

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

WRIT PETITION NO.9087 OF 2019

ANILKUMAR SUVALAL MUGDIYA
VERSUS
MANIK GANGARAM LINGAYAT AND ANOTHER

...
Advocate for the Petitioner : Shri Shaikh Mujtaba Gulam Mustafa.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 21st August, 2019

Per Court:

1 The petitioner is aggrieved by the order passed by the Trial Court dated 07.03.2019 by which, the application exhibit 66 filed by the petitioner in RCS No.611/2015, has been rejected.

2 The learned advocate for the petitioner has strenuously criticized the impugned order. The contention is that his application exhibit 11 seeking appointment of the court commissioner was earlier allowed by order dated 04.10.2017. After the order was passed, the City Surveyor should have performed his duties and should have complied with the directions of the Trial Court. Since he failed to perform his duties, the petitioner has filed exhibit 66 seeking appointment of a senior advocate to perform the work of the court commissioner. My attention is drawn towards the averments and the 16 grounds formulated in the

memo of the petition.

3 Notwithstanding the provisions under Section 75 and Order 39 Rule 7 of the Code of Civil Procedure, it is settled law that the court commissioner should not be appointed for collecting evidence. By exhibit 66, the petitioner prays that the court commissioner should visit the suit property site, carryout an inspection and record the visual situation. He should also submit a report as to what is the visual situation of house nos.241 and 242, which belong to the plaintiff and the defendant, respectively. He should also find out whether, there is one wall or two distinct and separate independent walls resting on their own basements. He should also note the markings of ballies on the wall on the side of the plaintiff and the Kapat (Ala).

4 In my view, the court commissioner's job is not to collect evidence in the nature in which the plaintiff seeks under the application exhibit 66. So also, this Court has consistently passed orders holding that the court commissioner should be appointed after the recording of oral evidence is over. 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) Gangaram Baban Tagad and others Vs. Sarubai

Yashwant Tagad and others (WP No.6700/2011 dated 12/06/2013).

- (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.*
- (e) Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314.*
- (f) Shantabai Pralhad Anantwad Vs. Tahsildar, Tahsil Office Latur and others (WP No.1096/2018 dated 31/01/2018).*
- (g) Baburao Jairam Borade vs. Fakira Tukaram Lanekar, Writ Petition No.1743/2018 decided on 28.08.2018 (Aurangabad Bench).*

5 As such, in the first place, the court commissioner should not have been appointed by the Trial Court immediately after lodging of the suit. However, since that incident is of the past and none of the defendants have approached this court for challenging the said order, the said issue need not be gone into. Nevertheless, exhibit 66 is aimed at collecting evidence. As such, considering the law laid down by this court, I do not find that the impugned order dated 07.03.2019 passed by the Trial

Court rejecting exhibit 66 could be termed as being perverse or erroneous.

This writ petition being devoid of merit is, therefore, dismissed.

kps

(RAVINDRA V. GHUGE, J.)