

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 950 OF 2015

CHANDRAKANT TRIMBAKRAO HONRAO
VERSUS
THE MUNICIPAL COUNCIL, LATUR AND ANOTHER

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Advocate for Petitioners : Shri Gunale V.D.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: March 10, 2015

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PER COURT :-

1. The petitioner is the plaintiff in RCS No.168 of 2013. On his application Exhibit 5, seeking temporary injunction under Order XXXIX Rule 1 of the CPC, the trial Court has granted status-quo. Issues are yet to be cast and therefore, recording of evidence is yet to commence.

2. The petitioner filed application Exhibit 16 seeking appointment of the Court Commissioner under Order XXVI Rule 9 of the CPC, which has been rejected by the impugned order dated 7.11.2014. The petitioner is, aggrieved for the reason that the Court Commissioner could have elucidated information on the issue as regards, whether there was any public way in existence.

3. This Court (Coram: S.S.Shinde, J.) has held in Writ Petition No. 2749 of 2012 (Ramkrishna Santu Kakad Vs. Reojee Sahadu Kakad and another), decided on 4.3.2013, that an application for appointment of Court Commissioner need not be filed at a premature stage in trial. The relevant

paragraph Nos.4 and 5 are reproduced hereinbelow :-

*“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 plaintiff's or defendants' case should stand or fall on the evidence lead by them. This Court in case of **Sanjay Namdeo Khandare Vs.Sahebrao Kachrau Khandare and others, reported in 2001(2) Mh.L.J. 959**, has taken a view that the Court Commissioner can not 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 premature. 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 invoking powers u/s. 26 Rule 9 of the C.P.C. appoints the Court Commissioner. Therefore, in my opinion, the impugned order can not 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 proceeding. Setting aside the impugned order will not come in the way of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit.”

4. This Court (Coram: S.V. Gangapurwala, J.), while passing an order in Writ Petition No.8877 of 2013 (Chandrakant Kashinath Dike and others V/s Smt. Satyabhama Vishwanath Dike and another), dated 17.1.2014, has also

echoed the same view in paragraph Nos.4,5 and 6, which are reproduced hereinbelow :-

“4. There can not 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 as per 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 regard to the identity of the property, the assistance of expert such as Cadestral 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 the 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, since I am not interfering with the impugned order in view of the law laid down by this Court, as observed herein above, this petition is disposed off. However, the petitioner as well as the defendants will be at liberty to prefer an application for

appointment of the Court Commissioner after the recording of evidence has commenced in the matter. In the event, such an application is made by any of the litigating sides, the trial Court shall consider the same in accordance with law and on its own merits without being influenced by its observations made in the impugned order.

(RAVINDRA V. GHUGE, J.)

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