

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 733 OF 2015

MAHARU GAINDHAL BHOI
VERSUS
SUSHIL RAVINDRA PATIL AND OTHERS

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Advocate for Petitioner : Shri Chapalgaonkar Shailesh S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 02, 2015
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PER COURT :-

1. The petitioner is a 75 years' old Senior Citizen, who is the original defendant No.4 in RCS No.87 of 2014. Issue is as regards a cart-way. The plaintiff insists that there is a cart-way which is used for a long time and is the only way to approach his field. The defendants have denied the very existence of such a cart-way.
2. By an ad-interim order, passed below Exhibit 5, temporary injunction has been clamped upon the defendants. Issues are not yet cast.
3. An application for appointment of the Court Commissioner was filed by the petitioner under Order XXVI Rule 9 of the CPC seeking appointment of the Court Commissioner. By the impugned order dated 2.12.2014, the same is rejected, since, the dispute is not regarding boundaries or an encroachment and therefore, a Court Commissioner need not be appointed.
4. This Court (Coram: S.S.Shinde, J.) has held in Writ Petition No. 2749

of 2012 decided on 4.3.2013 that an application for appointment of Court Commissioner need not be filed at a premature 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.”

5. This Court, while passing an order in Writ Petition No.8877 of 2013

(Coram: S.V. Gangapurwala, J.) dated 17.1.2014 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.”

6. In the light of the above, the application filed by the petitioner - Exhibit 37 was prematurely filed in the light of the view taken by this Court, as referred above. After the recording of evidence commences, the litigating parties would be at liberty to move an application for

appointment of the Court Commissioner. In the event such an application is filed, the trial Court shall consider the same on its own merits and in the light of the law crystallized and shall not be influenced by its observations made in the impugned order dated 2.12.2014.

7. With the above observations, the petition is disposed off.

(RAVINDRA V. GHUGE, J.)

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