

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

933 WRIT PETITION NO. 946 OF 2015
WITH WP/10144/2015

GANPAT SHAHAJI AMBHORE
VERSUS
PANDURANG MURLIDHAR AMBHORE AND OTHERS

Shri. K.F. Shingare, Advocate, for petitioner.

Shri. P.K. Nikam, Advocate, for respondent No.7.

CORAM: T.V. NALAWADE, J.

DATE : 1st SEPTEMBER 2016

ORDER:

1) Writ Petition No.946/2015 is filed to challenge two orders made by the learned 2nd Joint Civil Judge, Junior Division Vaijapur in Regular Civil Suit No.280/2012. On application Exhibit 36 filed by the original defendants orders are made by the learned trial Court Judge and one Advocate is appointed as Court Commissioner. Heard both the sides.

2) The plaintiff has filed the suit for perpetual injunction and the defendants are contesting the suit by contending that in the guise of relief claimed, the plaintiff

is trying to prevent defendants from using the road which is in existence and which is in use of the defendants. It appears that one proceeding was pending before the Mamlatdar under the Mamaldar's Courts Act, 1906 and some order was also made by the Mamlatdar in favour of the defendants and it appears that the matter is again remanded by the appellate authority to the Court of the Mamlatdar. There must be some record created by the Mamlatdar like spot inspection.

3) The main challenge by the plaintiff to the orders made by the trial Court Judge in the present matter is that by such Court Commission the defendants are trying to collect evidence. On that point he has placed reliance on the observations made by this Court, other Hon'ble Judge, in Writ Petition No.9098/2011 (Ayyaz v. Mohd. Moid @ Ajamatali). Facts of this case were totally different. Though in the present matter the trial Court has observed that the Court Commissioner may make measurement, this Court holds that in view of nature of dispute even such measurements are not necessary. The defendants want to bring on record that obstruction was

created.

4) It appears that the defendants want to bring on the record the factual situation, whether road is in existence or it does not exist. Some record is also there before the Mamlatdar and in view of the provisions of the Mamlatdar's Courts Act, that record also can be considered by the Civil Court if that record is called and it is duly proved. In view of these circumstances and as the only factual situation is to be brought on record, this Court holds that Court Commissioner will not be collecting evidence of any nature. In the result, Writ Petition No.946/2015 stands dismissed.

5) Writ Petition No.10144 of 2015 is filed to challenge the judgment and order of Misc. Civil Appeal No.57/2013 decided by the learned District Judge-1, Vaijapur. The District Court has disposed of the appeal by observing that the trial itself can be expedited.

6) Learned counsel for the petitioner, submitted that the petitioner, original plaintiff is aggrieved due to

some observations made by the first appellate Court with regard to the record created in the proceeding filed under the provisions of the Mamaldar's Courts Act. It appears that some observations are made with regard to the visit paid by the Mamlatdar to the spot for making spot inspection and it is the case of the plaintiff that, during that period the Mamlatdar was on leave. It is needless to mention that the observations made by the District Court or this Court while deciding any matter involving interim order, are not to be used by the trial Court when the trial Court is deciding the matter on merits. Interim applications are decided on the basis of affidavits and the record is considered for *prima facie* purpose. So, such observations are never to be considered by the trial Court while appreciating the evidence on merit for deciding the matter. These observations are also applicable to the observations made by the trial Court in that regard. With these observations Writ Petition No.10144/2015 is disposed of.

Sd/-
(T.V. NALAWADE, J.)

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