

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.13556 OF 2017

Balaji Chandrapal Sude,
Aged-33 years, Occu-Service and Agriculturist,
R/o New Shopping Center, Ahmedpur,
Tq.Ahmedpur, Dist.Latur -- PETITIONER

VERSUS

1. Parvatibai w/o Sambappa Nijwante,
Aged-87 years, Occu-Household,
R/o Ahmedpur, Tq. Ahmedpur,
Dist.Latur,

Through Power of Attorney Holder,
Shankarappa s/o Sambappa Nijwante,
Aged-53 years, Occu-Agriculturist,
R/o Saraswati Colony, Thodga Road,
Ahmedpur, Tq.Ahmedpur,
Dist.Latur,

2. The Chief Officer,
Municipal Council, Ahmedpur,
Tq Ahmedpur, Dist.Latur -- RESPONDENTS

Mr.A.N.Irpatgire, Advocate for the petitioner.
Mr.R.S.Patil, Advocate for respondent No.1.
Mr.R.S.Banik h/f Mr.V.P.Latange, Advocate for respondent No.2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 28/06/2018

ORAL JUDGMENT :

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

2. While issuing notices, this Court has passed the following order on 22/11/2017 :-

"1. Learned counsel for the petitioner-original defendant no.1 submits that, the respondent-plaintiff has instituted the suit for permanent injunction, for removal of the illegal construction and also for mandatory injunction to demolish the illegal construction carried out by the petitioner-defendant No.1. Learned counsel submits that, there is no pleadings to the effect that there is violation of the easementary right and even in the application Exh.20, respondents-plaintiffs nowhere contends that appointment of the Court Commissioner is required to find out whether there is violation of easementary rights. Learned counsel submits that, even then the trial court has considered the ground of violation of easementary rights as main ground and allowed the application exh.20 and appointed the T.I.L.R. as Court Commissioner. Learned counsel submits that, Municipal Council is also a party defendant to the suit and, it is for the Municipal Council to place on record all the relevant documents to show that the construction permission has been granted to the petitioner-defendant no.1 as per the rules and in accordance with the law. Learned counsel submits that, by way of the application Exh.20, respondent-plaintiff is collecting the evidence through the Court Commissioner and same is not permissible.

2. In view of the above, issue notice to the respondents,

returnable on 17.1.2018.

3. Till the next date of hearing, further proceedings in RCS No.66/2016 are hereby stayed.”

3. Learned Advocate for the original plaintiff strenuously submits that the impugned order is just and proper. No recording of evidence has commenced. Issues have been framed. The written statement of this petitioner/original defendant No.1 is silent about the parameters of the constructions erected by him. He has resorted to excess construction which is illegal. It is beyond the sanctioned plan and therefore the TILR can inspect the construction and prepare a report as to whether this petitioner has made excess construction and whether that is illegal.

4. It is settled law that a Court Commissioner cannot be appointed for collecting evidence. One who alleges has to prove. Respondent No.1/original plaintiff has alleged that this petitioner has resorted to excess construction. To support his allegations, he has to lead evidence and it is only when the Trial Court is convinced that some more information needs to be elucidated through a Court Commissioner, it could do so after the recording of oral evidence.

5. This Court has consistently held that a Court Commissioner cannot be appointed until the recording of oral evidence is completed.

6. It is obvious from the impugned order that the Trial Court has directed the TILR to inspect the construction over the suit plot, verify from the sanctioned plan as to whether any excess construction has been caused and whether that would amount to an illegal construction. It is apparent that such directions cannot be issued by the Trial Court as it amounts to assisting the plaintiff in collecting evidence.

7. In view of the above, this petition is allowed. The impugned order dated 05/10/2017 is quashed and set aside. Application Exh.20 stands rejected. Rule is made absolute in the above terms.

(Ravindra V.Ghuge, J.)