

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

WRIT PETITION NO.8665 OF 2014

1. Saraswatibai Vishwanath Wagh
Age 65 years, Occu.Agriculture
and Household
2. Deepak Vishwanath Wagh,
Age 32 years, Occu.Agriculturist
3. Gajanan Vishwanath Wagh,
Age 29 years, Occu.Agriculturist

All R/o Bambrud Raniche,

Taluka Pachora, Dist.Jalgaon

..Petitioners

(Orig.Defendants)

VERSUS

Vishnu Tryambak Thakare,

Age 42 years, Occu.Agriculturist

R/o Bambrud Raniche,

Taluka Pachora, Dist.Jalgaon

..Respondent

(Original Plaintiff)

Mr S.V. Suryawanshi, Advocate for petitioners

Mr Anand Bhandari, Advocate for respondent-sole

CORAM : N.W. SAMBRE, J.

DATE : 10th March 2015

ORAL ORDER

By the present petition, the petitioners/original defendants seek to challenge the order dated 24th July 2014, passed by Civil Judge Junior Division, Pachora, below Exh.29, in Regular Civil Suit No.35 of 2014, whereby their prayer for appointment of Court Commissioner, came to be turned down.

2. Respondent/original plaintiff has instituted Regular Civil Suit No.35 of 2014 seeking relief of perpetual injunction.

3. The petitioners/defendants filed a counter-claim and at the time of hearing of Exh.5 – an application for temporary injunction, moved application Exh.29, under Order XXVI, Rule 9 of the Code of Civil Procedure, seeking appointment of Court Commissioner, which came to be rejected by the Trial Court by order dated 24th July, 2014. Thus, the present petition.

4. Mr Suryawanshi, learned Counsel appearing on behalf of the petitioners/defendants, relying upon the judgment of this Court in the matter of **Mohd. Hashim Ajmullah Khan vs. Vasiullah Nasibullah Khan & ors.**, reported in 2014 (3) Mh.L.J. 451, so as to urge that the powers of appointment of Court Commissioner are available at the time of deciding the interlocutory application, i.e. application for temporary injunction. He would urge that the report of the Court Commissioner will act in aid of the parties and the Trial Court for reaching to an appropriate decision on the application for injunction. He, therefore, prayed to allow the petition.

5. Mr Bhandari, learned Counsel appearing on behalf of the respondent/plaintiff, would urge that the powers under Order XXVI, Rule 9 of the Code of Civil Procedure, are not available at the time of deciding the application Exh.5, seeking temporary injunction. In support of the said contention, learned Counsel has placed reliance on the wording of the said provision and on the judgment dated 17th January, 2012, rendered by this Court in **Writ Petition No.9089 of 2011 (Gangaram Baban Tagad & ors. vs. Sarubai Yashwant Tagad & anr.)**. Apart therefrom, he has invited my attention to the judgment of this Court, in the matter of **Sanjay s/o Namdeo Khandare vs. Sahebrao s/o Kachru Khandare & ors.**, reported in **2001 (1) Bom.**

C.R. 800, so as to canvass that the appointment of Court Commissioner cannot be permitted for collection of evidence.

6. Having considered rival contentions of the parties, it is required to be noted that the proposition of law, that appointment of Court Commissioner cannot be utilized for the purpose of collection of evidence as the same is contrary to the mandate of Order XXVI, Rule 9 of the Code of Civil Procedure, is not in dispute.

7. In the light of above proposition of law, if we examine the prayer of the present petitioners for appointment of Court Commissioner, which is moved at the stage of hearing of Exh.5, an application seeking interlocutory order of temporary injunction, it is prima facie noticed that the same is with an intention to collect the evidence for deciding the said application.

8. In my opinion, the law cited by Mr Bhandari, learned Counsel for the respondent, on the aforesaid point, is well placed.

9. In view of above, applicability of the judgment in the matter of Mohd. Hashim Ajmullah Khan (cited supra), relied upon on behalf of the petitioners, will be hardly of any assistance.

10. In that view of the matter, no case for interference is made out.
Writ Petition being sans merit stands rejected with no order as to costs.

(N.W. SAMBRE, J.)

amj