

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD****WRIT PETITION NO. 9924 OF 2017**

Dnyandeo s/o Tulshiram Pinjarkar

...PETITIONER

VERSUS

Vishwanath Dnyandeo Pinjarkar

...RESPONDENT

...

Mr. P S. Mehta, Advocate for petitioner.

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CORAM : RAVINDRA V. GHUGE, J.**DATE : 19-09-2017.****PER COURT :**

1. The petitioner is aggrieved by the order dated 05-05-2017 passed by the trial Court, rejecting application Exhibit 20, and refusing appointment of a Court Commissioner under Order XXVI Rule 9 of the CPC.

2. I have heard the strenuous submission of Shri. Mehta, learned advocate for the petitioner. He points out that two cousins are litigating against each other. My attention is drawn to the pleading in the plaint in paragraph 7, wherein the dispute between them with regard to the construction of their respective portions of the house in a single plot, has been narrated. The plaintiff claims to be residing in his portion.

3. My attention is then drawn to paragraph 5 of the counter claim filed by the original defendant, wherein it is stated that the original plaintiff is liable to be restrained from disturbing the peaceful use and enjoyment of the portion of the house of the original defendant. It is, therefore, contended that though the application for temporary injunction is pending adjudication, a Court Commissioner was required to be appointed, as the issue is only with regard to the boundaries.

4. The petitioner relies upon the following judgments of this Court :-

1. Deorao Punjabrao Mohd & anr. Vs. Janardhan Dhondbaji Mankar [2014 (4) Bom. C.R. 865]
2. Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade [2011 (3) Bom.C.R. 807]
3. Vitthal Rama Kumbhar Vs. Ram Shankar Metkari and others in Writ Petition No. 9830 of 2014.

5. I have considered the submissions of the learned advocate, I have gone through the judgments cited and the petition paper book.

6. In application Exhibit 20, the prayer putforth by the plaintiff is that an architect/engineer be appointed to inspect the plot No.5, Sector-F, N-1, CIDCO, Aurangabad and direct him to make a report of the equal possession of the plaintiff and defendant and submit a map along with his report.

7. There can be no dispute that after the recording of evidence has commenced, a Court Commissioner can be appointed for eliciting further information which would assist the trial court in the light of the oral and documentary evidence recorded. It is possible that a Court Commissioner could be appointed even before recording of evidence in rarest of rare cases and for strong reasons to be recorded. It is undisputed that a Court Commissioner cannot be appointed for collecting evidence.

8. In the instant case, prima facie, it appears that the dispute between the parties is with regard to the area of possession of the house property and the construction made by each of them. The learned counsel for the petitioner has canvassed that the issue is only about boundaries. This is with an intention of seeking an appointment of the Court Commissioner, since a Court Commissioner is normally to be appointed in matter of boundary disputes. I do not find any boundary dispute between the plaintiff and defendant, as the dispute is with regard to the area of construction and the portions occupied by them. Nevertheless, the application for temporary injunction is still pending and issues are yet to be cast.

9. Considering the above, I do not find that the impugned order could be termed as being perverse and erroneous. The petition

being devoid of merits is, therefore, dismissed. However, it be noted that after the commencement of the recording of oral evidence, if either of the parties desire to seek an appointment of a Court Commissioner, they would be at liberty to file an application and such application would then be considered by the trial Court on it's own merits without being influenced by the observations of this Court.

(RAVINDRA V. GHUGE, J)

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