

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

911 WRIT PETITION NO. 4811 OF 2020

1. Sarjerao Nathu Bangar,
Age. 64 years, Occu. Agri.,
R/o. Waghira, Tq. Patoda,
District. Beed.
2. Baban S/o. Nathu Bangar,
Age. 54 years, Occu. Agri.,
R/o. As above.
3. Sabhakar S/o. Nathu Bangar,
Age. 49 years, Occu. Agri.,
R/o. As above.

...Petitioners.

Versus

1. Kundalik S/o. Keru Bangar,
Age. 69 years, Occu. Agri.,
2. Namdeo S/o. Keru Bangar,
Age. 69 years, Occu. Agri.,
Both R/o. Waghira, Tq. Patoda,
District. Beed.
3. Raosaheb S/o. Keru Bangar,
Age. 59 years, Occu. Agri.,
R/o. Khokarmoha, Tq. Shirur (K),
District. Beed.

...Respondents.

Advocate for Petitioners : Mr. V.J. Dixit, Senior Advocate i/b. Mr. S.V. Dixit.
Advocate for Respondents : Miss. P.R. Deshpande.

CORAM : MANGESH S. PATIL, J.
DATE : 23.07.2020

JUDGMENT :

Heard. Learned Advocates for the parties.

2. Rule. Rule is made returnable forthwith. With the consent of both the sides, the matter is heard finally at the stage of admission.

3. In this Petition under Article 227, albeit styled as one under Articles 226 and 227 of the Constitution of India, the plaintiffs in a suit pending before the learned Civil Judge Junior Division, Patoda, District Beed, are impugning the order passed by the learned Judge rejecting their application (Exhibit 89) whereby they sought appointment of a Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure.

4. Shorn of details, the facts as are relevant are to the effect that the petitioners claim to be the owners in exclusive possession of the land Gat No. 540 (original survey Nos. 157 and 158), totally admeasuring 15 Hectares, 71 Ares (herein after referred as 'suit property'). They aver that their grand father Vithal was the original owner of the suit property and they have inherited it as the ancestral property. They further aver that the respondents' father was an agricultural labour engaged by petitioners' father for cultivating the suit property. Respondents' father was also allowed to reside in the suit

property in that capacity. The respondents have no right, title or interest in the suit property. However, colluding with the revenue authority, the respondents got mutated the revenue record. The petitioners got that entry to be deleted. However, after demise of respondents' father, again by Mutation Entry No. 412 dated 02.08.1982, they got mutated their names in the revenue record of the suit property. Subsequently, even the respondent No. 3 executed two sale deeds on 31.10.1995, purportedly transferring some portions of the suit property to the respondent Nos. 1 and 2. Thus, they pray for a declaration as to their title and for perpetual injunction restraining the respondents from obstructing their possession. They have also seek a declaration to the effect that the sale deeds executed by the respondent No. 3 on 31.10.1995, are not binding on them.

5. The respondent Nos. 1 and 2 are contesting the suit by filing their written statement. They deny that the petitioners are the exclusive owners in possession of the suit property. They contend that petitioners' predecessor Nathu had right and title to only half of the suit property. Respondents further contend that one Manaji Bangar was the original owner. He was having four sons viz. Vithal, Pandurang, Haribhau and Bapurao. Haribhau and Bapurao died issueless. Vithal had two sons namely Keshav and Nathu,

whereas Pandurang who was respondents' grandfather was survived by the only son Keru who was their father. Keru had two wives and the respondent Nos. 1 and 2 are the sons of first wife and respondent No. 3 is the son of the second wife. The petitioners who are the sons of Nathu and the respondents who are the grand sons of Pandurang, became the joint owners of the suit property. They lastly contend that since inception, father of the petitioners and the father of the respondents have been cultivating their respective shares from the suit property for years together. They flatly deny that their father Keru was merely an agricultural labour and was permitted by petitioners' father to reside in the suit property.

6. With such pleadings, the parties proceeded to lead evidence and the suit reached the stage of hearing final arguments.

7. The petitioners then by tendering an application (Exhibit 89) sought appointment of a Court Commissioner to bring on record several aspects which according to them would enable the Court to decide all the disputes. More particularly, they asserted that the Court Commissioner can be directed to opine about the extent of barren land and its situation, existence of wells and the use they are being put to, existence of bore wells, electric supply, pipeline, number of mango trees and their location, existence or otherwise of

a reservoir and the houses and cattle sheds and their location in the suit property.

8. The respondent Nos. 1 and 2 opposed the application by their say (Exhibit 93). They contended that they have a right and possession over half of the suit property. There was no need to bring on record the factual aspects obtaining in the suit property and those facts would not help the Court in deciding the suit.

9. After hearing both the sides, by the impugned order, the learned Civil Judge rejected the application (Exhibit 89). Hence this Writ Petition.

10. Learned Senior Advocate Mr. Dixit for the petitioners vehemently submits that in fact already an application for appointment of a Court Commissioner was once filed by the petitioners (Exhibit 41). The Civil Court was pleased to allow that application but only partly. It had refused to appoint the Commissioner particularly to solicit different points enumerated in the application as points A, D, E, EE and F. Being aggrieved by that order, both the sides had preferred Writ Petition Nos. 13441/2019 and 13554/2019. Learned Senior Advocate points out that both the Writ Petitions were decided by this Court by common judgment and order dated 07.11.2019. After

hearing both the sides on merits, this Court had dismissed the Writ Petition preferred by the petitioners but allowed the one preferred by the respondents. However, this Court further clarified that it was open for the parties to submit an application seeking appointment of a Court Commissioner after recording oral evidence and the Trial Court would consider it on its own merits. Learned Senior Advocate submits that pursuant to such liberty, the present application (Exhibit 89) was filed and the learned Civil Judge was obliged to decide it on merits.

