

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10197 OF 2019

DATTATRAYA BABURAO GAWALI THROUGH LRS
VERSUS
SUREKHA MANIKRAO PATIL AND OTHERS

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Advocate for Petitioners : Shri Kulkarni Krishna K.
Advocate for Respondents 1 to 3 : Shri Chavan P.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: November 06, 2019

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PER COURT :-

1. On 16.8.2019, I had heard the learned Advocate for the petitioners and have passed the following order:-

"1. This matter was not on board. An urgency was expressed at 10.30 a.m. Hence taken on the production board.

2. The learned Advocate for the petitioners submits that the Trial Court has passed the impugned order on 18/06/2019 directing appointment of a court commissioner by allowing application Exhibit 63 in Regular Civil Suit No. 330/2012. The recording of oral evidence is yet to commence. The final relief sought in the suit is measurement of the properties, marking of the boundaries and perpetual injunction. A final relief has been granted at the interlocutory stage.

3. *I find that this Court has consistently passed orders concluding that a court commissioner can be appointed after the recording of oral evidence is concluded. Some of the orders passed 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 & 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.

(e) Dipak Laxman Gadekar and anr. Vs. Trimbak Ravji Shirsath, Writ Petition No. 11593/2015 (Aurangabad Bench), decided on 23/08/2017.

(f) Mahadeo s/o Vaijanath Bembalge Vs. Chandrakala w/o Ramesh Athane, Writ Petition No. 832/2018 (Aurangabad Bench), decided on 04/06/2018,

(g) Dhondiram Nivrutti Pawar through L.Rs.

Vs.Laxman Khashaba Pawar and others, Writ Petition No. 1196/2017, (Bombay Bench), decided on 23/01/2018,

(h) Sanjay Balasaheb Khandare Vs. Vivek Surinder Mahajan and another, Writ Petition No. 4958/2018, (Aurangabad Bench), decided on 29/01/2018.

4. *Issue notice to the original plaintiff Nos. 1 to 3 who are respondent Nos. 1 to 3, returnable on 27/09/2019. Until then, the impugned order dated 18/06/2019 shall stand stayed.*

5. *Copies of the petition paper book, shall be supplied, for issuing notices, on or before 27/08/2019, failing which this petition shall stand dismissed without reference to the Court on 28/08/2019."*

2. The learned Advocate appearing on behalf of the respondents has strenuously opposed this petition. He relies upon a detailed affidavit-in-reply filed by the respondents on 17.10.2019 and submits that the petition deserves to be dismissed. Reliance is placed upon the following judgments:-

- (i) Bhupendra Bhagwat Turkar Vs. Homraj Zituji Meshram - [2015 (1) Bom.C.R. 456] and
- (ii) Lalitprabha Krishnaji Ajgaonkar Vs. Yunukh Khan - [2016 DGLS (Bom.) 896].

3. Considering that the recording of oral evidence in the suit is yet to commence and keeping in view the law crystallized by this Court in the matters referred to under paragraph No.3, reproduced above, I find that the impugned order is unsustainable.

4. This petition is, therefore, partly allowed. The impugned order dated 18.6.2019 is quashed and set aside and application Exhibit 63 stands rejected.

5. Needless to state, after the recording of oral evidence is concluded, if an application for appointment of a Court Commissioner is filed by any litigating side, the trial Court would consider the same on its own merits.

6. The learned Advocates pray that the suit be expedited as it is more than seven years old. As such, the trial Court shall decide RCS No. 330 of 2012 as expeditiously as possible and preferably on / or before 30.11.2020.

(RAVINDRA V. GHUGE, J.)

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