

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 215 OF 2019

Mahadeo Kondiba Shinde

...Petitioner

versus

Nitin Sakharam Shinde and another

...Respondents

.....
Mr. A.P. Bhandari, advocate for petitioner

Mr. S.S. Bora, advocate for respondent Nos. 1 and 2.

.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 24.02.2021**

**Date of pronouncing
the Order : 16.03.2021**

PER COURT:-

1. By consent, heard finally at admission stage.
2. Being aggrieved by order dated 19.11.2018 passed by the learned Joint Civil Judge, Junior Division, Patoda below Exh.40 in Regular Civil Suit No. 69 of 2012, the petitioner-original defendant has preferred this writ petition.
3. The respondents have instituted Regular Civil Suit No. 69 of 2012 for declaration of ownership and decree of perpetual injunction in respect of the suit property bearing land Survey No. 16/2/AA totally admeasuring 7 Hectare 37 R to the extent of 4 Hectare 22 R situated

at Sautada, Tq. Patoda, District Beed. The petitioner, as the original defendant, has resisted the said suit by filing written statement. Pending the suit, respondent No.1 filed an application Exh.40 for appointment of Deputy Superintendent of Land Records, Patoda as a Court Commissioner. By impugned order dated 19.11.2018 passed below Exh.40, the trial court has allowed the application directing the T. I. L. R. Patoda to carry out the measurement and fix the boundaries of the land of the petitioner and the respondents. Hence, this writ petition.

4. Learned counsel for the petitioner submits that even prior to commencement of evidence in the suit; the respondents have filed an application Exh.40 for appointment of Deputy Superintendent of Land Record, Patoda as Court Commissioner. Learned counsel submits that the said application Exh.40 has been filed with a sole intention for collecting evidence. Learned counsel submits that the object of the local inspection under Order XXVI Rule 9 of C.P.C. is not to collect evidence, which can be taken in the court but to obtain the evidence for elucidating the matters. Thus, the court may better appreciate the evidence already on record and at its discretion may appoint the Court Commissioner for local inspection. Learned counsel submits that this court has taken consistent view in various matters that the Commissioner for local inspection can only be appointed only after the parties have led their evidence.

5. Learned counsel for the petitioner, in order to substantiate his submissions, placed reliance on the following cases:-

- i) Order dated 17.01.2014 passed by this Court (Coram: S.V. Gangapurwala, J.) in writ petition No. 8877 of 2013.
- ii) Order dated 04.03.2013 passed by this Court (Coram: S.S. Shinde, J.) in writ petition No. 2749 of 2012.
- iii) Sanjay Namdeo Khandare vs. Sahebrao Kacharu Khandare and others, reported in 2001 2 Mh.L.J. 959,
- iv) Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar and others, reported in 2017 (3) Mh.L.J. 314,
- v) Syed Mushtaque Ahmad Syed Ismail and others vs. Syed Ashique Ali Khan s/o Haidar Ali and others, reported in 2011 STPL 23010 Bombay,
- vi) Order dated 12.12.2019 passed by this Court (Coram: V.K. Jadhav, J.) in writ petition No. 6969 of 2018,
- vii) Unreported judgment dated 20.11.2017 passed by this court (Coram: R.M. Borde, J.) in writ petition No. 6392 of 2013,
- viii) Unreported judgment dated 17.01.2012 passed by this Court (Coram: S.V. Gangapurwala, J.) in writ petition No. 9089 of 2011,

6. Mr. Bora, learned counsel for the respondents-original plaintiffs submits that there is no stage prescribed as such under

Section 75 r.w. Order XXVI Rule 9 of C.P.C. for filing an application for appointment of Court Commissioner.

7. Learned counsel for respondents, in order to substantiate his submissions, placed reliance on the following cases:-

- i) Order dated 6.7.2017 passed by this court (Coram: T.V. Nalawade, J.) in writ petition No. 6541 of 2017,
- ii) Order dated 29.9.2018 passed by this Court (Coram: Manish Pitale, J.) in writ petition No. 4777 of 2018,
- iii) Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade and Ors, reported in 2011 (3) Mh L. J. 348,
- iv) Kalyan Santram Kawade and others vs. Khanderao @ Khandu Ganpati Kawade and others, reported in 2015 (4) Mh.L.J. 429,
- v) Unreported judgment dated 27.9.2016 of this Court (Coram: Sangitrao S. Patil, J.) in writ petition No. 8608 of 2012.

