paragraph Nos.4, 5 and 6 of the judgment in Writ Petition No.8877/2013 read as under:-

" 4. There can not be a dispute with the proposition that to appoint the Court commissioner as per Section 75 of the Code of Civil Procedure is the discretion of the Court. The said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised asper the judicial norms.

5. *The parties have not yet stepped into witness box. The Court commissioner could have been appointed if the Court finds it necessary for the just decision of the case. No doubt, in case of encroachment, dispute with regards to the identity of*

the property, the assistance of expert such as Cadastral Surveyor to measure the property can be considered by the Court. However, the stage is too premature. Even the application for temporary injunction is not decided. The report of the T.I.L.R. If disputed by either party, is not admissible in evidence unless he T.I.L.R. Is examined.

6. *At the stage of evidence, from the evidence on record i.e. Documentary evidence if the Court finds that the appointment of court commissioner is necessary, then at that stage a party can file an application for appointment of T.I.L.R. As court commissioner, which application would be considered by the Court on its own merits. "*

5 In the light of the above, the petitioner seeks liberty to withdraw this petition so as to be able to file an application for appointment of Court Commissioner, at an appropriate stage in the matter after recording of oral evidence has commenced. The petitioner, as has been observed in the foregoing paragraphs in the above referred orders, iss granted such liberty.

6 As such, the petition is dismissed as withdrawn with liberty to file an application for appointment of Court Commissioner after recording of oral evidence commences in RCS No.261/2013. If such an application is filed, the same shall be decided by the Trial Court on its own merit and after hearing the litigating parties without being influenced by its observations in the impugned order.

(RAVINDRA V. GHUGE, J.)