

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1501 OF 2015

1. Shashikalabai W/o. Atmaran Patil,
Age – 52 years, Occupation – Agriculturist
and Housewife, R/o. At Post – Kodoli,
Tal. - Jamner, District – Jalgaon
2. Kalpana W/o. Ramesh Patil,
Age – 50 years, Occupation – Agriculturist and
Housewife, R/o. At post – Kodoli,
Taluka – Jamner, District – Jalgaon

.. Petitioners
(Orig. Plaintiffs)

Versus

1. The Gramsevak,
Group Grampanchayat, Kodoli,
At post – Kodoli, Tal. - Jamner,
District – Jalgaon
2. The Sarpanch,
Raghunath Ramdas Pardhi,
Age – 54 years, Occupation – Sarpanch
and Agriculturist, Group Grampanchayat,
Kodoli, At post – Kodoli,
Tal. - Jamner, District – Jalgaon

.. Respondents
(Orig. Defendants)

...

Mr. B.K. Patil, Advocate for petitioners
Mr. Milind M. Patil (Beedkar), Advocate for respondents

...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 28-01-2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned
counsel for the parties finally, by consent.

2. Petitioners had moved trial court instituting regular civil suit bearing no. 9 of 2015 seeking injunction in respect of land gat no. 123-A admeasuring 1 *Hectare* 56 *Are* and land gat no. 123-B also admeasuring 1 *Hectare* and 56 *Are*, contending that the lands have been purchased along with well in 2008 and are in possession and enjoyment of the same.

3. Petitioners' counsel submits that there is one land bearing gat no. 125 wherein as well there is a well and the respondents herein have installed water pump and electricity supply has been given to same. Respondents do not have any concern with lands gat no. 123-A and 123-B and have no right at all to use water therefrom, however, respondents are acting arbitrarily and are trying to obstruct petitioners' entry over the same.

4. While petitioners' application for temporary injunction against respondents is yet pending, respondents filed an application Exhibit - 25, seeking appointment of commissioner developing a theory of mistake and for physical inspection of property. It is being submitted that appointment of court commissioner, in such a case, would tantamount to collection of evidence. On that ground as well as the application, being at

premature stage even before the parties have led evidence, is untenable.

5. Counsel for respondents strenuously submits that looking at the larger public interest, such an application had been moved and had been granted. He further submits that there is no absolute embargo under law nor law puts restriction on powers of court to pass orders of appointment of commissioner. He submits that there may be instances when even before evidence is adduced, such an appointment would be necessary.

6. Looking at the position in present matter, it appears that lot of substance gets infused in the submissions of learned counsel for petitioners having regard to observations of learned Single Judge of this court in order dated January 23, 2015 in writ petition no. 21 of 2015, wherein it has been observed, thus,

“ 1. The petitioner is aggrieved by the order dated 10.10.2014, passed below Exhibit 51, by which, the request for appointment of the Court Commissioner under Order XXVI Rule 9 of the CPC has been turned down. It is fairly stated by the learned Advocate for the petitioner that issues are yet to be cast and therefore, recording of evidence is yet to commence. It is at this stage that application Exhibit 51 was filed.

2. This Court has consistently taken a view that the appointment of a Court Commissioner is to assist the Court by elucidating such information as would enable the proper adjudication of the matter and when evidence recorded may not make the picture clear before the Court.

3. This Court (Coram : S.S.Shinde, J.) has held in W.P. No. 2749/2012 decided on 04/03/2013 that an application for appointment of Court Commissioner need not be filed at a pre-mature stage in trial. The

relevant paragraph Nos.4 and 5 are reproduced hereinbelow :-

“4. I have given careful consideration to the rival submissions. I find considerable force in the submissions of the learned counsel for the plaintiff that yet the issues are to be framed by the Trial Court and at the threshold of hearing of the suit, application filed by the defendants for appointment of the Court Commissioner is entertained by the Trial Court. The plaintiff's or defendants' case should stand or fall on the evidence lead by them. This Court in case of Sanjay Namdeo Khandare Vs.Sahebrao Kachrau Khandare and others, reported in 2001(2) Mh.L.J. 959, has taken a view that the Court Commissioner can not be appointed for collecting evidence.

5. In that view of the matter, in my opinion, the stage of the proceeding for appointment of the Court Commissioner is premature. It is different matter if the Court starts recording the evidence and finds it difficult to locate the correct position about the questions of controversy involved in the matter and at that stage, by invoking powers u/s. 26 Rule 9 of the C.P.C. appoints the Court Commissioner. Therefore, in my opinion, the impugned order can not sustain for the afore stated reasons. Therefore same is quashed and set aside. However, the parties will have liberty to file an application for appointment of the Court Commissioner at appropriate stage of the proceeding. Setting aside the impugned order will not come in the way of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit.”

4. This Court, while passing an order in Writ Petition No.8877/2013 (Coram: S.V. Gangapurwala, J.) dated 17/01/2014 has also echoed the same view in paragraph Nos.4,5 and 6, which are reproduced hereinbelow :-

“4. There can not a dispute with the proposition that to appoint the court commissioner as per Section 75 of the Code of Civil Procedure is the discretion of the Court. The said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised as per the judicial norms.

5. The parties have not yet stepped into witness box. The Court commissioner could have been appointed if the Court finds it necessary for the just decision of the case. No doubt, in case of encroachment, dispute with regard to the identity of the property, the assistance of expert such as Cadestral Surveyor to measure the property can be considered by the Court. However, the stage is too premature. Even the application for temporary injunction is not decided. The report of the T.I.L.R. if disputed by either party, is not

admissible in evidence unless the T.I.L.R. is examined.

6. At the stage of evidence, from the evidence on record i.e. documentary evidence if the Court finds that the appointment of court commissioner is necessary, then at that stage a party can file an application for appointment of T.I.L.R. as court commissioner, which application would be considered by the Court on its own merits. ” ”

7. In present matter, it is not a case where issues are framed and evidence has commended. Having regard to the facts and circumstances, presently application Exhibit - 25 appears to have been moved at premature stage. While as observed in the judgment and quoted portions therein, litigating parties, after recording evidence has commenced, would have liberty to move an application, if the facts, circumstances and the situation so requires.

8. As such, impugned judgment and order dated 31-01-2015 passed below Exhibit – 25 by the learned civil judge junior division, Jamner is set aside with liberty as referred to above.

9. Writ petition is disposed of. Rule made absolute accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/