

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

10 WRIT PETITION NO. 5591 OF 2014

**TANAJI PANDHARI ANKUSHRAO AND ANOTHER
VERSUS
MARUTI AMBADAS SONWANE**

...

Advocate for Petitioners : Mr. S. V. Khoptekar h/for

Mr. V. D. Salunke

Advocate for Respondent : Mr. Kolpe Mahendra B

CORAM : V. K. JADHAV, J.

DATE : 12th January, 2016

PER COURT :

1. Heard finally with the consent of the parties at admission stage.

2. By this petition, the petitioners/original plaintiffs have challenged the order passed by the Civil Judge, Junior Division, Osmanabad on 07.04.2014 below Exh.46 in RCS No.29/2011 allowing thereby the application filed by the respondent / defendant for appointment of Court Commissioner.

3. The learned counsel for the petitioners/plaintiffs submits that after the plaintiffs' evidence is closed, the defendant has filed an application for appointment of the Court Commissioner for filling up lacuna in the

case. The learned counsel further submits that the plaintiffs have instituted the suit for simplicitor injunction and the defendant has filed an application for appointment of Court Commissioner belatedly with the sole purpose of collecting evidence in the case. The counsel submits that learned judge of the trial Court has erroneously allowed the application and the order impugned is thus liable to be set aside. The learned counsel placed reliance on the judgment in the case of **Syed Mustaque Ahmad Syed Ismail & ors Vs. Syed Ashique Ali Khan Haidar Ali** reported in 2012 (2) Bom. C.R.790.

4. Learned counsel for the respondent/defendant submits that the respondent/defendant has challenged the location of the tin shed as well as boundaries of the suit land. The learned counsel submits that the order passed by the trial Court is legal, proper and considering the facts and circumstances of the case. The learned counsel for the respondent placed reliance on the judgment in the case of **Malhar Ganpat Bokephod & ors. Vs. Shivaji Vishwanath Pawal**, reported in 2014 (1) Bom. C.R. 806 to substantiate his submission that even though the suit is instituted for decree of simplicitor injunction, if the boundaries are disputed, then the

application for appointment of Court Commissioner can be filed and entertained.

5. On careful perusal of the written statement filed by the respondent/defendant, it appears that in para 5 of the written statement, the defendant has merely disputed the location and boundaries of the suit property, however, the respondent/defendant has not mentioned the correct location and boundaries of the suit property. Furthermore, the respondent/defendant, in para 3 has come with the strange pleadings that the respondent/defendant has constructed the tin shed on behalf of one Amrapali Bansode who is in actual possession of the said land. Said Amrapali Bansode is neither party nor attempted to intervene in the suit.

6. It appears that the application Exh.46 is filed for filling up lacuna and for collection of evidence. The impugned order is thus liable to be quashed and set aside. Hence following order:

O R D E R

i. Writ petition is hereby allowed.

ii. The order dated 07.04.2014 passed below Exh. 46 in

RCS No. 29/2011 is hereby quashed and set aside.

iii. Application at Exh. 46 in RCS No. 29/2011 is hereby rejected.

(V. K. JADHAV, J.)

JPC