

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.978 OF 2015

MAHESH SHALIGRAM KABRA AND OTHERS	PETITIONERS
VERSUS	
HIRMAN SUKLAL CHAUDHARI	RESPONDENT

Mr.U.S.Malte, Advocate for the petitioners.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 09/02/2015

PER COURT :

1. Heard Mr.U.S.Malte, learned Advocate for the petitioners for quite some time.

2. RCS No.17/2014 has been preferred by the petitioners. Exh.23 is an application filed on 19/08/2014 seeking appointment of a Court Commissioner so as to pinpoint the location of a pipeline laid by the petitioners about 30 years ago, standing trees and shrubs. By the impugned order dated 08/12/2014, the application has been rejected on the ground that the plaintiff seeks to collect evidence and as such the application does not deserve to be entertained.

3. I have heard the learned Advocate for quite some time. In the light of the view consistently taken by this Court, I do not intend to

go into the merits of application Exh.23 and the grounds assailing the impugned order.

4. This Court (Coram : S.S.Shinde, J.) has held in W.P. No. 2749/2012 decided on 04/03/2013 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.”

5. This Court, while passing an order in Writ Petition No.8877/2013 (Coram : S.V. Gangapurwala, J.) dated 17/01/2014 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.”

6. As such, in the light of the view taken by this Court and as is evident from the orders reproduced hereinabove, an application filed prior to the commencement of recording of evidence has been termed to be an application prematurely filed for seeking appointment of a Court Commissioner.

7. In the instant case, the plaint has been instituted on 10/04/2014. Recording of evidence has still not commenced. As such, I do not intend to entertain this petition since application Exh.23 has been prematurely filed.

8. Ends of justice would be met by granting liberty to the petitioners to prefer an application for appointment of Court

Commissioner at an appropriate stage, after recording of oral evidence has commenced. This liberty deserves to be granted in the light of the consistent view having been taken by this Court in similar matters.

9. As such, this petition is disposed of without causing interference in the impugned order. However, the petitioners as well as the respondents are at liberty to prefer an application for appointment of a Court Commissioner after commencement of recording of oral evidence. In the event, such an application is filed, the Trial Court shall decide the same in accordance with Law and without being influenced by its observations set out in the impugned order dated 08/12/2014.

(RAVINDRA V. GHUGE, J.)