

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2695 OF 2019

Mrs. Nirmala Vilas Goregaonkar and Ors. .. Petitioners

vs.

Mr. Ravindra Narhari Mhatre .. Respondent

Mr. Anuj Desai I/b Mr. Satishkumar Chettiyar for the
Petitioners.

Mr. Rohit D. Joshi for Respondent

CORAM : M. S. SONAK, J.

DATE : 24th APRIL 2019.

ORAL JUDGMENT :-

1] Heard Mr. Anuj Desai for the petitioners and Mr. Rohit Joshi for the respondent.

2] The challenge in this petition is to the order dated 20-02-2018 by which the Learned Trial Judge has appointed Court Commissioner and issued certain directions to the Court Commissioner in the matter of partition by a comprehensive report.

3] At the outset, the entire dispute in the suit is between siblings. From the nature of dispute, this court was of the opinion that the parties should at least make an attempt to resolve dispute by mediation. For this purpose the matter

was adjourned in order to enable the Learned Counsel for the parties to seek instructions. The respondent, who is plaintiff in the suit, stated that he is agreeable for mediation. Learned counsel for the petitioners however, reported that whilst two of the brothers are agreeable for mediation, but instructions were required to be taken from the remaining parties, since some of the parties are traveling abroad.

4] According to me, the Learned Trial Judge, should explore the possibility of referring this matter to mediation because by then, it is possible that all parties agree to a reference to mediation. However, even if all parties do not agree, the court should counter reference to mediation, taking into consideration the provisions of Section 89 of Code of Civil Procedure 1908.

5] Mr. Anuj Desai, learned counsel for the petitioner, submits that, the Court Commissioner in present case has been appointed to collect the evidence for the respondent. He submits that, the appointment of Court Commissioner to collect evidence for any party is clearly impermissible. He submits that, the respondent in the plaint has grievance about the access to the property allotted to him. He submits

that, it is for the respondent to establish, by leading cogent evidence, as to whether the such access is really found at the site or not. He submits that, for such purpose there is no question appointing a Court Commissioner. He submits that the respondent has examined himself and is only interested in filling the lacunae in his deposition. For all these aforesaid reasons, Mr. Desai submits that, the impugned order warrants no interference.

6] Mr. Joshi, Learned Counsel for the respondent, defends the impugned order on the basis of reasons reflected therein. In addition, he points out there is no dispute as regards to the share of a property, which is allotted to the respondent. He points out that the petitioners are, however preventing the respondent from accessing to the property allotted to him. He points out that the appointment of Court Commissioner was necessary in order to enable the learned Trial Judge to appreciate the position at the site. He therefore, submits that, this petition may be dismissed.

7] The rival contentions now fall for my determination.

8] It is true as contended by Mr. Desai, the Commissioner is not required to collect the evidence in favor of any of the

parties to the suit. However, in the present case, it cannot be said that, the Learned Trial Judge has appointed Court Commissioner to collect evidence in favor of or against any of the parties to the suit. From the perusal of the impugned order it is clear that, the Learned Trial Judge has exercised his discretion in a proper and reasonable manner and the Court Commissioner has been appointed in order to seek assistance from such Commissioner in appreciating the position at the site.

9] This is not a case of any unreasonable exercise of discretion, so as to warrant interference under Article 227 of the Constitution of India. The supervisory jurisdiction under Article 227 of the Constitution of India, even otherwise, is required to be sparingly exercised. In the absence of any case of unreasonable exercise of discretion, such jurisdiction need not be exercised.

10] The report which the Court Commissioner submits certainly not substantive evidence. Both the parties will have the opportunity to submit their say to such report, and if the Court Commissioner is examined as a witness, then, the same will be subject to the right of cross examination.

Therefore, this is not a case whether the report which will be submitted by the Court Commissioner is to be directly treated as evidence in the Court.

11] At the request of Mr. Desai, it is clarified that, the Court Commissioner will have to give notice to all the parties before he proceeds to execute the commission. All parties or their representatives will have the right to remain present at the time when the Court Commissioner visits the site to execute the commission. Further, it is made clear that the parties or their representatives should not in any manner interfere with the Court Commissioner or seek to advance any arguments while executing the commission.

12] The parties or their representatives are only to remain present at the time of inspection by the Commissioner at the site, and if required by the Court Commissioner they may assist the Court Commissioner in the execution of his commission.

13] For the aforesaid reasons and with the aforesaid clarifications, this petition is liable to be dismissed and is hereby dismissed. In the facts and circumstances of the present case there shall be no order as to costs.

14] All concerned to act upon the basis of an authenticated copy of this order.

(M. S. SONAK, J.)