

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

917 WRIT PETITION NO.7159 OF 2014

Sanjay S/o. Dayanand Sude
Age: 42 years, Occu.: Agri,
R/o. Village Dangewadi, Tal.Nilanga,
District Latur.

..Petitioner
(Orig.deft.no.2)

VERSUS

1. Pratap S/o. Bhagwat Sude
Age: 40 years, Occu.: Agri.,
R/o. Village Dangewadi,
Tal. Nilanga, Dist.Latur.

2. Ashok S/o. Bhagwat Sude
Age: 56 years, Occu.: Agri.,
R/o. Village Dangewadi,
Tal.Nilanga, Dist.Latur.

3. Vijaykumar S/o Dnyanoba Sude
Age: 34 years, Occu.: Agri.,
R/o. Village, Dangewadi,
Tal.Nilanga, Dist.Latur.

4. Dnyanoba S/o. Namdeo Sude
Age: 65 years, Occu.: Agri,
R/o.Village Dangewadi,
Tal.Nilanga, Dist.Latur.

..Respondents
(Orig.Plff. & Deft.No.1,3 & 4)

...
Advocate for Petitioner : Shri P.R. Katneshwarkar
Advocate for Respondent No.1 : Shri G.L.Awale
...

**CORAM : P.R.BORA, J.
DATE: 24th July, 2019**

ORAL JUDGMENT:-

1. Rule. Rule made returnable forthwith. Heard finally with consent of learned counsel appearing for the parties.

2. Being aggrieved by three orders respectively passed below application at Exhibits-90, 99 and 129 in Regular Civil Suit No.256 of 2007, the petitioner has filed the present petition.

3. The application at Exhibit-90 was filed by the present respondent No.1, who is plaintiff in Regular Civil Suit, seeking amendment in the Suit plaint. The Trial Court vide order passed below the said application on 22.08.2013 has allowed the said application. The application at Exhibit-99 was filed by respondent No.1 - plaintiff for appointment of Court Commissioner. The Trial Court vide the order passed on 23.06.2014, has allowed the said application also. The application at Exhibit-129 was filed by the respondent No.1 - plaintiff with a prayer that the application filed by him seeking temporary injunction shall be taken up for hearing after the receipt of report of the Court Commissioner. The said application has also been allowed by the Trial Court vide order passed on 15.02.2014.

4. All the aforesaid three orders passed by the Trial Court are challenged in the present petition. Shri P.R.Katneshwarkar, learned counsel appearing for the petitioner submitted that the amendment sought by the plaintiff in the plaint was making out a

new case and as such could not have been allowed by the Trial Court. The learned counsel submitted that for this single reason the order passed below Exhibit-90 deserves to be set aside. The learned Counsel further submitted that the order passed below Exhibit-99 also deserves to be set aside for the reason that appointment of Court Commissioner in the said case would amount to collecting evidence for the plaintiff which is impermissible in law. The third order passed below Exhibit-129 has been assailed by the learned counsel being wholly unsustainable since passing of such order gives way to allow the plaintiff first to collect evidence for proving his case by the appointment of Court Commissioner and then to apply for interim injunction from the Court. The learned counsel, in the circumstances, prayed for setting aside the aforesaid orders.

5. Shri G.L.Awale, learned counsel appearing for respondent No.1, who is the only contesting respondent, invited my attention to the order passed by this Court in Writ Petition No.2409 of 2013. The learned counsel pointed out that the aforesaid Writ Petition was filed by the present petitioner against the order passed by the Trial Court for appointment of the T.I.L.R. as the Court Commissioner. The learned counsel pointed out that this Court had disposed of the said petition vide order passed on

10.04.2013. The learned counsel pointed out observations made in paragraph Nos.5 and 6 of the said order. The learned counsel submitted that in view of the said observations made by this Court, the applications were preferred by the respondent No.1 - plaintiff and accordingly these applications are allowed by the Trial Court. The learned Counsel submitted that amendment in the Suit was necessary in view of the subsequent events occurred and it was sought strictly in terms of liberty given by this Court in the order passed in Writ Petition No.2409 of 2013.

6. The learned counsel further submitted that though the previous order of appointment of the Court Commissioner was set aside by this Court, respondent No.1 - plaintiff was allowed to file an application for appointment of the Court Commissioner and the Trial Court was directed to decide the said application on its own merits. The learned counsel submitted that in the Suit of encroachment, as has been observed by the Trial Court, unless the report is received from independent authority i.e. Court Commissioner, no concrete conclusion can be drawn and in the circumstances, no fault can be found in the order passed by the Trial Court below Exhibit-99.

7. The learned counsel also supported the order passed below

Exhibit-129, stating that, that was already in consonance with the order passed by this Court in Writ Petition No.2409 of 2013. The learned counsel submitted that even for making out a *prima-facie* case before the Trial Court for temporary injunction, the report of the Court Commissioner was must. As such, the Trial Court has rightly passed an order thereby directing the consideration of such application only after decision on the application for appointment of Court Commissioner. The learned counsel, in the circumstances, prayed for dismissal of the Writ Petition.

8. After having considered the submissions advanced by the learned counsel appearing for the respective parties and on perusal of the impugned orders and other material placed on record, it does not appear to me that there is scope for causing any interference in the orders passed under Exhibits-90 as well as 99. The amendment which was sought has been rightly allowed by the Trial Court considering the averments in the said application and having regard to the subsequent events occurred in respect of subject matter. Appointment of Court Commissioner in the present case cannot be termed to be for the purpose of collecting evidence. In the circumstances, no error can be found in the orders so passed. Both these orders,

therefore, do not require any interference.

9. In so far as the order passed below Exhibit-129 is concerned, the said order, however, cannot be sustained. Moreover, when the Suit is filed in the year 2007, now it would be in the interest of both the parties that the Suit itself is finally decided. In the circumstances, it does not appear to me that there may be any propriety now in seeking any temporary injunction at this stage. The learned counsel for the respondent No.1 - plaintiff conceded that such application will not be pressed by the plaintiff and the plaintiff would proceed with the hearing of the Suit. The learned Counsel, however, prayed for direction to the Trial Court to expedite the Suit. For giving such direction there is not objection from the petitioner. In view of the submissions so made, the following order is passed:-

ORDER

- I) The Writ Petition is partly allowed.
- II) The order passed below Exhibit-129 in Regular Civil Suit No.256 of 2007, is set aside.
- III) The orders passed below Exhibits-90 and 99 in Regular Civil Suit No.256 of 2007, are maintained.

IV) As undertaken by the learned counsel appearing for respondent No.1 i.e. original plaintiff, it is recorded that respondent No.1 - plaintiff will not press for any interim relief instead will proceed for final hearing of the Suit. Accordingly, the Trial Court is directed to expedite the hearing of the Suit and decide it as expeditiously as possible and preferably within a period of nine months from the date of receipt of this order.

V) Writ petition stands disposed of in the aforesaid terms.

(P.R.BORA)
JUDGE

SPT