

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 4798 OF 2018

Sachin Suresh Thakare ... Petitioner
Vs.
Sanjay Balasaheb Godse & Ors. ... Respondents

Mr. Sachin Gite, Advocate for the petitioner.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **6th June, 2018.**

P.C.:

This Petition is filed under Article 227 of the Constitution of India taking exception to the order dated 8th March, 2018 below Exhibit 54 in Election Petition No. 1 of 2015 passed by the learned District Judge, Nashik. The Application for appointment of Court Commissioner was filed by the plaintiff, who is respondent No. 1. It is contended in the Election Petition that the petitioner/defendant has carried out illegal construction on Survey No. 353/1/A of Village Bhagur and also change the plan of his residential house. The Application for appointment of Court Commissioner was contested by the petitioner by filing reply. However, the learned Judge allowed the said Application, against which this Writ Petition is filed.

2. The learned counsel for the petitioner has submitted that the

appointment of Court Commissioner will amount to collection of evidence, which is not allowed in law. In support of his submissions, the learned counsel relied on the judgment of Single Judge of this Court in the case of **Syed Mushtaque Ahmad s/o. Syed Ismail & Ors. vs. Syed Ashique Ali Khan s/o. Haidar Ali**, reported in **2011 (6) Mh. L.J. 334**.

3. Perused the ruling of **Syed Mushtaque Ahmad** (*supra*). In the said case, the Court Commissioner was appointed giving report regarding location and possession of the suit site and whether there is any construction going on. The Court has taken a view that if there is a boundary dispute or any encroachment, then the report of the Court Commissioner will help the Court. In the said suit, there was a challenge given to the sale deed and also there was consequential relief of injunction regarding possession of the suit portion and the Court has taken a view that under such circumstances, the appointment of Court Commissioner is unwarranted.

4. It is a settled law that the Court Commissioner cannot be appointed to collect the evidence. However, as per the words used in Rule 9 Order 26, it is the discretion of the Court to appoint Court

Commissioner if the Court thinks that it is necessary to carry out local investigation for the purpose of elucidating any matter in dispute. In the case of **Syed Mushtaque Ahmad** (*supra*), the Single Judge of this Court has also held that if the report of the Court Commissioner is going to facilitate the Judge to arrive at a proper decision, then the appointment of Court Commissioner is justified. The collection of evidence and investigation of elucidating the matter or facilitating the Court to arrive at proper decision have fine shades of interpretation. It all depends on the facts of the case. In the present case, the learned District Judge, in paragraph 2 of his order has mentioned that “The Court Commissioner can go to the spot and ascertain whether any construction is made or not. Whether it is legal or illegal construction can be proved by other mode and not by the Court Commissioner”. Thus, it appears that the learned District Judge is clear that at the time of deciding whether the construction is authorized or not, he will look into the approved plan of the Corporation and on that basis it can be ascertained. Thus, I do not find any illegality in the order passed by the District Judge. Hence, Writ Petition is dismissed in limine.

(MRIDULA BHATKAR, J.)