

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

928 WRIT PETITION NO.10598 OF 2016

Kondaji Barku Khemnar and others.

Petitioners.

Versus

Bhaskar Devji Khemnar and another.

Respondents.

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Advocate for Petitioners : Mr. Bajaj Anil S.
Advocate for Respondent No.1 : Mr Shermale K. N.

Coram : N.M. Jamdar, J.
Date : 18 December 2018.

ORAL ORDER :-

1. Heard the learned Counsel for the parties.
2. By this petition, the petitioners have challenged the order passed by the learned Civil Judge (Senior Division), Sangamner, dated 31 August, 2016 rejecting the application for appointment of a Court Commissioner.
3. The main ground given by the learned Civil Judge is that, the appointment of the Court Commissioner would amount to

collection of evidence.

4. The suit is filed by the respondents/plaintiffs in the Court of the Civil Judge (Junior Division), Sangamner, seeking an order of injunction against the petitioners that they should not obstruct the cultivation of the respondents, petitioners should not install the electric meter on the old well owned by the respondents and the petitioners should not carry out excavation or construction. It is the contention of the respondents/plaintiff that though the petitioners have a right in respect of the new well, they have no such right in respect of the old well. In this suit, a counter claim is filed by the petitioners alongwith the written statement, in which the petitioners have claimed the declaration of ownership of one of the well and they have electricity connection on the same.

5. Therefore, both the parties are seeking an order of injunction against each other. Alongwith the written statement, the petitioners have placed on record a map. From this map, the case of the petitioners is that there are five wells in the area which were earlier in one survey number. Subsequently, they have been given gat numbers and there are two wells adjacent to each other. It is the case of the petitioners that it is not possible for the petitioners to establish as to on which well exactly the electric pump is fitted and electric

connection is taken and though paper position may appear to support the respondents/plaintiffs, in reality, the situation is different in view of the changes in the gat numbers and also bills would not show the exact location. It is the contention of the respondent that it is possible for the petitioners to show in which well the petitioners are claiming right and it is not necessary to appoint the Court Commissioner. The learned Counsel for the petitioners has relied upon the decisions in the cases of *Yeshwant Bhaduji Ghuse Versus Vithobaji Laxman Ladekar*¹ ; *Venubai Valuji Talekar (Awari) and others Versus Ranjana Ramesh Nisal and others*². The learned Counsel for the respondent has relied upon the decisions in the case of *Sanjay Namdeo Khandare Versus Sahebrao Kachru Khandare and others*³ ; *Ayyaz Shoukatali Sayyed and another Vs. Mohd. Moid @ Ajamatali S/o Mohd. Yasin Shaikh and others*⁴ ; and *Bhaskar Devji Khemnar Vs. Kondaji Barku Khemnar and others*⁵.

6. The impugned order proceeds primarily on the ground that the Court Commissioner cannot be appointed for collection of evidence. The learned Civil Judge has taken this as an absolute proposition of law.

1 [2010(2) ALL MR 694] 2 Writ Petition No. 8003 of 2013 delivered on 23 February 2015 of this Court.

3- [2001 (2) Mh.L.J. 959] 4 – Writ Petition No. 9089 of 2011 delivered on 17 January 2012 of this Court

5- Writ Petition No. 2285 of 2015 delivered on 28 September 2015 .

Basic position is that a party seeking relief from the Court has to prove its own case and cannot rely only on the Court Commissioner to collect the evidence. However, there is no absolute embargo to appoint a Court Commissioner. In case of boundary disputes it is some time desirable to appoint a Court Commissioner. Even if the case does not involve the boundary dispute or removal of encroachment, where the Court feels there exists circumstances where it is not possible for a party to demonstrate the actual position on the site on the basis of the documents alone, the Courts are not powerless to appoint the Court Commissioner. This view has been taken in the decision in case of *Yesabao Rangrao Lokhande Vs. Maroti Late Nagan Bitewar reported in 2004 (1) ALL MR 909* and *Habibkhan s/o Inauttalkhan and ors Vs. Waman s/o Govind Rathod and others reported in 2012 (1)ALL MR 803* and decision in the cases of under quoted *Venubai Valuji Talekar*.

7. In the case of *Ayyaz*, (supra) relied upon by the respondent, the learned Single Judge of this Court has observed that ultimately the appointment of the Court Commissioner is a discretionary and the discretion has to be used judiciously. In the decision in the case of *Sanjay Khandare* (supra) the learned Single Judge of this Court found that there was no cogent reason to deviate

from the general rule of not appointing a Court Commissioner purely for collecting the evidence.

8. Therefore, what is material to examine is to examine the facts of the case. The learned Civil Judge in the impugned order, in one paragraph has observed that, if it is the contention of the petitioners that electricity connection is taken by them and they have installed electric meter on the well, they can prove the same by leading the other evidence, for which appointment of the Court Commissioner is not necessary. There is no reference of five wells and change of survey number into gat numbers by passage of time. There is also no reference to the fact that where the electricity connection has been taken for the electric pump. How that would be established by documentation is not explained. It is only stated that it can be done by way of documents.

9. Considering the evidence put up by the petitioners, I am of the opinion that it is not feasible to demonstrate the actual position on the site based only on electricity bills and documents. For the purpose of ascertaining whether the electricity connection has been taken in respect of well to which the petitioners claim right, appointment of Court Commissioner is necessary and ought to have been considered.

10. In these circumstances, the writ petition is allowed. The order passed by the learned Civil Judge below Exh.21 quashed is set aside. Exh.21 filed by the petitioners is allowed. It will be the discretion of the learned Civil Judge as to whom he should appoint as a Court Commissioner. The Court Commissioner can be preferably an independent person from the Electricity Department, who will be able to ascertain the exact location of the well, wherein the electricity connection is sought to be taken by the petitioners.

11. It is made clear that, the observations made in this order are in the context of appointment of the Court Commissioner and the suit will be decided on its own merits. Needless to state that after report of the Court Commissioner is submitted, the respondents/plaintiff will be entitled to cross examine the Commissioner and dispute its veracity, as may be permissible in the law.

12. Writ Petition is disposed of in above terms.

(N.M. Jamdar, J.)

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