

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10127 OF 2017

Narayan Rama Jamadar
Age. 75 years, Occ. Nil,
R/o. Jakekurwadi, Tq. Omerga,
Dist. Osmanabad.

...Petitioner.

VERSUS

1. Dinkar Babarao Shinde,
Age. 50 years, Occ. Agri.,
2. Ganpati Motiram Rathod,
Age. 62 years, Occ. Agri.,

Both R/o. Aaurad, Tq. Omerga,
Dist. Osmanabad.

...Respondents.

Advocate for Petitioner : Mr. P.V. Barde.
Advocate for Respondent No. 1 : Mr. Shaikh Shoyab.
Respondent No. 2 is served.

CORAM : RAVINDRA V. GHUGE, J.
DATE : 27th November, 2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. The petitioner/original defendant No. 2 is aggrieved by order dated 09/06/2017, passed by the Trial Court, by which, his application Exhibit 140 filed in R.C.S. No. 19/2005, praying for recalling the 'No evidence' order against him and for appointment of a Commissioner to

record his evidence, has been rejected.

3. While issuing notice on 10/08/2017, this Court has recorded the contentions of the petitioner in its order which reads as under :

“1. The petitioner is aggrieved by the order dated 09/06/2017 by which the Trial Court has refused to appoint a Court Commissioner for recording the evidence of the petitioner / defendant No.2 in RCS No. 19/2005.

2. Contention is that vide Exh. 140, the petitioner brought it to the notice of the Trial Court that he is suffering from paralysis and this right thigh bone has been fractured. He is unable to move out of his bed. The Trial Court has rejected the application as the medical record was not produced before the Court.

3. The petitioner has referred to certain prescriptions of Barbade Hospital advising dosages of medicine as well as a certificate of Om Vishvekar Accident Hospital to indicate that the petitioner is unable to walk. Copy of the medical certificate dated 14/04/2017 is taken on record and marked as “X” for identification.

4. Considering the above, issue notice before admission to the respondents, returnable on 22/09/2017. Copies of the petition paper book shall be supplied on or before 16/08/2017, failing which this petition shall stand dismissed without reference to the Court.

5. Humdast is granted on request.

6. *The Trial Court shall adjourn RCS No.19/2005 beyond the next date of hearing in this matter.”*

4. I have heard the submissions of the learned advocates for the petitioner and the respondents.

5. The petitioner is defendant No. 2 in Regular Civil Suit No. 19/2005, (Old No. 39/1995) which has been filed for removal of encroachment. An immovable property is at issue. Application Exhibit 140 was filed by this petitioner on 09/06/2017, contending that he was suffering from paralysis for more than six months. His spine is affected and his thigh bone (Femur) is dislocated from the hip joint. He is to be physically lifted from his bed and this causes pain. It was, therefore, prayed that the ‘No evidence’ order passed against him be recalled and a Commissioner may be appointed who would record the examination and cross-examination of the petitioner.

6. The plaintiff has strenuously opposed the said application contending that the application was not supported with medical certificates. Learned counsel submits that the suit is of 1995 and because of the dilatory tactics of the defendants, he is still litigating at the first level in the civil litigation for the last 23 years. He, therefore, submits that the defendants have made every effort to delay the matter

and as such, this petition deserves to be dismissed with heavy costs.

7. I do find that the learned advocate for the plaintiff is right in submitting that the suit has been lingering for 23 years having been lodged in the year 1995. His sufferings can be understood. However, an immovable property is at issue. The condition of the petitioner can be *prima facie* assessed in view of the document Exhibit 'X' placed on record and in view of the medial papers which have been cited by the petitioner across the bar. In this backdrop, by appointing a Court Commissioner for recording the deposition of this petitioner, ends of justice would be met. The costs to be paid to such Commissioner shall be borne by this petitioner.

8. In view of the above, this petition is allowed. The impugned order dated 09/06/2017, is quashed and set aside. Application Exhibit 140, is allowed subject to the following directions :

(a) The Trial Court would appoint a practicing advocate with a standing of at least 15 years at the bar, as the Court Commissioner, within three weeks from today.

(b) The petitioner shall deposit the costs to be paid to the Court Commissioner, within two weeks from the date of the order of the Trial Court.

(c) Failure to pay the charges would permit the Trial Court to pass a fresh order of closing evidence of this petitioner and proceed with the matter.

(d) Along with depositing costs, the petitioner/defendant No. 2 would tender his affidavit in lieu of examination-in-chief sworn before a notary and supply a copy forthwith to the plaintiff.

(e) If the direction to deposit costs is complied with, the Trial Court shall decide an early date and preferably before 15/01/2019, for the parties to travel to the place of the defendant No. 2 and to enable the plaintiff to cross-examine him.

(f) Considering that the suit is pending for 23 years and would be entering the 24th year in 2019, the Trial Court shall ensure that RCS No. 19/2005 (Old No. 39/1995) shall be decided on/or before the 30/06/2019.

(g) Consequentially, the no cross order stands set aside.

9. Rule is made absolute in the above terms.

(RAVINDRA V. GHUGE, J.)