

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.383 OF 2015

RAMESHWAR HIRALAL VYAS

PETITIONER

VERSUS

KISHORE NARAYAN BHUSARI AND OTHERS

RESPONDENTS

Mr.S.S.Bora, Advocate for the petitioner.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 16/01/2015

PER COURT :

1. The petitioner is aggrieved by the impugned order dated 08/12/2014 passed by the Trial Court in RCS No.122/2007.

2. The petitioner is the original defendant in the said suit. The issues have been cast. Recording of evidence has still not commenced. An application under Order 26 Rule 9 of the CPC was filed for seeking appointment of a Court Commissioner. By the impugned order, the said application Exh.35 has been rejected.

3. This Court has consistently taken a view that an application for local inspection u/s 75(b) r/w Order 26 Rule 9 of The CPC is rendered pre-mature if the recording of evidence has not commenced or if issues have not been cast or if application Exh.5 is pending

decision.

4. 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 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 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.”

6. In the light of the above, I am not inclined to entertain this petition, since the rejection of Exh.35 by the impugned order will not preclude the petitioner from filing a fresh application at the relevant stage in the light of the observations of this Court in the orders / judgments referred to above, after commencement of evidence.

7. In the event, any of the parties desire to move an application for seeking an appointment of Court Commissioner, Law permits them to do so and such application shall be considered by the Trial Court on its own merits without being influenced by the observations made in the impugned order dated 08/12/2014 passed below Exh.35 in RCS No.122/2007.

(RAVINDRA V. GHUGE, J.)