

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 12570 OF 2017

MANOHAR KERBA BIRADAR
VERSUS
GOVIND KERBA BIRADAR

...

Advocate for the Petitioner : Shri Shinde Ram S..

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 27th June, 2018

Per Court:

1 The Petitioner, original Defendant in RCS No.28/2011, is aggrieved by the order dated 09.02.2017 passed by the Trial Court by which, the application Exhibit-76 filed by the Petitioner seeking the appointment of a court commissioner, has been rejected.

2 I have considered the strenuous submissions of the learned Advocate for the Petitioner, who submits that the impugned order is perverse and erroneous. He has drawn my attention to the 12 grounds formulated by him in the memo of the petition and his pleadings in Exhibit 76.

3 I find that the suit is purely for declaration and injunction against the sole Defendant. The Respondent/ Plaintiff has completed his evidence. The allegation is that the Defendant is attempting to encroach

upon the property of the Plaintiff and he is also creating disturbance.

4 In the above backdrop, onus and burden to the extent of the pleadings of the Defendant would lay on his shoulders in proving his contentions. After leading evidence, if the Plaintiff or the Defendant are of the view that the Court Commissioner will have to be appointed, they can move an application. The appointment of a court commissioner to find out the existence of the suit property and possession of the Plaintiff over the suit property, cannot be permitted as it amounts to collecting evidence.

5 This Court, in Sanjay Namdeo Khandare v. Sahebrao Kachru. Khandare & others, (2001(1) Bom.C.R. 800) and Ayyaz Shoukatali Sayyed & another v. Mohd.Moid @ Ajamatali Mohd.Yasin Shaikh & others in Writ. Petition No.9089/2011 decided on 17.1.2012, held that the Court Commissioner cannot be appointed for the purpose of collecting evidence for the parties and it would be premature to appoint a Court Commissioner before the trial has commenced and the parties have led their evidence.

6 Thus, this Court has consistently held that the court commissioner is not to be appointed for collecting evidence. If the Court is convinced that the court commissioner would assist it, then the Court Commissioner can be appointed, only after recording of oral and documentary evidence.

7 In the light of the above, I do not find that the impugned

order could be termed as being perverse or erroneous. This Writ Petition is, therefore, dismissed.

8 Nevertheless, it is clarified that after the recording of oral evidence, in the event, any of the litigating sides desire an appointment of a court commissioner, it may move an application and the Trial Court would consider such an application on its own merits.

kps

(RAVINDRA V. GHUGE, J.)