

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

WRIT PETITION NO.5470 OF 2017

**MOHANRAO BABURAO BHISE
VERSUS
GOVIND AMBADAS SHINDE**

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Advocate for the Petitioner : Shri S. A. Nagargoje h/f.
Shri A. S. Lomte

Advocate for Respondent- sole : Shri F. R. Tandale h/f.
Shri P.R. Tandale

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 11th DECEMBER, 2018.

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PER COURT :

1. The petitioner/original defendant is aggrieved by the order dated 28/02/2017 passed by the Trial Court allowing application Exhibit 34 and appointing the Deputy Superintendent of Land Records, Renapur as a court commissioner in RCS No. 23/2014.

2. This Court (Coram : M. S. Sanklecha – J.) has passed a speaking order on 27/04/2017 after hearing the learned Advocates which reads as under :-

"1] This petition challenges the order dated 20.2.2017

of the learned Joint Civil Judge (J.D.), Renapur, by which the Court Commissioner has been appointed.

2] Mr.A.S. Lomte, learned counsel for the petitioner submits that in the facts of this case, no Court Commissioner could be appointed as the suit filed by the respondent is not in respect of encroachment on the suit property but only for injunction. In the above view, it was submitted that no Court Commissioner could be appointed. In support, reliance was placed upon the decision of this Court in Sanjay N. Khandare v. Sahebrao K. Khandare (2001 (1) ALL MR 653). Therefore, it is submitted that the reliance upon the decision of this Court in Girish Vasant Rao Bhoyar & another v. Nimbaji Warhuji Bambal (2009 (4) ALL MR 761) in the impugned order is not appropriate.

3] Mr.F.R. Tandale, learned counsel appearing for the respondent on a caveat seeks time to take instructions.

4] At his request, the petition is adjourned to 4.5.2017.

5] As the petition is being adjourned at the request of the respondent, there shall be ad interim stay to the impugned order dated 20.2.2017.

6] S.O. to 4.5.2017."

3. The learned Advocate for the respondent plaintiff has

strenuously defended the appointment of a court commissioner though the application for temporary injunction Exhibit 5 was pending when the impugned order was passed. Issues were not framed.

4. Reliance is placed upon the judgment of this Court in the matter of *Kashinath s/o Ramkrishna Chopade Vs. Purushottum Tulshiram Tekade and others, 2005(4) Mh.L.J. 471*, to support his contention that the accuracy of the map was not established in the said matter, local investigation was not carried out and hence, the matter was remanded to the Trial Court for appointment of a court commissioner.

5. The contentions of the petitioner are already recorded in the above reproduced order.

6. This Court has consistently taken a view that a court commissioner cannot be appointed for collecting evidence. The litigating sides have to discharge their burden by recording evidence. After the recording of oral evidence is over, a court commissioner could be appointed to elucidate additional

information which would assist the Trial Court to decide the main controversy. Some of the orders passed by this Court are as under :-

- 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.*
7. In *Kashinath (supra)*, the Trial Court had decided the suit. The First Appellate Court had dismissed the Appeal. This Court noticed that additional information was required besides the material available on record and hence, the matter was

remanded for appointment of a court commissioner as the oral evidence on record could not conclusively prove the decisive issue in the matter.

8. In view of the above, this petition is, therefore, allowed. The impugned order dated 28/02/2017 is quashed and set aside. The application Exhibit 34 stands rejected.

9. It be noted that after the recording of oral evidence is concluded, if either of the litigating sides moves an application for appointment of a court commissioner, the Trial Court would consider the said application on its own merits.

(RAVINDRA V. GHUGE, J.)

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