

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

915 WRIT PETITION NO. 11310 OF 2018

NAMDEO SAMBHAJI BACHPALLE
VERSUS
DHANANJAY VITHALRAO GAIKWAD

WITH

921 WRIT PETITION NO. 11319 OF 2018

SUBHASH GANPATI KOLHE
VERSUS
MEENA DHANANJAY GAIKWAD

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Advocate for the Petitioner : Shri A. H. Kasliwal
Advocate for the Respondent : Shri Kunal Kale h/f.
Shri R. S. Deshmukh

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 11th OCTOBER, 2018.

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PER COURT :

1. In both these matters, the petitioner is the original plaintiff and appellant before the First Appellate Court in MCA No.22/2017 and 23/2017. The application for seeking appointment of a court commissioner Exhibit 15 in both the Appeals, have been rejected by the impugned orders.

2. I have considered the submissions of the learned

Advocate for the respective sides and have gone through the petition paper book with their assistance.

3. It is undisputed that Exhibit 5 application under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure is pending for adjudication before the Appellate Court. Both the Appeals are directed against an interlocutory order passed by the Trial Court, by which, the application seeking temporary injunction has been rejected.

4. This Court has consistently taken a view that until the recording of oral evidence is concluded, a court commissioner should not be appointed before the Trial Court.

5. Some of the judgments/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.

6. It is contended by the petitioners that since the Appeals are pending, there is no issue of adducing fresh evidence unless an application is specifically filed under Order 41 Rule 27 of the Code of Civil Procedure. Hence a court commissioner could be appointed at any stage. The learned Advocate for the respondent submits that the Appeal is a continuation of the suit and an application seeking temporary relief has to stand or fall on its own feet.

7. I do not find that the submissions of the petitioner can be accepted in view of the orders of this Court referred to above.

8.. However, in the event any of the litigating sides moves an application for seeking appointment of a court commissioner after the decision of the Appellate Court on the application Exhibit 5, the Trial Court would consider the said application on its own merits keeping in view Order 41 Rule 27 of the Code of Civil Procedure and/or any other provision cited.

9. In view of the above, I do not find that the impugned order passed by the Appellate Court could be termed as being perverse or erroneous. Both these petitions, being devoid of merit are, therefore, dismissed.

(RAVINDRA V. GHUGE, J.)

shp/-