

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.4071 OF 2016

(ARJUN JANARDHAN AMBHORE...VS..SAMADHAN RAMRAO AMBHORE & 6 OTH.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A.HAQ, J.

DATED : JULY 18, 2016.

Heard Shri R.M.Sharma, advocate for the
petitioner/ original defendant No.4.

The respondent Nos. 1 to 4 / plaintiffs have filed civil suit praying for decree for setting aside the order passed by the Naib Tahsildar and maintained by the Sub-Divisional Officer under the provisions of the Mamalatdars' Courts Act, 1906. The plaintiffs have prayed for decree for declaration that the defendant No.4 is not having approach way through the field of the plaintiffs. The plaintiffs have prayed for decree for permanent injunction restraining the defendant No.4 from using the alleged way.

In these proceedings, the plaintiffs filed application (Exh.27) praying that Commissioner be appointed to inspect the spot and submit report of local investigation. The learned trial Judge, by the order dated 30th November, 2015 allowed the application and appointed the Court Commissioner. The petitioner/ defendant No.4 filed an application (Exh.36) praying that the order passed on 30th November, 2015 be recalled. The learned trial Judge has rejected the application filed by the defendant No.4 by the impugned order.

The learned advocate for the petitioner/defendant No.4 has submitted that the competent authority under the Mamlatdars' Courts Act, 1906 had upheld the claim of the defendant No.4 and had directed the respondent Nos. 1 to 4 / plaintiffs to clear the way of the defendant No.4 and not to obstruct him from approaching his field through that way, however, the plaintiffs have high-handedly dug up the holes and have blocked the way and now are cultivating that portion of the land and if the Commissioner is appointed for local investigation then it will amount to allowing the plaintiff to collect evidence and this is not permissible. The learned advocate has relied on the judgment given in the case of *Syed. Mushtaque Ahmad S/o. Syed. Ismail & Ors. Vs. Syed Ashique Ali Khan S/o. Haidar Ali*, reported in **2012 (1) ALL MR 80** to support the submission.

The orders passed by the Naib Tahsildar and the Sub-Divisional Officer under the provisions of the Mamlatdars' Courts Act, 1906 are challenged in the civil suit. There are conflicting claims on record in respect of the use of way by the defendant No.4. The learned trial Judge has considered all the aspects on record and has rightly exercised his jurisdiction under Order 26 Rule 9 of the Code of Civil Procedure and has appointed the Court Commissioner for local investigation. I do not find any illegality in the impugned order.

The proposition laid down in the judgment given in the case of *Syed. Mushtaque Ahmed* (supra) that the Commissioner cannot be appointed to collect the evidence is well settled. However, in the facts of the present case it

cannot be said that the Commissioner is appointed to collect any evidence. The defendant No.4 is relying on the pleadings and the orders which form part of the record of the proceedings under the Mamalatdars' Courts Act, 1906 and the defendant No.4 can always counter the report of the Commissioner on the basis of the evidence which is and will be produced on record.

I see no reason to interfere with the impugned order. The petition is dismissed. No costs.

JUDGE

RRaut..

CERTIFICATE

I certify that this order uploaded is a true and correct copy of original signed order.

Uploaded by : R.B. Raut, PS

Uploaded on : 20/07/2016.