

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9349 OF 2014

Sharad S/o Khandu Chavan
and others

PETITIONERS

VERSUS

Rajaram Maka Chavan and others

RESPONDENTS

Mr.A.S.Magare, Advocate for the petitioners.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 09/02/2015

PER COURT :

1. Petitioners/original defendants are aggrieved by the rejection of application Exh.26 filed under Order 26 Rule 9 of The Civil Procedure Code filed in RCS No.71/2012. Learned Advocate for the petitioners submits that recording of evidence has not yet commenced in the said proceedings.

2. This Court (Coram : S.S.Shinde, J.) has held in W.P. 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 premature. 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."*

3. 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 Cadastral 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.”

4. In the light of the above, though I am not interfering with the impugned order, the application Exh.26 appears to have been filed prematurely in the light of the Law laid down by this Court in the above referred judgments. As such, I am inclined to grant liberty to the litigating parties as has been granted by this court in the above referred judgments.

5. This petition is, therefore, disposed of without interfering with the impugned order dated 13/08/2014. However, the litigating parties, if they so desire, are at liberty to file an application for appointment of a Court Commissioner after commencement of recording of evidence. In the event, any of the litigating parties files such an application, the Trial Court shall consider the same on its own merits and without being influenced by its observations in the impugned order dated 13/08/2014.

(RAVINDRA V. GHUGE, J.)