

Mahatma Gandhi Mission, Aurangabad	...	Petitioner
Versus		
The City and Industrial Development Corporation of Maharashtra Ltd. and another	...	Respondents

Mr. V.S. Kadam, Advocate for petitioner.
Mr. A.S. Bajaj, Advocate for respondent No.2

Coram : N.M. Jamdar, J.

Date : 27 November 2018.

ORAL ORDER:

1. By this petition, the petitioner/original plaintiff has challenged the rejection of the application below Exhibit No. 19 in Special Civil Suit No. 179 of 2017 for appointment of the Court Commissioner by the impugned order dated 20 March 2018. According to the petitioner, the petitioner is running *Vipashyana* centre on the suit land and in view of the controversy raised by the respondents/defendants it is necessary to appoint a Court Commissioner to ascertain the factual position. The application was

made by the petitioner under the provisions of Order XXVI Rule 9 of the Civil Procedure Code. The learned Civil Judge, considering the fact that application for temporary injunction is pending and the stage of the suit was not correct for appointment of the Commissioner, rejected the application.

2. It is the contention of the learned Counsel for the petitioner that the petitioner had filed a pursis that the application be treated as under Order XXXIX Rule 7(1)(a) instead of being under Order XXVI Rule 9, which was not considered and the learned Judge be directed to consider the application as under Order XXXIX Rule 7(1)(a). The learned Counsel for the respondent has opposed the said request.

3. The petitioner filed an application for appointment of a Court Commissioner to ascertain whether *Vipashyana* centre situates on the suit plot and whether the plot is fenced. This application was filed on 14 July 2017. The respondents filed their say on 12 September 2017, contending that such an application under Order XXVI rule 9 is not maintainable. It is only after that the say was received, a simple pursis was filed. The learned Counsel for the respondents is right in contending that ambit of both the provisions is entirely different. Filing of a simple pursis without making any change

whatsoever in the original application neither adding any averment, the application under Order XXVI Rule 9 could not have been simply treated under Order XXXIX Rule 7(1)(a). In the impugned order also there is no reference to such a request meaning the pursis was not pointed out. Therefore, the petitioner could not have come out of the defect filing an application under Order XXVI Rule 9 at the stage when it was not warranted, by simply adding two lines that it be treated under another provision having entirely different ambit.

4. In the circumstances, the discretion exercised by the Civil Judge cannot be faulted with. It is, however, clarified that if during the proceedings of the suit, the learned Judge comes to the conclusion that it will assist him in adjudication of the dispute by appointing the Commissioner, the learned Judge has all the powers to do so. Also if the petitioner is entitled in law to file such an application at the subsequent stages in the suit, such a right is not taken away by the impugned order. With these observations, the writ petition is disposed of.

N.M. Jamdar, J.