

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO.11593 OF 2015

1. Dipak Laxman Gadekar,  
Age-52 years, Occu-Driver,
  2. Sangita Dipak Gadekar,  
Age-47 years, Occu-Household,  
Both r/o Ward No.7, Kanifnath Road,  
Near Ganpati Temple, Morge Vasti,  
Shrirampur, Tq.Shrirampur,  
Dist.Ahmednagar
- PETITIONERS

VERSUS

1. Trimbak Ravji Shirsath,  
Age-67 years, Occu-Agriculturist,
  2. Gautam Trimbak Shirsath,  
Age-37 years, Occu-Agriculturist,  
Both R/o Ward No.7, Kanifnath Road,  
Near Ganpati Temple, Morge Vasti,  
Shrirampur, Tq. Shrirampur,  
Dist.Ahmednagar,
  3. Manda Nana Ghotale,  
Age-44 years, Occu-Household,  
R/o Lahgaon, Tq.Newasa,  
Dist.Ahmednagar
- RESPONDENTS

Mr.R.R.Karpe, Advocate for the petitioners.  
Mr.P.P.Dhorde, Advocate for the respondents.

( CORAM : Ravindra V.Ghuge, J.)

DATE : 23/08/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the

consent of the parties.

2. The petitioners are aggrieved by the order dated 06/11/2015 by which the Trial Court has appointed a Court Commissioner before framing of the issues and even before deciding the application for temporary injunction Exh.5.

3. I have considered the submissions of the learned Advocates for the respective sides. Mr.Dhorde submits that this petition deserves to be dismissed with heavy costs.

4. This Court (Coram : N.W.Sambre, J.), while considering the submissions of the petitioners, that no consent was given as is recorded in paragraph No.10 of the impugned order, permitted the petitioners to approach the Trial Court and seek a clarification regarding the purported consent. Paragraph No.1 of the order dated 05/12/2015 reads as under :-

*"Learned Counsel appearing on behalf of the petitioners submits that the petitioners intend to approach the learned Trial Court, on the matter of seeking clarification as regards recording of their consent in paragraph 10 of the impugned order, whereby Advocate R.D.Bhosale is appointed as Court Commissioner."*

5. Mr.Karpe, learned Advocate for the petitioners submits on instructions that an application Exh.41 was filed by the petitioners on 05/12/2015 seeking a clarification by stating that no consent was given by the petitioners who are original defendants. The Trial Court has deleted the word “consent” from the impugned order.

6. Even otherwise, considering the import of Section 75 r/w Order 26 Rule 9 of the CPC, the Trial Court can appoint a Court Commissioner at any stage. However, the same is meant for ensuring that the Trial Court could elicit further information on the aspects before it and thereafter evidence could be recorded on the return of commission. The intent of the legislature is to enable the Court to appoint a Court Commissioner for the purpose of elucidating any matter in dispute. It is settled that in matters of disputed boundaries, encroachment and similar causes of action, a Court Commissioner could be appointed after the recording of evidence.

7. It is obvious that the plaintiffs have approached the Trial Court claiming encroachment by the defendants and application Exh.5 has been filed for seeking temporary injunction. The plaintiffs have not put forth such grounds which would indicate that the appointment of a Court Commissioner is required even before a decision on Exh.5.

Neither are such pleadings put forth by the plaintiffs, nor do I find any conclusions by the Trial Court indicating that it is convinced that the Court Commissioner necessarily is to be appointed in the facts of this case.

8. Considering the above, this petition is partly allowed. The impugned order dated 06/11/2015 is quashed and set aside. Needless to State, since Exh.26 is filed prematurely, the litigating sides would be at liberty to prefer an application for appointment of a Court Commissioner after the recording of evidence has commenced and such an application shall then be considered on its own merits.

9. Rule is made partly absolute in the above terms.

( Ravindra V.Ghuge, J.)