

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1054 OF 2018

CHAND ABDUL JAKATE
VERSUS
SURENDRA SONAJI KALOKHE AND OTHERS

Advocate for Petitioner : Shri N.B. Narwade.
Advocate for Respondent No. 1 : Shri A.A. Phad
h/f. Shri N.V. Gaware.

CORAM : RAVINDRA V. GHUGE, J.
Dated : 29th January, 2018

PER COURT :

1. The petitioner/original plaintiff is aggrieved by the order dated 06/12/2017, passed by the Trial Court, by which, application Exhibit 49 filed by the petitioner, seeking appointment of a Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, has been rejected. R.C.S. No. 16/2001 is pending for hearing and adjudication on the application for temporary injunction Exhibit 5. Issues have not yet been cast.

2. Learned counsel for the petitioner has strenuously criticized the impugned order. He submits that when the application was made by the defendant before the Mamlatdar under Section 5 (2) of the Mamlatdar Courts Act, 1906, the petitioner was not arrayed as respondent, though the defendant intended to create a new way

through the agricultural field of the petitioner. When the said proceedings under 1906 Act, were being conducted in the absence of the petitioner, he has preferred the Civil Suit in the year 2011.

3. I find that the dispute as to whether an old path was existing or whether a new path is sought to be created by the defendants, is the question in the pending suit. Reliance is placed upon the judgments of this Court in the matters of Girish Vasantrao Bhoyar and another Versus Nimbaji Warluji Bambal [2009(4) ALL MR 761], Yeshwant Bhaduji Ghuse Versus Vithobaji Laxman Ladekar [2010(2) ALL MR 694] and Vachhalabai Kundlik Gavane and others Versus Chinkaji Malhari Jadhav and others [2012(4) Mh.L.J.], to support the contention that when there is a dispute regarding the boundaries, local inspection as provided under Section 75 read with Order XXVI Rule 9 of the C.P.C. is warranted and would assist the litigating sides as well as the Court while adjudicating upon the suit.

4. I find that there can be no dispute about the appointment of a Court Commissioner, when it comes to the boundary dispute, measurement of the boundaries and fixing of the boundaries. However, this Court, in a series of judgments/orders in the matter of

Sanjay N. Khandare Versus Sahebrao K. Khandare [2001(1) ALL MR 653], Kolhapuri Bandu Lakde Versus Yallappa Chinappa Lakade (Deceased) [2011(3) ALL MR 599] and Sayeed Mushtak Ahamad Versus Sayeed Ashique Ali Khan [2011(6) Mh L J 334].

has laid down the law that appointment of a Court Commissioner is not to be allowed when recording of oral evidence is not yet commenced. The purpose of local inspection is not for collecting evidence but for eliciting further information so as to clear all doubts after the recording of evidence.

5. In the instant case, issue is as to whether an alternate path is available to the defendants by way of a Vahivaat and whether there was an existing path so available which would prevent creation of a new path on the request of the defendants. In my view, the litigating sides need to step into the witness box and lead evidence to prove their respective cases and in the event of any doubt, if either of them move an application for appointment of a Court Commissioner, the Trial Court could then consider such an application in the backdrop of the evidence recorded and on its own merit.

6. In the light of the legal position as above, I do not find that the impugned order passed by the Trial Court can be termed as

being perverse or erroneous. This petition being devoid of merit, is therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

S.P.C.