8. In the writ petition No. 8877 of 2013 this Court (Coram: S.V. Gangapurwala, J.) by order dated 17.01.2014 disposed of the writ petition with observations, particularly in para 4 that there can not a dispute with the proposition that to appoint the court commissioner as per Section 75 of C.P.C. is the discretion of the Court and the said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised as per the judicial norms. This Court in

para 6 of the said order has observed as under:-

“6. At this stage of evidence, from the evidence on record i.e. documentary evidence if the Court finds that the appointment of court commissioner is necessary, then at that stage a party can file an application for appointment of T.I.L.R. as court commissioner, which application would be considered by the court on its own merits.”

9. In the case of Ramkrishna Santu Kakad vs. Reojee Sahadu Kakad and another, in writ petition No. 2749 of 2012, this court (Coram: S.S. Shinde, J.) has made similar observations by granting liberty to the parties to file an application to appoint the court commissioner at appropriate stage of the proceeding. The cases at Sr. No. (iii) to (vi) relied upon by the learned counsel for the petitioner are mainly on the point that the court commissioner cannot be appointed for collection of evidence.

10. In the case of Sandeep Dnyandeo Sangle and another vs. Ganesh Sudhakar Chothe and others, in writ petition No. 6392 of 2013 this Court (Coram: R.M. Borde, J.) in para 9 of the order has made the following observations:-

“9. It would obviously be open for the parties to take steps as permissible in law after framing of issues and while leading evidence. However, at the stage of

consideration of application for temporary injunction, to secure appointment of Court Commissioner for measurement of the property would be an attempt to collect evidence which may not be permissible.”

11. In the case of Sunita Ashok Kachre and another vs. Santram Bapurao patkal, relied upon by learned counsel for the respondents this court (Coram: T.V. Nalawade, J.) in para 6 has however, made the following observations:-

“6. This Court has carefully gone through the observations made by this Court. The points involved in those matters and facts of the present matter are altogether different. The provisions of Order 26 Rule 9 of Civil Procedure Code shows that, there is no prohibition to appoint Court Commissioner at such stage. This is enabling provision and no stage is fixed in the provision. Further facts of the present matter show that the dispute can be resolved effectively after taking the measurement through Government Surveyor, if such measurement is possible.”

12. It appears from the observations that this court has considered the facts of the case and further held that the dispute can be resolved effectively after taking measurement through the Government surveyor. Even though certain cases have been referred, however, in the peculiar facts of the said case, this court has not discussed the said referred cases.

13. The general powers of the courts with regard to commissions

have been summarised in Part III of the Civil Procedure Code. This court time and again held that the power of the court to issue commission is discretionary and can be exercised to do the complete justice to the parties in the suit. The provisions of Order XXVI Rule 9 of C.P.C. is re-produced herein below:-

*“Order XXVI: **Commissions.***

1 to 8

9. Commissions to make local investigations. - *In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

14. It is thus clear that the object of the local inspection under this Rule is not to collect the evidence, which can be given in the court but to obtain the evidence for elucidating the matters.

15. As per Merriam Webster dictionary, the word elucidate: to make plain or understandable and the synonyms for elucidate are (i) clarify, clear (up), (ii) construe, demonstrate, demystify, (iii) explain, explicate, expound, get across, illuminate, (iv) illustrate, interpret,

simplify, spell out, unriddle.

As per Collins dictionary, "if you elucidate something, you make it clear and easy to understand." and the synonyms are, clarify, explain, illustrate, interpret etc.

As per Cambridge dictionary elucidate means to explain something or make something clear and the synonyms are clarify and explain.

As per Oxford's advanced learner Dictionary, Elucidation means (i) the act of making something clearer by explaining it more fully, (ii) their objectives and methods require further elucidation.

16. If we read the meaning of the word elucidate alongwith synonyms in terms of the various dictionaries, as above, it is clear that to elucidate something means to make it clear and easy to understand. In view of the same, after the parties led the evidence, to make the issue involved easy to understand or to make it clear, the discretion is conferred upon the Court in terms of the provisions of Order XXVI Rule 9 of C.P.C. to appoint the Court Commissioner to obtain the evidence for elucidating the matters.

17. In view of the same, and since there are catena of judgments and orders passed by this court taking consistent view, in the instant

case, the order impugned is premature one. The parties have not yet stepped into witness box. The trial court may appoint the court commissioner if the same appears to be necessary to elucidate the matter in dispute. Thus, the order impugned is liable to be set aside with liberty to the parties to file an application for appointment of T.I.L.R. as Court Commissioner at the stage of evidence.

18. In view of above, writ petition is hereby allowed.

19. The impugned order dated 19.11.2018 passed by the learned Joint Civil Judge, Junior Division, Patoda below Exh.40 in Regular Civil Suit No. 69 of 2012 is hereby quashed and set aside. However, the parties are at liberty to file an application for appointment of Court Commissioner at the stage of evidence and upon filing such application for appointment of T.I.L.R. as Court Commissioner, it is for the trial court to decide the same on its own merits.

20. Writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

rlj/