

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

WRIT PETITION NO. 9626 OF 2016

1. Sitaram Suklal Patil
Age: 76 years, Occu.: Agriculture,

2. Ananda Sitaram Patil
Age: 36 years, Occu.: Agriculture,

Both are R/o At Post Dabli (Dhandarne),
Taluka Sindkheda, District Dhule.

..PETITIONERS

VERSUS

Vasudeo Suklal Patil
Age: 73 years, Occu.: Agriculture,
R/o At Post Dabli (Dhandarne),
Taluka Shindkheda, District Dhule.

..RESPONDENT

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Mr. P.B. Patil, Advocate h/f Mr. B.R. Warmaa, Advocate for petitioners.
Mr. S.P. Brahme, Advocate for respondent.

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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 31st JULY, 2017**

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioners are aggrieved by the impugned order dated 30th July, 2016 by which the Trial Court has allowed application Exhibit 14 filed by the

respondent – original plaintiff for appointment of the Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure.

3. The learned Counsel for the petitioners – original defendants has strenuously criticized the impugned order. The learned Counsel for the respondent has canvassed at length and has vehemently contended that the impugned order calls for no interference. It is further submitted that this Court need not interfere with the interlocutory order in its writ / supervisory jurisdiction. Only because a second view is possible, no interference is called for and this petition be dismissed with heavy costs.

4. It is further informed that though this Court, by order dated 01st August, 2016, had stayed the impugned order, the T.I.L.R. has implemented the impugned order on 03rd August, 2016 in defiance of this Court's order. It is undisputed that the application Exhibit 14 was filed before the issues in the matter were cast and the trial had not commenced.

5. This Court, in Writ Petition No. 2749 of 2013 decided on 04-03-2013 in the matter Ramkrishna Santu Kakad Vs. Reojee Sahadu Kakad & Another (Coram : S.S. Shinde, J.), Writ Petition No. 8877 of 2013 decided on 17-01-2014 in the matter of Chandrakant Kashinath Dike & Ors. Vs. Smt. Satyabhama

Vishwanath Dike & Anr. (Coram :- S.V. Gangapurwala, J.) and in Writ Petition No. 234 of 2015 decided on 19-01-2015 in the matter of Balkrushna Mahadeo Dongre and Another Vs. Seva Niketan English School, Kopergaon and another (to which I am a party), has laid down the law that an application for local inspection (appointment of Court Commissioner) under Order XXVI Rule 9, can be entertained only after the commencement of the recording of oral evidence.

6. This Court (Coram : S.S.Shinde, J.) has held in Writ Petition 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 pre-

mature. 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.”

7. This Court (Coram : S.V. Gangapurwala, J.), while passing an order in Writ Petition No.8877/2013 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.”*

8. This Court (Coram : Myself), in Writ Petition No. 234 of 2015, dated 19-01-2015 has also taken the same view in paragraph No. 9 which is reproduced hereinbelow :-

“ 9. Since the scheme of Section 75(b) r/w Order 26 Rule 9 of the Code of Civil Procedure is aimed at elucidating information through local inspection in order to assist the Trial Court in resolving the real controversy at issue, this Court has laid down the law as referred above that such an application for appointment of the Court Commissioner can be filed after commencement of the recording of evidence. It is not disputed that the recording of evidence is yet to commence.”

9. Considering the above, this petition is allowed. The impugned order dated 30th July, 2016 is quashed and set aside and application Exhibit 14 is rejected for the reason that the Court Commissioner was appointed even before

the issues have been framed and when a specific ground was raised by the defendants that the application is not maintainable at that stage.

10. It appears that the interim order of this Court dated 01st October, 2016 was not served on the T.I.L.R. who proceeded to implement the impugned order, being oblivious of the same. Consequentially, the steps taken by the T.I.L.R. pursuant to the impugned order are rendered redundant and the measurement, the report and the map drawn stand set aside and shall not be relied upon by the Trial Court.

11. Needless to state, after the recording of the evidence has commenced, if any of the litigating sides desire to file an application for appointment of the Court Commissioner, the Trial Court would consider the same on its own merits.

(RAVINDRA V GHUGE, J.)

SSD