

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10146 OF 2019

SUBHASH VISHNU PATHAK AND OTHERS
VERSUS
MAHADEV EKNATH PATHAK DIED THROUGH HIS LEGAL HEIRS
ARUN MAHADEV PATHAK AND OTHERS

Mr.H.S.Surve, Advocate for the petitioners.

(CORAM : Ravindra V.Ghuge, J.)
DATE : 18/09/2019

PER COURT :

1. The petitioners are the original plaintiffs in Reg.Civil Suit No. 36/2018. By order dated 03/08/2018, application Exh.5 seeking temporary injunction under Order 39 Rules 1 and 2 of the CPC, has been rejected. Misc.Civil Appeal No.13/2018 has been filed by the petitioners before the Appellate Court on 20/08/2018. An application for seeking appointment of a Court Commissioner Exh.11, has also been filed on 03/10/2018. By the impugned order dated 06/03/2019, Exh.11 has been rejected.

2. I have considered the strenuous submissions of the learned Advocate for the petitioners and have gone through the grounds formulated in the memo of the petition. It is strenuously submitted

that a Court Commissioner needs to be appointed as the petitioners' rights to a residential property are likely to be affected by the impugned orders. It is also submitted that the pending misc.appeal can be decided expeditiously.

3. This Court has consistently taken a view that a Court Commissioner cannot be appointed until the recording of oral evidence is concluded, except in rare cases. Some of the orders passed by this Court are as under :-

(1) *Syed Mushtaque Ahmad Syed Ismail and others Vs. Syed Ashique Ali Khan Hatdar* [2011 (6) Mh.L.J. 334 = 2012 (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.

(10) Bhika Mahadu Katkar and another Vs. Arjun Bhimraj Ghode, WP No.1890/2019 (Aurangabad Bench) decided on 09/07/2019.

(11) Sitaram Suklal Patil and another Vs. Vasudeo Suklal Patil, WP No.9626/2016 (Aurangabad Bench), decided on 31/07/2017.

4. In view of the above, the petitioners would have a right to file an application for seeking an appointment of a Court Commissioner before the Trial Court after the recording of oral evidence is concluded.

5. In so far as seeking an appointment of a Court Commissioner in a pending Misc.Civil Appeal is concerned, it would have the trappings of bringing new evidence on record. If either of the parties are not satisfied with the report of the Court Commissioner, they have a right to examine and cross examine such a Court Commissioner in order to prove or disprove the report and the measurements. This would therefore be covered by Order 41 Rule

27 of the CPC. The Hon'ble Apex Court has laid down the law in the matters of Malyalam Plantation Ltd. Vs. State of Kerala [AIR 2011 SC 559], Union of India Vs. Ibrahim Uddin and another [(2012) 8 SCC 148], A. Andisamy Chettiar Vs. A. Suburaj Chettiar [AIR 2016 SC 79] and Jagdish Prasad Patel (Dead) through LR's and another Vs. Shivnath and others [(2019)6 SCC 82], by which it is held that such an application can be entered by the Appellate Court only while deciding the main appeal.

6. In view of the above, I do not find that the impugned order dated 06/03/2019 could be termed as being perverse or erroneous. This petition, being devoid of merit, is therefore dismissed.

7. However, it is expected that the Appellate Court would decide MCA No.13/2018 as expeditiously as possible and preferably on or before 31/12/2019. So also, after the recording of oral evidence is concluded in the suit before the Trial Court, any of the litigating parties would be at liberty to file an application for seeking appointment of a Court Commissioner and the Trial Court would then consider such an application on its own merits.

(Ravindra V.Ghuge, J.)