

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

Writ Petition No.545 of 2018
Ashok Kawale & others Vs. Yogiraj Tarare and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mrs. S.W. Deshpande, Advocate for petitioners
Mr. P. Thakre, Advocate for respondent No.1.

CORAM : MANISH PITALE, J.

DATED : DECEMBER 03, 2019

By this writ petition, the petitioners (original defendants) have challenged order dated 22/08/2017, passed by the Court of Jt. Joint Civil Judge Junior Division, Morshi (Trial Court), whereby an application for appointment of court commissioner (Exh.38), filed by the petitioners has been rejected.

2. The respondent No.1 (original plaintiff) has filed a suit for declaration and injunction claiming right of way on the *Dhura* on the agricultural land belonging to the respondents. An application had been earlier filed for appointment of court commissioner on behalf of the defendants on the ground that the written statement is yet to be filed and in that such a situation, an application for appointment of court commissioner could not be granted.

3. Thereafter, the written statement was filed on behalf of the petitioners. The petitioners then moved an application (Exh.38) for appointment of court commissioner to ascertain actual position on the spot, which would assist the Court to come to a considered conclusion on the rival claims made by the parties. The said application was opposed by the respondent No.1 primarily on the ground that the earlier application for appointment of court commissioner had been rejected and such subsequent application ought not to be entertained. The Trial Court rejected the application. A perusal of the impugned order passed by the Trial Court shows that the only reason for rejecting the said application was that if second application was entertained it would amount to review of earlier order rejecting the application for appointment of court commissioner. The prayer made on behalf of the petitioner in the application at Exh.38 has not been considered on merits at all and it has been rejected only on the ground that such second application could not be entertained. Only a cursory reference is made in the last sentence of paragraph No.3 that the petitioner failed to explain the position on the spot being different.

4. The Trial Court ought to have considered in a more elaborate manner because the necessity of appointment of court commissioner ought to have been

considered on the basis of material on record and facts and circumstances available. The Trial Court ought not to have rejected the second application on the ground that it would amount to review of the earlier order. The discussion on the merits of the claim made by the petitioner is cryptic and vague necessitating setting aside of the impugned order and direction to the Trial Court to decide the application afresh.

5. In view of above, the present application is partly allowed and impugned order dated 22/08/2017, is quashed and set aside and the matter is remanded back to the Trial Court for considering the application at Exh.38 afresh by giving appropriate opportunity to the rival parties. The application at Exh.38 be decided by the Trial Court on its own merits without being influenced by any observation made by this Court in the present order.

6. The writ petition is disposed of in above terms.

JUDGE