

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6125 OF 2018
(Dharmu s/o Harsing Rathod Vs. Udhav s/o Satwa Ghuge and
another)

Mr.A.S.Deshmukh, Advocate for the petitioner.
Mr.U.B.Bondar, Advocate for respondent Nos. 1 and 2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 22/02/2019

PER COURT :

1. Heard the learned Advocates for the respective sides.
2. The petitioner/original defendant is aggrieved by the order dated 25/04/2018 by which the Trial Court has allowed application Exh.71 filed by the plaintiff in RCS No.80/2017 and has directed the appointment of a Court Commissioner to measure the suit lands and the properties of all the litigating sides. It is conceded that the application for temporary injunction is pending and issues are yet to be cast.
3. Learned Advocate for the plaintiffs relies upon an order passed by this Court on 29/08/2017 in WP No.7444/2014 in Nazabai w/o

Gana Patil and 3 others Vs. Shantabai w/o Vitthal Bagul, to support his contention that a Court Commissioner can be appointed at any stage. Reliance is also placed on the judgment of this Court in the matter of Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade [2011(3) Mh.L.J. 348].

4. I find that one of the plaintiffs in the pending suit, namely Uddhav Satwaji was the defendant in Reg.C.S.No.90/2006. He was the appellant alongwith Aasaram Uddhav and Sagarbai Uddhav in S.A.No.344/2014, for challenging the concurrent findings of the Trial Court and the Appellate Court against him.

5. It is contended that the said proceedings were in a different cause and the cause in RCS No.80/2017 pertains to land Gat No.312.

6. This Court has consistently held that a Court Commissioner could be appointed after the conclusion of the recording of oral evidence. Some of such orders passed by this Court 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.*

7. In the present case, when the temporary injunction application is pending and when issues are yet to be cast, a Court Commissioner could not have been appointed by the Trial Court. The plaintiffs have to stand on their own feet and have to canvass the temporary injunction application based on the material available on record. After recording of oral and documentary evidence, either of the litigating sides can move an application for appointment of a Court Commissioner.

8. I do not find that the Trial Court has directed the appointment of a Court Commissioner at the right stage since, prima facie, the plaintiff desires to bring evidence on record through the Court Commissioner and then pursue his temporary injunction application.

It requires no debate that if such a report is to be considered before dealing with the temporary injunction application, the rights of the parties to lead evidence on the report and even examine the Court Commissioner, will have to be permitted and which normally should be avoided until the recording of evidence is concluded.

9. In view of the above, this petition is allowed. The impugned order dated 25/04/2018 is quashed and set aside and application Exh.71 stands rejected.

(Ravindra V.Ghuge, J.)