

WRIT PETITION NO. 11903 OF 2017

Versus

- Mr.Karl Tamboly a/w. Ms.Madhulika Murthy i/b.Mr.Arun Panickar for the Petitioner.
- Mr.Saurabh D. Butala for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th JANUARY, 2018.

P.C. :

1] Heard learned counsel for the Petitioner and Respondent No.1.

2] By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioner is challenging the legality, validity and propriety of the order dated 20th July, 2017 passed by 2nd Joint Civil Judge Senior Division, Kalyan, below Exhibit-130 in Special Civil Suit No.180 of 2016.

3] The application at Exhibit-130 was filed by the Respondent No.1/Plaintiff under Order-26 Rule-9 of Civil Procedure Code (for short "C.P.C.") for appointment of T.I.L.R. as a Court Commissioner.

4] By the impugned order, the trial Court has allowed the said application and directed the T.I.L.R. to measure the suit land, demarcate the boundaries thereof and submit the map with clear position existing over there.

5] While challenging this impugned order of the trial Court, the submission of learned counsel for the Petitioner is that without

there being any sort of boundary despite, under the camouflage of such dispute, the Respondent No.1 herein has got the appointment of Court Commissioner and that too, for the obvious purpose of collecting the evidence. It is urged by learned counsel for the Petitioner that this Court has in ample number of authorities held that the Court Commissioner cannot be appointed for collecting evidence. Hence, in the instant case, as on mere asking of the Respondent No.1, the trial Court has appointed the Court Commissioner and that too for collecting the evidence, to know the existing situation over the suit property, on this ground itself, the impugned order, passed by the trial Court, needs to be quashed and set-aside.

6] Secondly, it is submitted that the Petitioner has produced on record the sanctioned plan to show that since the year 1992 septic tanks are in existence and, therefore, there is no question at all of the Petitioner recently making any encroachment over the land of the Respondent No.1 as alleged in the suit. According to learned counsel for the Petitioner, the documentary evidence was clear to rule out the case of encroachment and for that purpose, the appointment of T.I.L.R. as Court Commissioner was not at all necessary.

7] Thirdly, it is submitted that the Petitioner has raised contention in the written statement that the suit is barred by

limitation and the issue of limitation needs to be decided as preliminary issue under Section 9A of C.P.C. The application to that effect is also filed. However, before deciding the said issue, the trial Court has allowed this application for appointment of Court Commissioner. On that ground also, the impugned order cannot be sustained in law.

8] To substantiate his submissions, learned counsel for the Petitioner has relied upon the judgment of this Court in the case of *c 2009 SCC Online Bom.51*, wherein it was held that, *“the perusal of the provisions of Section 9A of C.P.C. makes it clear that whenever there is an application for grant of temporary injunction or appointment of Receiver is sought before any Court and an objection to the jurisdiction of the Court to entertain the suit in which the application for such interim relief has been made by any of the parties, then it becomes the duty of the Court to first frame the preliminary issue as to the jurisdiction of the Court to entertain the suit and decide that issue and thereafter take up for consideration the application for interim relief”*.

9] According to learned counsel for the Petitioner, therefore, the trial Court should not have taken up this application for appointment of Court Commissioner for hearing, before deciding the

preliminary issue of limitation.

10] Learned counsel for Respondent No.1, however, submits that as on today also, no such preliminary issue is framed by the trial Court as the application to that effect filed by the Petitioner under Section 9A of C.P.C. is yet not decided. Therefore, this contention cannot be of any help. Secondly, it is urged that here in the case, the appointment of the Court Commissioner is sought and not the appointment of Court Receiver or the relief of interim injunction. Hence, this judgment in *Royal Palms (India) Pvt. Ltd. & Ors. V/s. Bharat Shantilal Shah & Ors.(supra)* cannot be applicable.

11] It is submitted that, as it is a boundary dispute between the parties, the trial Court has rightly appointed the T.I.L.R. as a Court Commissioner, which is not for the purpose of collecting any evidence but to bring on record the existing position of the suit land. According to learned counsel for Respondent No.1, therefore, the impugned order passed by the trial Court being just, legal and correct; no interference is warranted therein.

