

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

WRIT PETITION NO. 1987 OF 2015

Parbata S/o Manikrao Mungal
& others

... Petitioners

Versus

Govind S/o Datta Solanke

... Respondent

.....
Mr. A.M. Gaikwad , Advocate for petitioners
.....

CORAM : RAVINDRA V. GHUGE, J.

DATED : 20th FEBRUARY , 2015

PER COURT :

1. Petitioners are original defendants in R.C.S. No. 59 of 2013. Exhibit 5 application preferred by the plaintiffs under Order XXXIX Rule 1 of the Code of Civil Procedure (CPC) seeking injunction is still pending. Issues are yet to be cast. Application Exhibit 28 has been filed by the petitioners for appointment of a Court Commissioner under Order XXVI Rule 9 of the CPC. Same has been rejected by the impugned order dated 29-01-2015.

2. This Court in Writ Petition No. 2749 of 2013 decided on 04-03-2013 in the matter **Ramkrishna Santu Kakad Vs. Reojee Sahadu Kakad & Another** (Coram : S.S. Shinde, J.), Writ Petition

No. 8877 of 2013 decided on 17-01-2014 in the matter of **Chandrakant Kashinath Dike & Ors. Vs. Smt. Satyabhama Vishwanath Dike & Anr.** (Coram :- S.V. Gangapurwala, J.) and this Court in Writ Petition No. 234 of 2015 decided on 19-01-2015 in the matter of **Balkrushna Mahadeo Dongre and Another Vs. Seva Niketan English School, Kopergaon and another** (to which I am a party) has laid down the law that an application for local inspection (appointment of Court Commissioner) under Order XXVI Rule 9, can be entertained only after commencement of recording of oral evidence.

3. 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 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 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."*

4. 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.”*

5. This Court in Writ Petition No. 234 of 2015, dated 19-01-2015 has also observed the same view in paragraph No. 9 which is reproduced hereinbelow :-

“ 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.”

6. In the light of the above, this petition is disposed off without causing any interference with the impugned order. However, akin to the liberty granted by this Court in the above referred judgments, I am granting the same liberty to the petitioner as well as to the litigating parties in R.C.S. No. 59 of 2013 to file an

application for appointment of a Court Commissioner after the recording of oral evidence has commenced in the said matter.

7. In the event any of the litigating parties prefers such an application, the same shall be considered by the Trial Court on its own merits without being influenced by its observations set out in the impugned order dated 29-01-2015 below Exhibit 28.

(RAVINDRA V. GHUGE, J.)