

kps

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

WRIT PETITION NO.959 OF 2015

Dnyanoba Hanmant Shinde.

..Petitioner

-Versus-

Purushottam Digambar Mahajan
and others.

..Respondents

.....

Mr.Ram S. Shinde, Advocate for the Petitioner.

Mr.N.G.Kale, Advocate for the Caveators/ Respondents.

.....

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 06th February, 2015

Per Court:

1 I have heard Mr.Shinde, learned Advocate appearing for the
Petitioner and Mr.N.G.Kale, learned Advocate appearing for the
Caveators/ Respondents.

2 The grievance is as regards the impugned order dated
30.12.2014 passed below Exhibit-40 in RCS No.482/2012 by which the
request for appointment of the Court Commissioner made by the
Petitioner has been turned down.

3 This Court by it's order dated 01.10.2014 in Writ Petition

No.502/2014 has expedited the suit looking at age of the parties.

4 The recording of oral evidence has still not commenced in the matter. The Trial Court has rejected the application not on the ground that it has been prematurely filed as has been held by this Court, but on the ground that the Petitioner/ Plaintiff can commence the recording of his evidence and produce a map prepared by the Local or Government Body.

5 The learned counsel appearing for the Petitioner submits that this Court has crystallized the law that the dispute as regards the boundaries (fixing of the boundaries) of the suit property, can be gone into through the Taluka Inspector of Land Records (TILR) appointed as a Court Commissioner. He has placed reliance on the following reported judgments:-

- (a) *Bento Antonio Gomes alias Antonio Bento Gomes Vs. Rosario Salvador Carneiro and others, 2014(4) Mh.L.J. 366,*
- (b) *Siddharth Sambhaji Survase and another Vs. Air India Charters Ltd., 2014(4) Mh.L.J. 374,*
- (c) *Manikrao Ramji Chawake Vs. Ashok Ambadas Gawande and another, 2014(2) Mh.L.J. 840,*
- (d) *Prerna Shikshan Mandal, Chandrapur and another Vs. State of Maharashtra and others, 2014(2) Mh.L.J. 843,*

- (e) *Bhupendra S/o Bhagwat Turkar Vs. Homraj S/o Zituji Meshram, 2014(4) Mh.L.J. 231,*
- (f) *Indira Pragati Shikshan Sanstha, Mindala, Chandrapur Vs. State of Maharashtra and others, 2014(4) Mh.L.J. 235.*
- (g) *Malhar S/o Ganpat Bokerphod and others Vs. Shivaji S/o Vishwanath Pawal, 2014(4) Mh.L.J. 237,*
- (h) *Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade, 2004(2) Mh.L.J. 724,*
- (i) *Habibkhan S/o Inauttalakhan and others Vs. Waman S/o Govind Rathod and others, 2012(2) Mh.L.J. 541,*
- (j) *Haryana Waqf Board Vs. Shanti Sarup and others, 2008(8) SCC 671. (Supreme Court of India).*

6 The learned counsel appearing for the Respondents opposed the petition contending that the Petitioner should first commence the recording of evidence. The appointment of a Court Commissioner is a discretionary power.

7 The Petitioner seems to be right in making a submission that the measurement of the suit property, fixing of boundaries and preparing a report and map pursuant thereto, would be more appropriately done through a Cadastral Surveyor. Nevertheless, this Court has consistently held that an application for appointment of a Court Commissioner can be

said to be prematurely filed if the recording of evidence in the matter has not yet commenced.

8 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 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 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.”

9 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.”*

10 In the light of the view taken by this Court as reproduced above, I am not entertaining this Writ Petition at this stage. However, akin to the liberty granted by this Court to the Petitioners in the above mentioned judgments, I am inclined to grant such liberty to the Petitioner herein.

11 As such, after the recording of oral evidence has commenced, the Petitioner/ Plaintiff as well as the Respondents are at liberty to move an application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of a Court Commissioner in the form of a TILR or a Cadastral Surveyor in the light of the proposition settled by this Court.

12 In the event such an application is filed, the Trial Court shall consider the same on its own merits and shall not be influenced by its observations set out in the impugned order dated 30.12.2014 or by the fact that this Court has not interfered with the said order.

13 The Writ Petition is disposed of with the above observations and liberty. No order as to costs.

(RAVINDRA V. GHUGE, J.)