11. Learned Senior Advocate Mr. Dixit, further submits that considering the nature of dispute, when the respondents have also asserted their title and possession over a portion of the suit property, it is utmost necessary to bring on record the factual scenario obtaining in the suit property. It is only when such report is received objectively on the points mentioned in this application that the suit could be decided. The information sought to be solicited by appointing the Court Commissioner would certainly help the Court in deciding the rival claims. Learned Senior Advocate Mr. Dixit, thus submits that the impugned order is perverse, arbitrary and amounts to refusing to exercise jurisdiction vested in the Civil Court and writ in the nature of Certiorari deserves to be issued.

12. Learned Advocate Miss. Deshpande, for the respondent Nos. 1 and 2 submits that the application for appointment of Commissioner is devoid of merits. The information being solicited is not going to help the Court in deciding the points in issue. Only the information as to the factual situation obtaining in the suit property is sought to be elicited. When the petitioners are asserting their exclusive ownership and possession in the suit property, they cannot resort to Order XXVI Rule 9 of the CPC and bring on record evidence. She would submit that Court Commissioner is not to be appointed to collect evidence but is expected to only elucidate the subject matter in controversy. She would further point out that both the sides had led evidence and the suit is now ripe for hearing final arguments.

13. Miss. Deshpande further points out that the information solicited by appointing a Court Commissioner as enumerated in paragraph No. 5 of the application (Exhibit 89), is on the same points in respect of which, at an earlier point of time it was sought by the application (Exhibit 41). The petitioners had made a similar request for appointment of a Court Commissioner. That application was rejected except for couple of points and the Writ Petition preferred by the petitioners was also dismissed by this Court. She would further point out that though a liberty was granted by the Court to

both the sides to again seek appointment of a Court Commissioner after conclusion of oral evidence, it had not permitted the petitioners to once again seek appointment of Court Commissioner to elucidate the very same aspects. Thus according to her, when the request of the petitioners for appointment of Commissioner for same purpose has already been rejected by this Court, the petitioners are not entitled to once again seek appointment of a Court Commissioner merely because this Court had observed that the parties could apply for appointment of Court Commissioner in future. Thus according to the learned Advocate, there is no perversity or arbitrariness in the impugned order and the Writ Petition may be dismissed.

14. It is pertinent to note that a Court Commissioner is not to be appointed to collect evidence but is to be appointed to solicit some information which would enable the Court to decide the matter in issue. The petitioners are asserting their exclusive title and possession over the entire suit property. Both the sides have led evidence and now the petitioners are seeking appointment of Court Commissioner soliciting information on specific points as enumerated in paragraph No. 5. If at all the petitioners are in exclusive possession of the suit property its condition or the factual scenario obtaining in it in respect of existence of wells, trees, their location, etc. would not be of

any help to the Civil Court in deciding the suit.

15. The submission of learned Senior Advocate Mr. Dixit, that since the respondents are also simultaneously asserting their title, ownership and possession over the suit land, information on these factual aspects would enable the petitioners to disprove the assertions of the respondents, in my considered view, cannot be the purpose for which a Court Commissioner can be appointed under Order XXVI Rule 9 of the CPC. If the petitioners are coming with a specific case of they being exclusive owner of the entire suit property, they will have to stand or fall on their own legs.

16. The learned Civil Judge has correctly considered the rival pleadings and has demonstrated as to how existence or location of the wells, bore wells, trees, sheds and houses in the suit property is not going to help him in deciding the suit. He has also correctly observed that it would tantamount to collection of evidence by appointing a Court Commissioner which is not permissible in law.

17. Apart from the above state of affairs it is also important to note that the petitioners had already filed an application (Exhibit 41) for similar relief and had sought appointment of Court Commissioner soliciting information in

respect of all the factual aspects about which once again they have solicited the information in this application. Admittedly, both the sides had challenged that order passed on the application (Exhibit 41) since it was allowed partly, and by the judgment and order dated 07.11.2019, this Court had allowed the Writ Petition filed by the respondent Nos. 1 and 2 and dismissed that of the petitioners. It is pertinent to note that it was specifically observed in paragraph No. 16 of that order that a Court Commissioner could not have been appointed to collect evidence. It is thus apparent that having failed to get a Court Commissioner appointed at earlier point of time, a second attempt is being made by taking aid of the observations of this Court whereby it was merely stated that it was open for the parties to apply for appointment of a Court Commissioner after oral evidence was concluded. The observations did not have the effect of enabling the petitioners to once again solicit the appointment of Court Commissioner for the self same purpose.

18. Having considered all the aforementioned aspects, I do not see any perversity or arbitrariness in the impugned order which can be interfered with under a limited jurisdiction under Article 227. The Writ Petition is therefore, liable to be dismissed.

19. The Writ Petition is dismissed. Rule is discharged. Learned Civil Judge

shall not feel influenced by the observations made herein above and shall decide the suit on its own merits.

20. At this juncture, the learned Senior Advocate Mr. Dixit prays that the petitioners may be granted liberty to agitate the issue being raised in this petition before the appellate Court.

21. With respect, no such liberty is required, still, the appellate Court will be free to consider all the aspects as are permissible under Order XLI Rule 27 of the CPC, on their own merits.

(MANGESH S. PATIL, J.)