

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

WRIT PETITION NO. 6564 OF 2020

Aadhar Vitthal Mali

... Petitioner
(Orig. Plaintiff)

Versus

Jagannath Hiranman Mali

... Respondent
(Orig. Defendant)

....

Mr. A. R. Syed, Advocate h/f Mr. Shailesh P. Brahme, Advocate for
the petitioner

Mr. J. V. Patil, Advocate for the respondent

....

**CORAM : R. G. AVACHAT, J.
RESERVED ON : 27th JANUARY, 2021
PRONOUNCED ON : 03rd FEBRUARY, 2021**

PER COURT :-

. Heard.

2. The challenge in this writ petition is to the order dated 18.03.2020 passed by the Court of Civil Judge, Junior Division, Parola below Exh.73 in the suit, being Regular Civil Suit No.41 of 2013. By the impugned order, the application preferred by the petitioner-plaintiff for appointment of a Court Commissioner, came to be rejected.

The petitioner-plaintiff filed the suit (RCS No.41 of 2013) for perpetual injunction, restraining the respondent-defendant from obstructing his user of a cart-way, particularly described in the plaint.

The respondent-defendant denied the existence of the cart way. According to him, there exists some other way, as stated in paragraph 14 of the written statement. The petitioner-plaintiff has been using the said way to negotiate with his land.

3. The petitioner-plaintiff moved the application (Exh.73) for appointment of a Court Commissioner for local investigation. The trial Court rejected the application on the ground that the suit is for injunction simplicitor. The petitioner-plaintiff has examined four witnesses. Thereafter, the application has been moved. It is for the respondent-defendant to prove his case as regards existence of some other way. If the Court Commissioner is appointed, it may amount to collection of evidence.

4. Learned Advocate for the petitioner-plaintiff would submit that the dispute is as regards right of way. The suit way has been described in a sketch appended to the plaint. Application for

interim injunction moved by the petitioner has been allowed. Recording of evidence in the case has commenced. To elucidate the matter in controversy, the trial Court should have allowed the application.

5. Learned Advocate for the respondent, would on the other hand, submit that it is a suit for injunction simplicitor. The petitioner-plaintiff has to stand on his own legs. Court Commissioner cannot be appointed for collection of evidence. Learned Advocate supports the impugned order. He has placed reliance on the following authorities.

- (i) *Dnyandeo Vithal Salke and Ors. vs. Dagdu Kadar Inamdar* 2017(5) ALL MR 104.
- (ii) *Nalubai Narayan Shinde and Ors. vs. Gopinath Dagdu Shinde* – 2011(1) ALL MR 100.
- (iii) *Vij Kamgar Sahakari Patsanstha Limited vs. Ramkrushna Dhondiram Thorat and Ors.* - 2009(1) Bom CR 880
- (iv) *Sanjay vs. Sahebrao and Ors.* - 2001(1) Bom CR 800.

6. Section 75 of the Code of Civil Procedure empowers the Court to issue commission to make a local investigation. It is a discretionary power. True discretion has to be exercised judicially.

Each case has to be decided on its peculiar facts and circumstances. There can be no dispute over the proposition that Court Commissioner cannot be appointed for collection of evidence. Court Commissioner cannot also be directed to report as to who is in possession of property in suit. In the case of *Dnyandeo (supra)*, the trial Court had directed the Commissioner to report regarding factum of possession. Same were the directions issued by the trial Court in the case of *Nalubai (supra)*.

7. Right of way is the subject matter of the suit. The alleged suit way has been described in the plaint and sketch appended thereto. The respondent-defendant denied the same. According to him, there exists some other way. Description thereof has been given in paragraph 14 of the plaint. Recording of evidence has already been commenced. To shed light upon the dispute involved in the suit, it has thus become necessary to appoint a Court Commissioner for local investigation. The trial Court ought to have allowed the application. Interference with the impugned order, is therefore, called for.

8. The writ petition, thus, succeeds. The impugned order dated 18.03.2020 passed by the Civil Judge, Junior Division, Parola,

on application Exh.73 in Regular Civil Suit No.41 of 2013 is set aside. Application Exh.73 is allowed. The trial Court shall appoint one of the Advocates as a Court Commissioner. It is for the trial Court to spell the terms of the order appointing the Court Commissioner.

9. The writ petition is accordingly disposed of.

[R. G. AVACHAT, J.]

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