

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4154 OF 2019

VIJAY SUBHASH NALAWADE AND ANR.)...PETITIONERS

V/s.

STATE OF MAHARASHTRA & OTHERS)...RESPONDENTS

Shri.Nikhil Wadikar i/b. Shri.Nandu Pawar, Advocate for the
Petitioner.

Shri.Kalpesh Patil, Advocate for Respondent Nos.4 to 11.

Shri.C.D.Mali, AGP for the Respondent Nos.1 to 3.

CORAM : A. M. BADAR, J.

DATE : 4th NOVEMBER 2019

P.C. :

1 This is a petition by the plaintiffs whose application for
appointment of Court Commissioner came to be rejected vide
order dated 22nd January 2019 by the learned Civil Judge, Senior
Division, Karad.

2 Heard the learned counsel appearing for the petitioners/original plaintiffs. He drew my attention to paragraph 3 of the plaint and contended that, infact, there was no way from filed Gat No.720 which was comprising of several survey numbers. The learned counsel further argued that though from Survey No.105, a causeway was shown by marks on the map, there was no such way. The learned counsel further argued that as the application for temporary injunction was pending for consideration, the plaintiffs moved an application under Order 39 Rule 7 of the Code of Civil Procedure (hereinafter referred to as the CPC for the sake of brevity) for local inspection, for appointment of Court Commissioner, for inspection of the field mentioned in paragraph 1(b) of the plaint and for furnishing the report of inspection thereof. The learned counsel further argued that the learned trial court has misread the said application and held that the Court Commissioner cannot be appointed for collecting evidence. In his submission, as the application was under Order 39 Rule 7 of the CPC, the case was a fit case for local

inspection and therefore, the learned trial court ought to have appointed the Commissioner for local inspection.

3 As against this, the learned counsel appearing for the respondents/original defendants argued that the attempt in making such an application was for collecting of evidence and nothing else. The application for temporary injunction is still pending and in order to establish the fact which was otherwise required to be proved by the plaintiffs, an attempt is made to appoint the Court Commissioner. The learned counsel further argued that the Court Commissioner can be appointed only for boundary disputes or for fixing boundaries and for collecting evidence.

4 I have considered the submissions so advanced and perused the impugned order.

5 The suit is for declaration that there is no way from the suit field bearing Gat No.720. Ancillary relief of injunction restraining the defendants from damaging the suit field is also

prayed. Averments in the plaint are to the effect that in Consolidation Scheme, Gat No.720 came to be formed from Survey Nos.105/1, 105/7, 109/6, 109/10 and 109/11. The plaintiffs averred that there is no way from this field and they are not accepting the mark of way in old record on Survey No.105. On this backdrop, during pendency of the suit and more particularly prior to hearing of the application under Order 39 Rules I and II of the CPC, the plaintiffs moved an application for appointment of Court Commissioner with an averment that as there is no way from the field Gat No.720, it is necessary to appoint the Court Commissioner for local inspection.

6 The learned trial court, by the impugned order, considered the submissions of the parties and concluded that by appointment of Court Commissioner, the plaintiffs want report of the Court Commissioner in respect of existence or non-existence of the way. It is further held that in this manner, the plaintiffs want to bring the possession over the suit property from the report of the Court Commissioner.

7 It is seen that on 23rd August 2017, the Circle Officer of Karad issued a notice to the agriculturists informing them that an application is received for opening the way and they should attend his office for giving their say. This notice has, ultimately, resulted in filing of the suit for declaration and injunction.

8 The question is whether the plaintiffs are entitled for injunction restraining the defendants from passing through their field. For that purpose, it is for the plaintiffs to make out the case that there is no way from their field. For that purpose, the plaintiffs cannot pass the burden of collecting evidence by seeking appointment of Court Commissioner. Discretion exercised in refusing the relief so sought is proper, as seen from the impugned order. The plaintiffs have to establish their claim for temporary injunction by making out a prima facie case and by establishing the fact that balance of convenience lies in their favour and they would suffer irreparable loss if the temporary injunction, as prayed, is not granted. Order 39 Rule 7 of the CPC does provide for appointment of a Court Commissioner for inspection of any

property but that power cannot be exercised in order to collect evidence in favour of a particular party for seeking temporary injunction. Ultimately, it is for the party to establish its case.

9 As such, no case for interference is made out. The petition is, therefore, rejected.

(A. M. BADAR, J.)