

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2713 OF 2018
(Santosh s/o Vasantrao Korde and others Vs. Shri Ramkisan
Gorakhshanath Dhokne and others)

Mr.R.B.Temak, learned Advocate for the petitioners.
Mr.Sk.Ashraf Patel h/f Mr.A.P.Avhad, learned Advocate for
respondent Nos. 1 and 2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 13/02/2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2. On 14/03/2018, this Court had passed the following order :-

*"1. The petitioners are aggrieved by the order dated
25/01/2018 by which the Trial Court has allowed application
Exh.7 in RCS No.731/2016 and has directed the appointment of
a Court Commissioner.*

*2. Grievance is that the Trial Court has virtually passed a
final order at an interlocutory stage and a Court Commissioner
is appointed even when the application for temporary injunction
is pending. Reliance is placed upon the judgment of the Hon'ble
Apex Court in the matter of Vishnu Babu Tambe Vs. Apurva
Vishnu Tambe (2017) 2 SCC 454 and the order of this Court*

dated 08/12/2014 in WP No.4756/2014.

3. Issue notice to the respondents, returnable on 20/04/2018. Till the returnable date, the impugned order shall stand stayed. However, in the event of the Court Commissioner having implemented the impugned order, the Trial Court would preserve the report of the Court Commissioner in a sealed envelope and would not divulge the same to the litigating sides.

4. Copies of the petition paper book shall be supplied for issuance of notice on or before 22/03/2018, failing which, this petition shall stand dismissed without reference to the Court on 23/03/2018.”

3. Learned Advocate for respondent Nos. 1 and 2 has strenuously opposed this petition. Contention is that the Trial Court has assigned sufficient reasons for appointing the TILR as a Court Commissioner. Causing a measurement of the suit property is in tune with the Law that a Court Commissioner can be appointed. He relies upon the judgment of this Court delivered in the matter of Sanjay Namdeo Khandare Vs.Sahebrao Khandare [2001(2) Mh.L.J. 959] and Kolhapuri Bandu Lakade Vs.Yallappa Chinappa Lakade, deceased, through Pooja Lakade and others [2011(3) All MR 599].

4. This Court has consistently held that the Court Commissioner

should not be appointed until the recording of oral evidence has concluded. Some of such orders are as under :-

- (a) *Syed Mushtaque Ahmad Syed Ismail and others vs. Syed Ashique Ali Khan Haidar Ali, 2012 (1) ALL MR 80 : 2011 (6) Mh.L.J. 334.*
- (b) *Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314.*
- (c) *Chandrakant Kashinath Dike and others vs. Smt.Satyabhama Vishwanath Dike and another, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.*
- (d) *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.*

5. In the matter of Dhondiba Bapu Zaware Vs. Santosh Paraji Zaware and others, WP No.4756/2014 decided on 08/12/2014, I had concluded that my earlier view in the order dated 13/03/2014 in WP No.6024/2013, Rajaram Shankar Gawade Vs. Bhimrao Shankar Gawade was not a proper view since the judgment in the case of Sanjay Namdeo Khandare (supra) was not cited before me.

6. In view of the above, this petition is allowed. The impugned order dated 25/01/2018 passed below Exh.7 in RCS No.731/2016,

is quashed and set aside and Exh.7 stands rejected. Needless to state, after the recording of oral evidence is concluded, the litigating sides, would be at liberty to request the Trial Court for the appointment of a Court Commissioner and such an application shall then be considered by the said Court on its own merits.

6. Rule is made absolute in the above terms.

(Ravindra V.Ghuge, J.)