

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9849 OF 2019

Dattatraya Dhondiba Devmane ... Petitioner
Vs.
Sajabai Jagannath Mane ... Respondent

.....
Ms. Sneha Naik I/b. Mr. P.D. Pise for the Petitioner.

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CORAM : M. S. KARNIK, J.

DATE : 6th SEPTEMBER, 2019.

P. C.:

1. Heard learned counsel for the petitioner.
2. By this petition filed under Article 227 of the Constitution of India the petitioner - original plaintiff challenges the order dated 17.01.2019 passed below Exhibit 39 in Regular Civil Suit No.12 of 2012 for appointment of Court Commissioner.
3. The plaintiff has filed suit for permanent injunction restraining the defendant from encroaching upon the suit property of the plaintiff. The petitioner had filed an application at Exhibit 26 for appointment of Court Commissioner. The application came

to be allowed. The Court Commissioner submitted his report on 17.4.2012.

4. Thereafter, the plaintiff filed application at Exhibit 31 contending that the Court Commissioner while submitting report dated 17.4.2012 has submitted the report without fixing boundaries and therefore nothing is revealed from the report. The Trial Court by the order dated 9.10.2017 rejected the application at Exhibit 31 as he did not find substance in the contention of the plaintiff for appointment of Court Commissioner again as it is not expected from the Court Commissioner to submit report in favour of the plaintiff.

5. Thereafter, the application Exhibit 39 was filed jointly by the plaintiff and the defendant for appointment of Court Commissioner. This application is rejected by the Trial Court by the impugned order dated 17.1.2019. Learned counsel for the petitioner would submit that the Trial Court committed an error in rejecting the application as joint request was made by plaintiff as well as defendant and therefore there was no difficulty for the

Trial Court to allow the application. She would moreover submit that the report submitted by the Court Commissioner on the earlier occasion is incomplete and the same does not reveal the correct boundaries and therefore it is necessary for the Court Commissioner to submit proper report. She would submit that even at the stage of considering the application Exhibit 39 the Trial Court has kept the suit for dismissal stating that the plaintiff has not led evidence.

6. Heard. The earlier application filed by the plaintiff for appointment of Court Commissioner was allowed. The report was submitted by him on 17.4.2012. On the premise that the said report is incomplete another application Exhibit 31 came to be filed which was rejected by the Trial Court by order dated 9.10.2017. Vide application filed below Exhibit 39 again a request is made by the plaintiff, this time a joint request for appointment of the Court Commissioner. As the earlier application below Exhibit 31 was already rejected, for the same relief again the present application is filed. It can not be said the order passed by the Trial Court is erroneous. Merely because a joint request is made is by itself not a reason to allow the application.

7. Learned counsel for the petitioner states that the plaintiff is willing to lead evidence. As the plaintiff is willing to lead evidence the observations of the Trial Court that the plaintiff does not appear to be interested in leading evidence and therefore the suit be listed for dismissal calls for interference. The Trial Court to grant opportunity to the plaintiff to lead evidence. Learned counsel for the plaintiff states that the plaintiff will co-operate with the Trial Court and will not seek unnecessary adjournments. The suit is of the year 2012.

8. Liberty to the petitioner to file an appropriate application for appointment of Court Commissioner after the evidence is led. The application may be considered by the Trial Court on its own merits and in accordance with law.

9. With these observations, the petition is rejected.

(M. S. KARNIK, J.)