

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10739 OF 2015

RAJENDRA KACHRU BHOGE AND ANOTHER
VERSUS
KAMALBAI AMBADAS WAYSAL AND OTHERS

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Advocate for Petitioners : Shri Badakh Vishal S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: October 27, 2015

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PER COURT :-

1. The petitioner is aggrieved by the impugned order dated 10.9.2015, delivered by the trial Court, below Exhibit 46 in RCS No.369 of 2014.
2. The petitioner has sought an order, vide application Exhibit 46 invoking Order XXVI Rule 9 of the CPC, for an appointment of a Court Commissioner in order to measure the boundaries of the suit property. Grievance is that the respondent / plaintiff has not properly stated the boundaries of the suit property in its plaint. Application Exhibit 5 under Order XXXIX Rule 1 of the CPC, seeking injunction against the petitioners is pending hearing.
3. Shri Gadakh further submits that the trial Court has erroneously made a reference in the impugned order that the defendants, prima facie, do not appear to be in possession.
4. It is further stated that unless a Court Commissioner is appointed, the boundaries of the suit property cannot be ascertained.
5. I have considered the submissions of the learned Advocate for the petitioners. With his assistance I have gone through the application Exhibit

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46 in which the petitioners have stated in paragraph No.5 as regards the purpose for which the appointment of a Court Commissioner has been sought.

6. It is settled law that a Court Commissioner cannot be appointed prior to the commencement of the recording of evidence in a suit. In the present case, neither had issues been cast nor has application Exhibit 5 under Order XXXIX Rule 1 and 2 been adjudicated by the trial Court.

7. In the light of the above, I find that the application Exhibit 46 was filed prematurely. Any litigating side is at liberty to file an application under XXVI Rule 9 seeking appointment of a Court Commissioner after the commencement of the recording of evidence. So also, the observations of the trial Court in the impugned order are restricted to application Exhibit 46.

8. Needless to state, application Exhibit 5 will have to be decided by the trial Court on its own merits and without being influenced by its observations in the order dated 10.9.2015 below Exhibit 46.

9. With the above observations, this petition is disposed off without causing any interference in the impugned order.

(RAVINDRA V. GHUGE, J.)

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