

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 21 OF 2015

MOHAN SUKHDEO DAHIWAL AND ANOTHER
VERSUS
DHARMARAJ JAGANNATH LOLGE AND OTHERS

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Advocate for Petitioners : Shri Dharurkar Chaitanya V.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: January 23, 2015

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PER COURT :-

1. The petitioner is aggrieved by the order dated 10.10.2014, passed below Exhibit 51, by which, the request for appointment of the Court Commissioner under Order XXVI Rule 9 of the CPC has been turned down. It is fairly stated by the learned Advocate for the petitioner that issues are yet to be cast and therefore, recording of evidence is yet to commence. It is at this stage that application Exhibit 51 was filed.

2. This Court has consistently taken a view that the appointment of a Court Commissioner is to assist the Court by elucidating such information as would enable the proper adjudication of the matter and when evidence recorded may not make the picture clear before the Court.

3. 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.”

4. 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 Cadestral 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.”

5. In the light of the observations as reproduced herein above, it is clear that an application for appointing a Court Commissioner before the commencement of evidence has been termed to be prematurely filed. As observed in the above referred judgments of this Court, after the recording of evidence has commenced, the litigating parties are at liberty to move an application for the said purpose, which the Court can consider and decide in the light of Section 75(b) and Order XXVI Rule 9 of the CPC.

6. As such, I do not wish to cause any interference in the impugned order. However, as has been observed by this Court in the above referred two judgments, the petitioner would be at liberty to file an application for seeking inspection or local inspection. In the event, such an application is filed, the trial Court shall consider the same strictly in accordance with law and without being influenced by the fact that application Exhibit 51 has been rejected on 10.10.2014.

7. With the above observations and with the liberty as is granted, this Writ Petition is disposed off.

(RAVINDRA V. GHUGE, J.)

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