

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1641 OF 2014

Hirabai Annu Sambhushete deceased through legal heir Mahavir Annu Sambhushete	..	Petitioner
vs.		
Bapuso Govind Katkar	..	Respondent

Mr. Satyavrat Joshi for Petitioner.
Mr. Vijay Killedar for Respondent.

CORAM : M. S. SONAK, J.
DATE: 26 MARCH 2018

P.C :

- 1] Heard Learned counsel for the parties.

- 2] The challenge in this petition is to the order dated 2nd January 2014 made by the Joint Civil Judge, Junior Division, Jaysingpur, below Exhibit 64 in Regular Civil Suit No. 94 of 2004 appointing a court commissioner in exercise of powers conferred by Order XXVI Rule 9 of the Civil Procedure Code.

- 3] Mr. Joshi, the learned counsel for the petitioner submits that by the impugned order, the learned trial court, has appointed a court commissioner for collection of evidence. He submits that this is impermissible. He relies on ***Sanjay s/o. Namdeo Khandare vs. Sahebrao s/o. Kachru Khandare & Ors.***¹ and ***Syed. Mushtaque Ahmad s/o. Syed. Ismail & Ors. vs. Syed Ashique Ali Khan s/o.***

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Haidar Ali² in support of his contention that the Courts cannot, in exercise of its powers under Order XXVI Rule 9 of the CPC appoint court commissioner to collect evidence. Mr. Joshi further submits that the reasons set out in the application at Exhibit 4 seeking for appointment of court commissioner finds no place in the pleadings and that is another ground, on which, the impugned order is liable to be interfered with.

4] Mr. Killedar, the learned counsel for the respondent (original defendant) submits that there is no jurisdictional error whatsoever in the impugned order. He submits that there are allegations of encroachment made in the pleadings and if in these circumstances, civil court, expressed an opinion that it would be helpful to the court to determine the real dispute between the parties by appointment of commissioner, then, there is no case made out to interfere with the impugned order.

5] Rival contentions now fall for determination.

6] From the material on record, it is clear that there are allegations of encroachment made in the pleadings. The civil court, in the impugned order has held that appointment of a court commissioner, in such circumstances, to measure the land, will assist the court in proper determination of the matter. The court

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commissioner, upon completion of the commission, may produce the report and may also be offered for examination. The parties will have full opportunity to raise their grievances against such report including, *inter alia*, by way of examination and cross-examination of the court commissioner. Thus construed, it cannot be said that the appointment of the court commissioner in the present case, is to secure or to collect evidence for any one of the parties to the suit. It is important that in the present case, the civil court has itself held that it would be helpful to the court if, the commissioner is appointed and such commissioner, is called upon to measure the land and submit a report. There is really no jurisdictional error in the making of the impugned order.

7] The two decisions relied upon by Mr. Joshi were on their own facts. There was a dispute as to which of the parties was in possession or there was a dispute as regards the stage of construction. It is in this context, this court, has held that the court commissioner cannot be appointed for collection of evidence on behalf of any one of the parties. The position in the present case is quite different and therefore, the two decisions will not apply.

8] For all the aforesaid reasons, this petition is dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)