

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

WRIT PETITION NO. 5216 OF 2017

ROHIDAS SHANKAR NAWALE
VERSUS
SAVITA AMBADAS NAWALE

...

Advocate for the Petitioner : Shri Gawali Amol K..
Advocate for the Respondent : Shri Phatke Rajendra P.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 27th June, 2018

Per Court:

1 The Petitioner/ Defendant is aggrieved by the order dated 06.03.2017 passed by the Trial Court in RCS No.356/2015 by which, the application Exhibit-15 filed by the Respondent/ Plaintiff seeking an appointment of a court commissioner has been allowed.

2 While issuing notice, this Court has passed an order on 20.04.2017, which reads as under :-

- "1] *Heard learned counsel for the petitioner.*
- 2] *Issue notice before admission to respondent returnable on 16.6.2017.*
- 3] *This petition challenges the order dated 6.3.2017 passed by the learned Joint Civil Judge (J.D.), Ahmednagar. The impugned order has appointed the Court Commissioner to take measurement of the suit land and submit his report alongwith the map. This is done even before the trial has commenced in a suit filed for possession of encroached portion of the*

- property together with mesne profits.*
- 4] *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.*
- 5] *In the above prima facie view, the impugned order dated 6.3.2017 is stayed till the returnable date i.e. 16.6.2017."*

3 The learned Advocate appearing on behalf of the sole Respondent has strenuously defended the impugned order. He contends that the appointment of a court commissioner is a discretionary order considering the effect of Section 75 r/w Order 26 Rule 9 of the Code of Civil Procedure. When the Court finds that a court commissioner would assist the Court in the proper adjudication of the suit, a court commissioner can be appointed. He further submits that it is settled law that when there is a boundary dispute and boundaries have to be measured and fixed, a court commissioner in the form of the Taluka Inspector of Land Records (TILR) can perform this job suitably.

4 The submissions of the learned Advocate for the Respondent are appreciable, but pre-mature. However, 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.

5 Considering the above, this Writ Petition is allowed. The impugned order dated 06.03.2017 is quashed and set aside and the application Exhibit-15, which has been filed before the commencement of the recording of oral evidence, stands rejected.

6 Needless to state, after the recording of oral evidence, in the event any litigating side desires an appointment of a court commissioner, it may make an application and the Trial Court would consider such an application on its own merits.

kps

(RAVINDRA V. GHUGE, J.)