

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

WRIT PETITION NO.7289 OF 2014

Sadashiv s/o Harji Kadam
Age 60 years, Occ-Agri
R/o Janapuri, Tq. Loha
Dist.Nanded, at present
C/o House of Adv. Pradip Atharkar
Dayanand Nagar, Nanded
Tq. & Dist.Nanded

.. PETITIONER

Versus

Ramesh s/o Ramchandra Surve
Age 50 years, Occ-Agri
R/o Wadeपुरi, Tq. Loha
Dist.Nanded

.. RESPONDENTS

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Shri H.I.Pathan,Adv. For petr.
Shri D.M.Shinde,Adv. For respondent.

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**CORAM : N.W.SAMBRE,J.
DATED : 19TH NOVEMBER,2015**

ORDER :-

The present petition is filed by plaintiff in Regular Civil Suit No.77/2010 for specific performance and injunction.

2] In the Suit, the petitioner moved application for appointment of Court Commissioner so as to ascertain the standing crop, electricity connection, construction of water tank, plantation.

3] The said application Exh.52 since was objected by respondent-defendant, came to be rejected by order dated 1/8/2014 passed by Civil Judge, Junior Division, Loha, as such present petition.

4] The learned counsel for the petitioner Shri Pathan would urge that the order passed by learned Court below in rejecting the application for appointment of Court Commissioner is based on misconception and incorrect appreciation of the case for which appointment of Court Commissioner was sought. According to him, it is not case of the petitioner that he wants to ascertain the possession over the suit property but to have a report before the Court as regards the factual position existing in the field in relation to the above aspects of the matter. He would then urge that in view of provisions of Order 26 (9) of C.P.C. appointment of Commissioner cannot be considered as one amounting to collection of evidence and such prayer be granted by quashing the order impugned.

5] Shri Shinde, learned counsel for defendant-respondent while relying upon the judgment of this Court in the matter of **Kolhapuri Bandu Lakade V/s Yallappa Chinappa Lakade (died) through Pooja @ Poojari Y. Lakade and others reported in 2011 (3) Bom. C.R. 807** and in the matter of **Syed Mushtaque Ahmad Syed Ismail and others V/s Syed Ashique Ali Khan Haidar Ali reported in 2012(2) Bom.C.R.790** would urge that the cause for appointment of Court Commissioner in the background of prayer in the plaint cannot be considered within the scope of Order 26 Rule 9. He would then urge that the object which is sought to be achieved by the petitioner by seeking prayer for appointment of Commissioner amounts to an indirect way of collecting evidence so as to establish his possession over the suit property. According to him, having

regard to the nature of claim in the suit, learned trial Court was right in rejecting application and as such prayed for dismissal of the petition.

6] Having given my anxious consideration to the submission made by the respective counsel, it is required to be noted that the petitioner in categorical terms before the Court below has stated that the parties to the suit will be required to independently establish their possession. However, according to him, for ascertaining the fact as regards the nature of crop and other amenities which are in the suit property, in my opinion, cannot be stretched to the extent of drawing the conclusion that the said amounts to the collection of evidence. The same in my opinion, is nothing but ascertaining the exact position on the spot in relation to the above referred issues. The prayer as such in my opinion should have been granted by Courts below as the same cannot be termed as collection of evidence in favour of either of the parties. In view thereof, the reliance placed by learned counsel for the petitioner on both the judgments i.e. Kolhapuri Bandu and Syed Mustaque will be of hardly any assistance.

7] As such, for the reasons recorded hereinabove, Petition stands allowed. The order passed below Exh.52 by the Court below on 1/8/2014 in Regular Civil Suit No.77/2010 is hereby quashed and set aside and said application stands allowed.

(N.W.SAMBRE,J.)

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