

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11962 OF 2017
(Nanabhau Ganpat Wagh and others Vs. Sunanda Babanrao
Dongare)

Mr.A.K.Gawali, Advocate for the petitioners.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 29/09/2017

PER COURT :

1. The petitioners /original defendants are aggrieved by the impugned order dated 08/06/2017 by which the Trial Court has rejected application Exh.17 filed under Order 26 Rule 9 of the CPC seeking an appointment of a Court Commissioner.

2. The petitioners do not dispute that application Exh.5, seeking relief under Order 39 Rule 1 and 2 of the CPC, is pending. Grievance is about the suit plot / land in survey No.49/2A/1, which is claimed to be as yet unpartitioned (sub division), by the defendants. The map of survey No.49/2A/1 (Old No.59/2) annexed to the plaint is disputed by the defendants. It is specifically contended that its a false map and a false suit has been filed.

3. The Trial Court, while considering Exh.17, has noted that the plaintiff claims to be the owner and possessor of the suit property. She has carried out a construction of a double storeyed building on 104.56 Sq.Mtrs.. The plaintiff has kept 75.44 Sq.Mtrs. of land open towards the Western side of the suit property. The defendants have objected to the construction of a compound wall to the suit property by the plaintiff.

4. By Exh.17, the defendants sought appointment of a Court Commissioner so that the land can be measured and the actual share of the defendants could be identified/located and measured. The Trial Court has considered this request to be an attempt to collect evidence.

5. Learned Advocate for the petitioners has strenuously contended that the issue is only as regards disputed boundaries and in a case of any dispute of such nature, a Court Commissioner can be appointed. I do not find that the contention of the petitioners could be sustained for the reason that the plaintiff is seeking injunction as against the petitioners on the ground that the entire suit plot belongs to her. As of date, a counter claim has not been filed by the defendants.

6. In this backdrop, the contention of the petitioners that in the peculiar facts emerging from this case, a Court Commissioner could be appointed considering the effect of Section 75 r/w Order 26 Rule 9 and Order 39 Rule 11 of the CPC, cannot be said to be a sustainable submission. This Court has consistently held that except in rare circumstances, a Court Commissioner could be appointed only after the recording of evidence has commenced.

7. This petition, being devoid of merit, is therefore, dismissed. Needless to state, either of the litigating sides would be at liberty to file an application for appointment of a Court Commissioner after the recording of evidence has commenced and the same would then be considered by the Trial Court on its own merits. These observations are restricted to the decision on Exh.17.

(Ravindra V.Ghuge, J.)