

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3491 OF 2017

Mr. Rajaram Krishnaji Shinde
(Deceased) & Anr.

....Petitioners

V/s.

Mr. Tabaji Krishnaji Shinde & Ors.

....Respondents

Mr. Sandeep Mishra for the Petitioners.

None for the Respondents.

CORAM : M.S. SONAK, J.

DATE : 1st MARCH, 2018

P.C.

1. Heard Mr. Mishra, the learned counsel for the petitioners.
2. The challenge in this petition is against the order dated 17.09.2016 by which the learned Trial Judge has rejected the petitioners' application for appointment of Court Commissioner.
3. Mr. Mishra submits that the issue involved in the suit is about access. He submits that the petitioners-plaintiffs have pleaded that there is only one access available and the case pleaded by the respondents-defendants as regards alternate access is false. He

submits that, in these circumstances, it is only appropriate that the Court Commissioner is appointed to visit the site and report the facts. Relying upon the decision of this Court in *Kolhapuri Bandu Lakade V/s. Yallappa Chinappa Lakade, since deceased through Pooja @ Poojary Y. Lakade & Ors.*¹, Mr. Mishra submits that the report of the Court Commissioner is never conclusive and parties can always be granted opportunity to cross examine the Court Commissioner. He submits that after the Court Commissioner is appointed, then no prejudice will occasion to either parties. Mr. Mishra has placed reliance on certain other judgments which also takes the view that the parties should be granted full liberty to produce the best evidence and if best evidence is available by appointment of Court Commissioner, then the Court should appoint the Court Commissioner for that purpose.

4. Mr. Mishra also fairly points out that order dated 23.12.2016 made by the Principal District Judge, Pune transferred the suit from the Court of Jt. Civil Judge Jr. Division, Junnar to the Court of Civil Judge Jr. Division, Junnar, Dist. Pune. He points out that in the said order, the learned Principal District Judge has issued direction to the

¹ [2011(3) Mh.L.J.348]

Civil Judge Jr. Division, Junnar to decide the application for appointment of Court Commissioner as expeditiously as possible.

5. As regards, the order dated 23.12.2016 is concerned, it appears that the direction to decide the application for appointment of Court Commissioner as expeditiously as possible has been issued by mistake. This is because, there is no dispute that the application for appointment of Court Commissioner had already been disposed of by order dated 17.09.2016, which is impugned in the present petition. Accordingly, there arises no question to once again decide the application for appointment of Court Commissioner.

6. Upon due consideration of the submissions of Mr. Mishra, there is no case made out for interference with the impugned order. The issue in which in this case is “Whether there is only one access as contended by the petitioners?” or “Whether there is more than one access?” or “Whether there is any alternate access as contended by the respondents?” In such a matter, it cannot be said that the discretion not to appoint the Court Commissioner has been exercised unreasonably or unfairly by the learned Trial Judge. On that term, the learned Trial Judge has observed that this is a matter for

evidence and both parties can lead their own evidence as regards this aspect. The learned Trial Court has correctly observed that the purpose for appointment of Court Commissioner is not to assist the parties with collecting evidence. In the absence of any error or unreasonable exercise of discretion, there is no question to interfere with the impugned order in the exercise of jurisdiction under Article 227 of the Constitution of India. The decisions relied upon by Mr. Mishra turn on their own facts and do not really assist the case of the petitioners. Some of the cases relied upon relates to boundary dispute where it was observed that examination by Court Commissioner at the spot would really assist the Court in better appreciation of the issues involved.

7. Therefore, upon due consideration of all the aforesaid circumstances, there is no case made out to interfere in the impugned order.

8. This Petition is therefore dismissed.

9. There shall be no order as to costs.

(M.S. SONAK, J.)