

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4210 OF 2020

Abdul Qayyum S/o. Shaikh Hasan,
Age 64 years, Occu. Nil,
R/o. Maqsood Colony, Roshan Gate,
Aurangabad

.. Petitioner
(Original Plaintiff and appellant)

Versus

1. Najma Begum w/o. Abdul Bari,
Age 64 years, Occu. Household,
2. Abdul Bari,
Age 72 years, Occu. Nil,

Both Respondents R/o. Hattesinghpura,
Katkate Gate, Aurangabad

**(Respondents no.1 and 2 are deleted
as per Court's order dated 01-03-2021)**

3. Mohammad Yusuf s/o. Shaikh Maheboob,
Age 69 years, Occu. Business,
R/o. Chishtiya Colony, N-6,
CIDCO, Aurangabad

.. Respondents
(Original Defendants and Respondents)

...
Mr. Ashutosh S. Kulkarni, Advocate for Petitioner
Mr. P. F. Patni, Advocate for Respondent no. 3
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 20TH DECEMBER 2021

ORAL ORDER :

1. Heard.
2. This petition impugns the order passed by the learned District Judge-6, Aurangabad, below Exhibit-17 in Regular Civil Appeal no. 154 of 2018, thereby rejecting the application filed by the petitioner/

appellant (original plaintiff), for appointment of Court commissioner, under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 (in short, "CPC").

3. The petitioner filed Regular Civil Suit no. 1058 of 2000 seeking a declaration of ownership and recovery of possession against the respondents no. 1 and 2 (defendants no. 1 and 2). During the pendency of the suit, the suit property was transferred by respondent no.1 to respondent no.3. Therefore, the plaint was amended and by adding respondent no.3, and a declaration was sought that the subsequent sale deed is not binding on the petitioner. The suit came to be partly decreed by holding the petitioner-plaintiff as the owner of the suit property, but the recovery of possession was denied.

The petitioner, therefore, filed Regular Civil Appeal no. 154 of 2018 before the District Judge-6, Aurangabad. In the said appeal, application Exhibit-17, seeking appointment of Court Commissioner was filed in respect of four boundaries of the suit property bearing CTS No. 11316/P, Plot No. 120 and Plot Nos. 6 and 7 in CTS No. 11318 was requested to be caused. The said application was resisted by the respondent no. 3. The first appellate Court rejected the application. Hence, the present petition.

4. I have heard the rival submissions and perused the record. It is clear from the record that there is a dispute in respect of identity of the property. The parties have adduced evidence before the trial Court

and the petitioner had an opportunity for applying to the Court Commissioner for local investigation before the trial Court. The application, appears to be filed by the petitioner to collect evidence. The petitioner since has failed to establish his case by leading proper evidence before the trial Court, has filed present application for appointment of Court Commissioner.

5. In the evidence led before the trial Court, in cross-examination, the petitioner has given vital admissions. He has admitted that there is no plot bearing CTS No. 11316/P. He has got his CTS No. 11316 measured from the City Survey Office, but, he has not produced the said measurement report on record. He has further admitted that he has no concern with the defendants' plots No. 6 and 7.

6. Though, the learned Advocate for the petitioner submitted that during the pendency of the suit, an application for appointment of Court Commissioner was moved and the same was allowed, the suit was decided without obtaining the report from the Court Commissioner and, therefore, it is necessary to appoint Court Commissioner. It was for the petitioner to pursue the trial Court to call for the report of the Court Commissioner, if the Court Commissioner was appointed at that time. The petitioner has failed to do so.

7. The learned Advocate for the petitioner placed reliance on decision in ***Kolahpuri Bandu Lakade Versus Yallappa Chinappa Lakade, 2011(3) Mh.L.J. 348***, wherein, this Court has held that, in case

of dispute about demarcation of lands, it is appropriate to direct investigation by a Court Commissioner under Order XXVI, Rule 9 of CPC, which would be necessary for just decision of case.

8. Reliance is also placed in ***Bento Antonio Gomes alias Antonio Bento Gomes Versus Rosario Salvador Carneiro and Others, 2014(4) Mh.L.J. 366***, which is in respect of boundary dispute/encroachment on the suit property. This Court in the facts of that case held that the evidence of neither of the experts was to be believed, and it would have been necessary for the Court to have got done local investigation, by appointing Court commissioner. Such are not the facts of the present case.

9. The first appellate Court has rightly held that the petitioner is trying to collect the evidence by appointment of the Court commissioner. No illegality or perversity is found in the order impugned in the present Petition. The petition is, therefore, dismissed. No order as to costs.

10. It is made clear that the observations in this order shall not influence the first appellate Court while deciding the appeal on merits.

[NITIN B. SURYAWANSHI, J .]

arp/