

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

WRIT PETITION NO. 8622 OF 2015

Dattatraya s/o Ambadas Shelke,
Age: 30 years, Occ: Agriculture,
R/o. Mandavgan, Tq. Shrigonda,
Dist. Ahmednagar & anr

...Petitioners

versus

Sultan s/o Mohammad Tade,
Age: 57 years, Occ: Agri.,
R/o. Shani Chowk, Shrigonda,
Dist. Ahmednagar & anr

...Respondents

.....
Mr. Niteen V. Gaware, Advocate for petitioners
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CORAM : N.W. SAMBRE, J.

DATE : 26th NOVEMBER, 2015

ORAL ORDER :

The suit for rectification of sale deed came to be filed by respondent No.1, in which counter claim is moved by petitioners seeking possession of the part of the suit property.

2. After recording of evidence in the suit has begun, respondent-plaintiff filed an application for appointment of Court Commissioner, which came to be granted by an order dated 23/03/2015 by learned Civil Judge, Senior Division, Shrigonda. As such, present writ petition.

3. Learned Counsel for the petitioners-defendants would urge that recourse taken to the remedy of appointment of Court Commissioner, particularly in the light of claim of plaintiff in the suit is uncalled for. While relying upon the provisions of Order 26 Rule 9 of Code of Civil Procedure and inviting attention of this Court to the order passed in Writ Petition No. 8877 of 2013 on 17/01/2014, learned Counsel would urge that powers which are exercised for appointment of Court Commissioner are at the initial stage, as evidence in the matter is yet to be concluded.

4. While opposing the above referred submissions and substantiating the order for appointing Court Commissioner, learned Counsel for respondent-plaintiff would urge that appointment of Court Commissioner is after taking into account the prayer of the petitioners in the counter claim, which pertains to seeking possession of certain part of the suit property. He would then urge that appointment of Court Commissioner was necessary in the above referred back ground so as to identify the suit property and in any case, same cannot be considered, as correction.

5. Having bestowed anxious thought to the submissions of rival parties, it is required to be noted that learned trial Court was

alive to the fact as regards filing of suit and counter claim therein alongwith properties mentioned in the sale deed and that of one claim in the counter claim. Learned trial Court then has proceeded to consider the prayer made by present petitioners in the counter claim for possession of 625 sq. ft., particularly in the background of sale deed of which correction is sought by respondent-plaintiff.

6. In my opinion, in view of above referred factual background and rival claims put forth in the suit and counter claim, learned trial Court was justified in ordering appointment of Court Commissioner. Reliance placed by learned Counsel upon the order passed by this Court in Writ Petition No. 8877 of 2013, particularly paragraph-5 cannot be construed to put embargo on the right of Court below in appointment of Court Commissioner during course of recording of evidence. This Court was dealing with the issue of appointment of Court Commissioner at the time of deciding application for injunction. In view thereof, the reliance placed upon such order by learned Counsel for petitioners is misconceived. The writ petition lacks merit, as such, dismissed.

[N.W. SAMBRE, J.]