

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12149 of 2016
(Shivajirao Gyanoba Patil and another Vs. Trivenabai Ganpatrao
Bajulge and others)

Mr.A.N.Sabnis h/f Mr.V.D.Gunale, Advocate for the petitioner.
Mr.Amit S.Deshpande, Advocate for respondent No.1.

CORAM : RAVINDRA V. GHUGE, J.)

DATE : 12/12/2017

PER COURT :

1. The petitioners, who are original defendant Nos. 1 and 2, are aggrieved by the order dated 07/11/2016 passed by the Trial Court by which application Exh.59, seeking appointment of a Court Commissioner under order 26 Rule 9 of the CPC, has been allowed.

2. I have considered the strenuous submissions of the learned Advocates for the petitioners and respondent No.1 who is the original plaintiff. Respondent Nos. 2 to 4 who are original defendant Nos.3 to 5, have not chosen to appear in this matter despite service of Court notice.

3. The plaintiff has filed RCS No.163/2011 for declaration of title on the basis of adverse possession and for perpetual injunction

against the defendants since she is in possession of the suit plot bearing GP House No.1518 admeasuring 12 ft. on the Eastern side, 37 feet on the Western side, 20 feet on the Southern side and 19.5 ft. on the Northern side in Samarth Nagar, at village Nideban, Tal.Udgir, Dist. Latur. She has claimed the existence of several parts in the house premises in the nature of Shahabadi Stone Flooring, a Tulsi plant, various trees comprising of Ashoka, Umbar and lemon etc. By application Exh.80, the appointment of a Court Commissioner was sought in the face of the denial of the defendants, for visiting the house premises and for noticing the situation of the fabricated gate, compound wall, shahabadi stone flooring, a platform constructed of bricks, tulsi plant and several trees which are about 25 to 30 ft. tall.

4. By the impugned order, the Trial Court has concluded that the suit is neither for recovery of possession, nor any dispute about the boundaries arises in the suit. It is further concluded that as the defendants have denied the existence of several items, trees and other constructed portion in the house premises, the Court Commissioner needs to be appointed so that he can visit the house premises and collect the data about the abovesaid aspects and inform the Court through his report whether such aspects are located in the house premises.

5. The specific direction issued by the Trial Court in clause Nos. 2 and 3 of the impugned order read as under :-

"2. Adv.K.S.Bhosale is hereby appointed as Court Commissioner, who shall visit the suit site, i.e. plot bearing GP house No.1518 and ascertain as to whether compound wall, water tank, stone flooring, tulsi plant and various trees like Coconyt, Ashoka, Leman and Umar on the suit plot.

3. Court Commissioner is further directed to bring on record existence of aforesaid things on the suit plot."

6. The law on appointment of Court Commissioner is well settled. The purpose of appointing a Court Commissioner is not for collecting evidence or for bringing on record such aspects which are required to be proved by leading oral and documentary evidence. It is equally settled that if the issue of encroachment or boundary dispute emerges in a matter, the properties of the litigating sides can be jointly measured in order to fix the boundaries. None of these aspects are found in the instant case.

7. In my view, considering the settled position of law, the direction issued by the Trial Court in Clause Nos. 2 and 3, reproduced above, would practically amount to collection of evidence on behalf of the plaintiff. The recording of oral evidence is yet to commence.

8. Considering the above, this petition is allowed. The impugned order dated 07/11/2016 is quashed and set aside and application Exh.59 stands rejected.

9. Needless to state, since the impugned order was passed at a stage when recording of oral and documentary evidence had not commenced, the litigating sides would be at liberty to seek appointment of a Court Commissioner after the recording of oral and documentary evidence and in the event of such an application being filed by either of the sides, the Trial Court shall consider the same on its own merits and strictly in accordance with law.

(RAVINDRA V. GHUGE, J.)