

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 34 OF 2018

Ismail Mohammad Shikalgar & ors. ...Petitioners

Versus

Mahadu Genu Chougule ...Respondent

Mr. Rajaram V. Bansode, for the Petitioners.

Mr. Rushikesh C. Barge, for the Respondent.

CORAM: N. J. JAMADAR, J.

DATED: 21st JUNE, 2019

Oral Order :-

1. Heard Mr. Bansode, the learned Counsel for the Petitioners and Mr. Barge, the learned Counsel for the Respondent.

2. This petition assails the order below application (Exhibit 108) in Regular Civil Suit No.269 of 2001, passed by the learned Joint Civil Judge, Junior Division, Dahiwadi, dated 29th August, 2017, whereby the application of the Petitioners – original plaintiffs to summon and examine the Court Commissioner, who had conducted local inspection, as a witness, came to be rejected. The learned Counsel for the Petitioners submitted that the Trial Court had appointed a Commissioner to visit suit land and submit a report to indicate whether there is a pipeline in the suit land and, if so,

from which well water is sourced. The Court Commissioner submitted a report (Exhibit 35) on 3rd January, 2004.

3. The parties led evidence and arguments were commenced. During the course of the arguments the Defendant – Respondent questioned the admissibility of the Court Commissioner's Report sans the examination of the Court Commissioner as a witness. Thereupon the Petitioners preferred the aforesaid application to summon and examine the Court Commissioner as a witness. The learned Civil Judge was persuaded to reject the application principally on the premise that the report of the Court Commissioner was received by the Court in the year 2004 itself and the matter was posted for recording of evidence from 2009 to 2016 and at the fag end of the trial when the final arguments were being advanced and especially when the defendant had raised a specific contention about the admissibility of the report of the Court Commissioner, without the Court Commissioner being examined as a witness, it may not be permissible to reopen the evidence for the plaintiff.

4. The learned Counsel for the Petitioners endeavoured to impress upon the Court that the observations made by the

learned Civil Judge in paragraph 7, while rejecting the application, in question, may have bearing upon the ultimate outcome of the proceedings. Therefore, even if the impugned order is not interfered with, the observations are required to be clarified, urged the learned Counsel for the Petitioners.

5. The learned Counsel for the Respondent – Defendant, per contra, submitted that the application to summon the Court Commissioner when the matter was being finally argued, was wholly misconceived and untenable. The learned Counsel for the Respondent – Defendant raised strong objection even for making any observation which would clarify the observations made by the learned Civil Judge in paragraph 7 of the impugned order as the same may cause prejudice to the case of the defendant. It was submitted that if the plaintiff intended to place reliance upon the report of the Court Commissioner it was incumbent upon the plaintiff to examine the Court Commissioner and get the same duly proved in evidence. Thus, at this stage, the alternative prayer on behalf of the Petitioners is also untenable.

6. It is evident that the Court Commissioner was appointed in the year 2001. An Advocate - Commissioner

submitted the report in the year 2004. The parties went for trial. After conclusion of the evidence, the matter was posted for arguments. During the course of argument, an objection to the admissibility of the report of the Court Commissioner seems to have been raised. Thereupon the Petitioners – Plaintiffs preferred the application in question for examination of the Court Commissioner, after final arguments were advanced. In the circumstances, no fault can be found with the impugned order.

7. It is pertinent to note that the learned Civil Judge, made certain observations in paragraph 7. From the perusal of those observations it *prima facie* seems that those observations were made for the purpose of determination of the application for summoning the Court Commissioner as a witness. It would, thus, be open for the Petitioners to urge before the learned Civil Judge that the said observations in paragraph 7 were made for the limited purpose of determination of the said application and they may not have any bearing upon the final adjudication.

8. In the passing, it may be noted that the provision contained in Order XXVI Rule 10(2) of the Code of Civil

Procedure provides that the report of the Court Commissioner shall form part of the record. In the facts of the case, whether the report of the Court Commissioner (Exhibit 35), ought to be read in evidence, though the Court Commissioner has not been examined as a witness, is a matter for consideration of the learned Civil Judge and this Court has not considered the said aspect.

9. All contentions on the said point are kept specifically open.

10. With the aforesaid observations, the petition stands dismissed.

[N. J. JAMADAR, J.]