12] Perusal of the impugned order passed by the trial Court reveals that the trial Court has considered the fact that the Respondent No.1--Plaintiff has come before the Court with a specific

case of being the owner of the suit property bearing Survey No.1, Hissa No.7 ad-measuring 710 square meter situated at Mouje Barave, Tal. Kalyan and that the Petitioner by making encroachment on the property of Respondent No.1 is making construction of the septic tanks and the compound wall. It is stated in the plaint that the Petitioner has made construction of the septic tanks on the property of Respondent No.1 and therefore, there is a boundary dispute and hence, the Respondent No.1 sought to get the land measured on 30th April, 2016. However, the Petitioner did not allow him to do so. Hence, it was averred that, the appointment of T.I.L.R. as the Court Commissioner is necessary, to decide the boundary dispute, to know whether any encroachment is made in the suit property.

13] The trial Court, has in this respect, considered the two judgments of this Court, which were relied upon by learned counsel for Respondent No.1 viz. *Shyam Janardhan Chaoudary V/s.Asha Ramdas Katkar & another, 2014(5) Mh.L.J.770*, and *Bento anotonio Gomes alias Antonioa Bento Gomes V/s. Rosario Salvador Carneiro and Other, 2014(4) Mh.L.J.366*, wherein it is held that in the case of dispute about the boundaries and encroachment on the immovable property, appointment of T.I.L.R. as a Court Commissioner can assist the Court to find out whether there has been an encroachment.

14] In this case, admittedly, the case made out by the Respondent No.1 before the trial Court was that of the Petitioner carrying out construction on its property, by making encroachment. The Respondent No.1 has already made an attempt to get the measurement done through T.I.L.R. but the Petitioner objected to the same. Hence, the trial Court has rightly held that, in order to decide the real controversy between the parties, the appointment of the T.I.L.R. as a Court Commissioner in such case is essential. It is also the law laid down by this Court in number of authorities that, whenever the dispute is raised about the encroachment on the immovable property, then it is always desirable to get the measurement of the land done by an expert like T.I.L.R., as that will assist the Court in resolving the dispute. Hence, no fault, as such, can be found in the impugned order of the trial Court in appointment of T.I.L.R. as the Court Commissioner for measurement of the property and for brining on record the map with clear position existing over there.

15] It is the submission of learned counsel for the Petitioner that appointment of T.I.L.R. as Court Commissioner is as good as amounting to collecting evidence and for collection of evidence, Court Commissioner cannot be appointed as held in the judgment of this Court in the case of *Sanjay Namdeo Khandare V/s. Sahebrao Kachru*

Khandare & Ors., 2001(2) Mh.L.J.959. However, as held in the above-said authority of *Shyam Janardhan Chaoudary V/s.Asha Ramdas Katkar & another (supra)*, the appointment of T.I.L.R. like appointment of any lay person as a Court Commissioner is not for the purpose of collecting evidence, but for bringing on record the existing situation, so that the Court can arrive at its proper finding.

16] The contention that the trial Court has allowed this application for appointment of T.I.L.R. as a Court Commissioner, before deciding the preliminary issue under Section 9A of C.P.C. relating to limitation, also cannot be accepted, because as yet the trial Court has not framed the issue of limitation as preliminary issue as the application to that effect filed under Section 9A C.P.C. by the Petitioner is yet not decided. Secondly, the issue of limitation, as preliminary issue can be decided independently even without any reference to this report of Court Commissioner. However, if such issue is framed by the trial Court, in that case under Section 9A(2) of C.P.C. the Respondent No.1 becomes entitled to get some interim relief and for grant or refusal of such relief the report of T.I.L.R. can be of assistance to the trial Court. Therefore, it cannot be said that the trial Court has committed any illegality in allowing the said application of Respondent No.1 at this stage.

17] Moreover, in the case of *Royal Palms (India) Pvt. Ltd. & Ors. V/s. Bharat Shantilal Shah & Ors. (Supra)*, it was held that whenever the application is made for grant of temporary injunction or appointment of Receiver, then said application should not be considered before deciding the preliminary issue. In the present case, the application is for appointment of Court Commissioner and not for appointment of Court Receiver. As such, on this aspect also, there is no reason to hold that the impugned order passed by the trial Court suffers from any illegality, so as to warrant interference therein.

18] The Writ Petition, therefore, being without merits stands dismissed.

19] As this stage, on the request of learned counsel for the Petitioner, it is clarified that whatever observations are made here-in-above are only for the purpose of deciding this Writ Petition and they are not to be used for any other purpose.

[DR.SHALINI PHANSALKAR-JOSHI, J.]