

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1890 OF 2019
(Bhika Mahadu Katkar and another Vs. Arjun Bhimraj Ghode)

Mr.S.B.Kadu, Advocate for the petitioners.
Mr.A.D.Shinde, Advocate for respondent No.1.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 09/07/2019

PER COURT :

1. The petitioners/defendants are aggrieved by the order dated 26/07/2018 passed by the Trial Court, vide which application Exh.21 seeking appointment of a Court Commissioner in RCS No.60/2016, has been rejected.

2. The learned Advocate for the petitioners has strenuously criticized the impugned order. He draws my attention to the 6 grounds formulated by him in the memo of the petition. He relies upon the judgments delivered by this Court in the matters of Kolhapuri Bandu Lakade Vs.Yallappa Chinappa Lakade, deceased, through Pooja Lakade and others [2011(3) All MR 599], Sanjay Namdeo Khandare Vs.Sahebrao Khandare [2001(2) Mh.L.J. 959] and Bento Antonio Gomes @ Antonio Bento Gomes Vs. Rosario Salvador

Carneiro and others [2014 (4) Mh.L.J. 360] to support his contention that in the case of a boundary dispute, a Court commissioner can be appointed.

3. The learned Advocate for the plaintiff submits that if the suit is merely for seeking mandatory injunction against the respondent, he will have to prove before the Trial Court that the defendant is disturbing his peaceful possession and is interfering with the *bandh* and the tress that are standing. No Court Commissioner is necessary in such matters because the issue is of causing disturbance and the onus would be on the plaintiff to prove that the defendant is creating disturbances for which he needs to be injuncted.

4. This Court has held consistently, some of the orders are as under, that a Court Commissioner normally should not be appointed until the recording of oral evidence is concluded :-

“(1) Syed Mushtaque Ahmad Syed Ismail and others Vs. Syed Ashique Ali Khan Hatdar [2011 (6) Mh.L.J. 334 = 212 (2) Bom. C.R. 790],

(2) Nalubai Shinde and others Vs. Gopinath Shinde [2011(2) Mh.L.J.991],

(3) Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314.

(4) Chandrakant Kashinath Dike and others vs. Smt.Satyabhama Vishwanath Dike and another, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.

(5) Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.

(6) *Dipak Laxman Gadekar and anr. Vs. Trimbak Ravji Shirsath, Writ Petition No. 11593/2015 (Aurangabad Bench), decided on 23/08/2017,*

(7) *Mahadeo s/o Vaijanath Bembalge Vs. Chandrakala w/o Ramesh Athane, Writ Petition No. 832/2018 (Aurangabad Bench), decided on 04/06/2018,*

(8) *Dhondiram Nivrutti Pawar through L.Rs. Vs. Laxman Khashaba Pawar and others, Writ Petition No. 1196/2017, (Bombay Bench), decided on 23/01/2018,*

(9) *Sanjay Balasaheb Khandare Vs. Vivek Surinder Mahajan and another, Writ Petition No. 4958/2018,(Aurangabad Bench), decided on 29/01/2018."*

5. In view of the above, I find that the Trial Court has not committed any error in rejecting Exh.21. This petition, being devoid of merit, is therefore dismissed.

6. It be noted that keeping in view the nature of the cause of action, if any litigating side moves an application before the Trial Court for appointment of a Court Commissioner after the recording of oral evidence has concluded, the Trial Court would consider the same

on its own merits, without being influenced by the observations in the impugned order dated 26/07/2018 and shall assess as to whether a Court Commissioner is required to be appointed.

(Ravindra V.Ghuge, J.)