

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1743 OF 2018
(Baburao Jairam Borade and others Vs. Fakira Tukaram Lanekar
and others)

Mr.D.B.Pokale, Advocate for the petitioners.
Mr.M.B.Ubale h/f Mr.L.K.Pradhan, Advocate for respondent Nos. 1 to 3.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 28/08/2018

PER COURT :

1. While issuing notice to the respondents, this Court had recorded the submissions of the petitioners in its order dated 13/02/2018 as under :-

"1 The Petitioners/ original Defendant Nos.1 to 6 are aggrieved by the impugned order dated 17.11.2017 passed by the Trial Court, by which, the application Exhibit-23 seeking appointment of a court commissioner in RCS No.183/2014 has been allowed even when the application Exhibit-5 seeking temporary injunction was pending and the issues are yet to be cast.

2 The contention is that the Trial Court has allowed the appointment of the Court Commissioner not only for the measurement of the suit property, but to ascertain the actual position of the disputed

land. The grievance is that this amounts to collecting of evidence. Further grievance is that this Court has consistently held that the Court Commissioner ought not to be appointed before the recording of oral evidence in the suit.

3 Issue notice to Respondent Nos.1, 2 and 3/ original Plaintiffs, returnable on 23.03.2018.

4 Copies of the petition paper book for issuance of notices shall be supplied on or before 21.02.2018, failing which, this petition shall stand dismissed without reference to the Court on 22.02.2018.

5 Until the returnable date in this matter, the impugned order dated 17.11.2017 shall stand stayed.”

2. Reliance is placed upon the following judgments / orders whereby this Court has consistently taken a view that a Court Commissioner should not be appointed before the recording of oral evidence is concluded :-

- 1. Gangaram Baban Tagad and others Vs. Sarubai Yashwant Tagad and others (WP No.6700/2011 dated 12/06/2013)*
- 2. Shantabai Pralhad Anantwad Vs. Tahsildar, Tahsil Office Latur and others (WP No.1096/2018 dated 31/01/2018)*
- 3. Syed Mushtaque Ahmad Syed Ismail and others vs. Syed Ashique Ali Khan Haidar Ali, 2012 (1) ALL MR 80 : 2011 (6) Mh.L.J. 334.*

4. *Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar*, 2017 (3) Mh.L.J. 314.
5. *Chandrakant Kashinath Dike and others vs. Smt.Satyabhama Vishwanath Dike and another*, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.
6. *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others*, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.

3. Learned Advocate for the plaintiffs contend that since the defendants have disputed the boundaries of the suit property in their written statement, the plaintiffs had moved the application even when the Exh.5 application was pending. Reliance is placed upon the judgment of this Court in the matter of Vasant Tukaram Prabhu Vs.Xalinibai Borcar alias Shalinibai Borkar (died), through LR's and another [2014(5) Mh.L.J. 382].

4. Considering the judgments / orders of this Court relied upon by the plaintiffs, it is apparent a Court Commissioner is not to be appointed for collecting evidence and more so when the recording of evidence by the litigating sides has not concluded. A Court Commissioner is appointed when the Trial Court finds it appropriate to seek his assistance after recording of oral evidence, if the Court finds that further information needs to be elicited through the Court

Commissioner and especially in matters of joint measurement of the properties and fixing of boundaries.

5. In Vasant Tukaram (supra), this Court dealt with an Appeal from Order after the Trial Court as well as the Appellate Court had delivered judgments. In this matter, the issue as to at what stage can the Court Commissioner be appointed was not considered by the Trial Court.

6. It is obvious that the Trial Court misdirected itself while considering the law laid down in Vasant Tukaram (supra). Considering the above, this petition is allowed. The impugned order dated 17/11/2017 passed by the Trial Court is quashed and set aside and application Exh.23 stands rejected.

7. Needless to state, after the recording of oral evidence is concluded in the pending suit, if either of the litigating sides file an application for an appointment of a Court Commissioner, the Trial Court would consider the same on its own merits.

Kranti
Hansraj
Shekatkar

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(Ravindra V.Ghuge, J.)