

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11841 OF 2018
(Uttam Trimbak Salunke and others Vs. Sanjay Ganpat Bagade and others)

Mr.A.S.Patil h/f Mr.S.S.Chapalgaonakr, Advocate for the petitioners.
Mr.A.V.Pandao, Advocate for respondent Nos. 1 to 4.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 12/04/2019

PER COURT :

1. On 23/10/2018, I had passed the following order :-

“1. The petitioners/original defendants are aggrieved by the order dated 01/08/2018, by which, the Trial Court has allowed application Exhibit 31 and has directed the appointment of a court commissioner in RCS No. 427/2015. Grievance is that even issues are not framed in the matter and yet a court commissioner has been appointed.

2. I find that this Court has consistently held in series of orders/judgments that the court commissioner cannot be appointed for collection of evidence and can be appointed after the recording of oral evidence is concluded :-

1. Gangaram Baban Tagad and others Vs. Sarubai Yashwant Tagad and others (WP No.6700/2011 dated 12/06/2013)

2. Shantabai Pralhad Anantwad Vs. Tahsildar, Tahsil Office Latur and others (WP No.1096/2018 dated 31/01/2018)

3. *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.

4. *Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar*, 2017 (3) Mh.L.J. 314.

5. *Chandrakant Kashinath Dike and others vs. Smt.Satyabhama Vishwanath Dike and another*, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.

6. *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others*, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.

3 By the impugned order, the Trial Court has directed the court commissioner to find out whether, any road exists, if yes, what is its exact breadth, and to submit a report in that regard. Prima facie, I find that the impugned order is not only passed at a premature stage, but it would amount to collection of evidence.

4. Issue notice to the respondents, returnable on 14/12/2018. Until then, the impugned order dated 01/08/2018 shall stand stayed. In the event, the DSLR has completed the exercise as per the impugned order, the Trial Court would preserve his report in a sealed envelop and would not divulge the report of the court commissioner to either of the litigating sides.

5. Copies of the petition paper book, for issuance of notice, shall be supplied on or before 01/11/2018, failing which, this petition shall stand

dismissed without reference to the Court on 02/11/2018.”

2. Learned Advocate for the respondents submits that this petition deserves to be dismissed with costs. In the alternative, he submits that the Court Commissioner has completed his task and the report is submitted to the Trial Court in a sealed envelope. He, therefore, contends that this petition has become infructuous.

3. I do not find that the said submission of the respondents could be entertained. If this Court has consistently taken a view that a Court Commissioner should be appointed after the recording of oral evidence is completed, except in rare cases, merely because the Court Commissioner has completed that task, would not mean that the impugned order would be sustained.

4. Learned Advocate for the petitioners submits that the Court Commissioner has hurriedly conducted the measurement without even issuing notices to the petitioners.

5. Considering the above and the law laid down by this Court, this petition is allowed. The impugned order dated 01/08/2018 is quashed and set aside. Application Exh.31 filed in RCS

No.427/2015, stands rejected.

6. Needless to state, after the conclusion of the recording of oral evidence, if the litigating sides move an application for seeking appointment of a Court Commissioner, the Trial Court would be at liberty to consider such an application on its own merits. The report preserved in a sealed envelope pursuant to the order of the Trial Court dated 01/08/2018, shall then be considered, only if the Trial Court concludes that a Court Commissioner can be appointed. However, if the record reveals that the petitioners herein were not issued any notice when the DSLR performed his task, the Trial Court would discard the said report and pass a fresh order for the appointment of a DSLR who would undertake the fresh task of measuring the suit properties and fixing of the boundaries.

7. Needless to state, the Trial Court would therefore preserve the report of the DSLR in a sealed envelope subject to the above directions so as to be opened after the recording of oral evidence is concluded and only if it comes to a conclusion that a Court Commissioner needs to be appointed.

(Ravindra V.Ghuge, J.)