

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.14988 OF 2019

ASARAM KHUSHALRAO TAUR AND OTHERS
VERSUS
MANISH PRALHADRAO TAUR AND OTHERS

Mr.A.V.Lavte h/f Mr.S.J.Salunke, Advocate for the petitioners.
Mr.A.M.Nagarkar, Advocate for respondent Nos. 1 to 3.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 17/12/2019

PER COURT :

1. The petitioners, who are original defendant Nos. 1 to 6, are aggrieved by the cryptic order passed by the Trial Court dated 04/04/2019, by which it has appointed a Court Commissioner in view of application Exh.42 filed by the original plaintiffs in RCS No.317/2018.

2. The learned Advocate for the plaintiffs relies upon the affidavit in reply and the judgments appended thereto and strenuously defends the impugned order. He places reliance upon the judgment delivered by the Hon'ble Apex court in Jaspal Singh and others Vs. State of Punjab and others [AIR 2011 SC 1123], the judgment

delivered by the Madhya Pradesh High Court dated 10/10/2018 in the matter of Anurag Jaiswal Vs. The Collector, MP No.44084/2018, Kisanlal Maniklal Rathi Vs. Dinkar Yashwant Patil (2004(1) Mh.L.J. 138), Sukhdeo Parashramji Bhugul (DR.) Vs. Wamanrao Nagorao Charhat (2004(3) Mh.L.J. 724), Malhar s/o Ganpat Bokerphod and others Vs. Shivaji s/o Vishwanath Pawal (2014(4) Mh.L.J. 237), Kashinath s/o Ramkrishna Chopade Vs. Purushottam Tulshiram Tekade and another [2005(4) Mh.L.J. 471].

3. The learned Advocate for the plaintiffs is right in submitting that a Court Commissioner, in rare and peculiar circumstances, may be appointed by the Trial Court, if the Court finds it necessary to elucidate additional information which would assist the Court. The judgments relied upon by him lay down the law that when it is necessary for the Court to separate the grain (not wheat) from the chaff and the Trial Court finds it advantageous to take the assistance of the Court Commissioner, he could be appointed.

4. I find from application Exh.42 that the plaintiffs have specifically pleaded in paragraph Nos.2 and 3 of the short application that the petitioners have encroached upon government land which is earmarked for a Government School. They have erected a

construction and therefore a Court Commissioner should be appointed to measure the exact construction erected, investigate how much is the encroachment made and submit a report identifying the encroached portion. This application has been filed even when the application Exh.5 seeking temporary injunction under Order 39 Rules 1 and 2, is pending. The prayers made in Exh.42 clearly indicate that the plaintiffs desire to collect evidence.

5. I have perused the impugned order and I find that the learned Judge, who has passed the order, did not even care to consider the law laid down by this Court in the matter of Sanjay Namdeo Khandare Vs.Sahebrao Khandare [2001(2) Mh.L.J. 959] which clearly lays down the law that a Court Commissioner should not be utilized for collection of evidence. Though the judgment was cited before the Trial Court, it has ignored the law laid down and has proceeded to direct the TILR, Majalgaon to prepare a map for showing encroachment. The learned Judge has completely lost sight of the pleadings in Exh.42.

6. So also, the law laid down by this Court, that the Court Commissioner should not normally be appointed until the recording of oral evidence is concluded, except in rare cases in the following

judgments, has also been ignored :-

- (1) *Syed Mushtaque Ahmad Syed Ismail and others Vs. Syed Ashique Ali Khan Hatdar* [2011 (6) Mh.L.J. 334 = 2012 (2) Bom. C.R. 790],
- (2) *Nalubai Shinde and others Vs. Gopinath Shinde* [2011(2) Mh.L.J.991],
- (3) *Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar*, 2017 (3) Mh.L.J. 314.
- (4) *Chandrakant Kashinath Dike and others vs. Smt.Satyabhama Vishwanath Dike and another, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.*
- (5) *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No.4756/2014 (Aurangabad Bench) decided on 08.12.2014.*
- (6) *Dipak Laxman Gadekar and anr. Vs. Trimbak Ravji Shirsath, Writ Petition No. 11593/2015 (Aurangabad Bench), decided on 23/08/2017,*
- (7) *Mahadeo s/o Vaijanath Bembalge Vs. Chandrakala w/o Ramesh Athane, Writ Petition No. 832/2018 (Aurangabad Bench), decided on 04/06/2018,*
- (8) *Dhondiram Nivrutti Pawar through L.Rs. Vs. Laxman Khashaba Pawar and others, Writ Petition No. 1196/2017, (Bombay Bench), decided on 23/01/2018,*
- (9) *Sanjay Balasaheb Khandare Vs. Vivek Surinder Mahajan and another, Writ Petition No. 4958/2018,(Aurangabad Bench), decided on 29/01/2018.*
- (10) *Bhika Mahadu Katkar and another Vs. Arjun Bhimraj Ghode, WP No.1890/2019 (Aurangabad Bench) decided on 09/07/2019.*
- (11) *Sitaram Suklal Patil and another Vs. Vasudeo Suklal Patil, WP No.9626/2016 (Aurangabad Bench), decided on*

31/07/2017.

(12) Sarjerao Nathu Bangar and others Vs. Namdeo Keru Bangar and others, WP No.13441/2019 (Aurangabad Bench), decided on 07/11/2019.

7. The learned Advocate for the petitioners prays for costs for having been dragged into this litigation and the said costs may be donated for the treatment of poor patients.

8. Considering the above, this petition is allowed. The impugned order dated 04/04/2019 stands quashed and set aside and application Exh.42 stands rejected by imposing costs of Rs.2,500/-, which the plaintiffs shall deposit with the Government Medical College and Hospital, Aurangabad, **through Medical Officer, High Court Dispensary, Aurangabad**, either in cash or by Demand Draft (Demand Draft be drawn in the name of “**Dean, Government Medical College and Hospital, Aurangabad Dengi Samiti**”) as donation for treatment of the poor patients, on or before 21/01/2020. The receipt of such deposit shall be placed before the Trial Court on or before 31/01/2020.

9. The learned Advocate for the plaintiffs prays for return of the amount of Rs.2,000/- which was deposited before the Deputy Supdt.

Land Records at Majalgaon. As such, the plaintiffs are at liberty to approach the D.S.L.R. and seek refund of the amount without interest. The learned Advocate for the plaintiffs prays that liberty may be granted to move an application for appointment of a Court Commissioner, only after the recording of oral evidence is concluded. As such, this conditional liberty is granted.

(Ravindra V.Ghuge, J.)