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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.1029 OF 2015

Shrirang Vitthalrao Kandekar.

..Petitioner

-Versus-

Madhukar Umaji Kandekar and others.

..Respondents

.....
Mr.Milind Patil a/w Mr.D.A.Mane, Advocates for the Petitioner.
.....

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 11th February, 2015

Per Court:

1 The Petitioner is aggrieved by the impugned order dated 14.10.2014 passed by the Trial Court below Exhibit-23 in RCS No.252/2006, thereby rejecting the request of the Petitioner/ original Plaintiff for appointment of a Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure.

2 This matter was heard for quite sometime. The learned counsel appearing for the Petitioner fairly states that an application Exhibit-5 seeking temporary injunction under Order XXXIX Rule 1 of the Code of Civil Procedure is still pending. The issues have been cast, but the recording of evidence has still not commenced.

3 This Court has consistently taken a view that an application for appointment of a Court Commissioner cannot be entertained prior to the commencement of the recording of evidence. This Court in Writ Petition No.234/2015 decided on 19.01.2015 has held as under:-

“4. *This Court has consistently taken a view that an application for appointment of the Court Commissioner could be filed after commencement of the recording of evidence.*

5. *This Court (Coram : S.S.Shinde, J.) has held in Writ Petition No.2749/2012 decided on 04.03.2013 that an application for appointment of Court Commissioner need not be filed at a pre-mature 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 plaintiffs 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 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 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.”

6. 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.”

7. *The Petitioners contend that they are the Plaintiffs before the Trial Court. The Petitioner No.1 is of very advanced age and may not be in a position to sustain rigours of litigation. The Petitioner No.2 is a lady, 49 years of age and is in employment.*
8. *Reliance is placed upon the judgment of the Honourable Supreme Court (a Three Judges' decision) in the case of Maria Margarida Sequeria Fernandes and others v/s Erasmo Jack De Sequeria (Dead) through L.Rs. reported in AIR 2012 SC 1727, to contend that in the backdrop of such factors the Court has to assist a litigant so as to do complete justice to the litigating parties. Reliance is placed upon paragraphs 31 to 41 which are reproduced herein below:-*
 - “31. In this unfortunate litigation, the Court's serious endeavour has to be to find out where in fact the truth lies. The truth should be the guiding star in the entire judicial process.*
 - 32. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty.*
 - 33. Justice system will acquire credibility only when people will be convinced that justice is based on the foundation of the truth.*
 - 34. In Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271, this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the*

combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done.

35. What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice.

36. In *Ritesh Tewari and Another v. State of U.P. and Others* (2010) 10 SCC 677 this Court reproduced often quoted quotation which reads as under:

"Every trial is voyage of discovery in which truth is the quest".

37. This Court observed that the power is to be exercised with an object to subserve the cause of justice and public interest and for getting the evidence in aid of a just decision and to uphold the truth.

38. Lord Denning, in the case of *Jones v. National Coal Board* [1957] 2 QB 55 has observed that:

"In the system of trial that we evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of the society at large, as happens, we believe, in some foreign countries."

39. Certainly, the above, is not true of the Indian Judicial system. A judge in the Indian System has to be regarded as failing to

exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law.

40. Lord Denning further observed in the said case of Jones (supra) that "It's all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth..."

41. World over, modern procedural Codes are increasingly relying on full disclosure by the parties. Managerial powers of the Judge are being deployed to ensure that the scope of the factual controversy is minimized."

9. *Since the scheme of Section 75(b) r/w Order 26 Rule 9 of the Code of Civil Procedure is aimed at elucidating information through local inspection in order to assist the Trial Court in resolving the real controversy at issue, this Court has laid down the law as referred above that such an application for appointment of the Court Commissioner can be filed after commencement of the recording of evidence. It is not disputed that the recording of evidence is yet to commence."*

4 In the light of the above, without entertaining this Writ Petition on its merits, ends of justice would be met, by following the ratio laid down by this Court in the above referred decisions, by permitting the Petitioner or for that reason any litigating party to RCS No.252/2006, to move an application for appointment of a Court Commissioner after the

commencement of the recording of oral evidence. In the event, any of the parties move such an application, same shall be considered on its own merits and in accordance with law without being influenced by the observations made by the Trial Court in its order dated 14.10.2014 below Exhibit-23.

5 With these observations, the Writ Petition is disposed of. No order as to costs.

(RAVINDRA V. GHUGE, J.)