

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5010 OF 2019

Dattatray Ramchandra Waikar

....Petitioner

v/s.

Balutai @ Ranjana Suresh Gavali and anr.

.... Respondents

Ms. Shraddha Pawar i/b. Mr. Dilip Bodake for the Petitioner.

Mr. Vaibhav Gaikwad for Respondent No.1.

CORAM: MADHAV JAMDAR, J.

DATED : 11th MARCH, 2021.

JUDGMENT :-

. In the present Writ Petition filed under Article 227 of the Constitution of India, the Petitioner who is the original Defendant No.1, has challenged the order dated 22/10/2018 passed by the learned Civil Judge, Junior Division, Khandala below Exhibit – 36 in Regular Civil Suit No.58 of 2013. Exhibit – 36 was filed by original Plaintiff i.e., present Respondent No.1 for appointment of Court Commissioner. It is the contention in the Application at Exhibit – 36 that earlier a lady advocate was appointed as Court Commissioner, however she has not done work properly to some extent and therefore both the parties i.e., Plaintiff and Defendant No.1 have filed objections to the said report. It is contended that it is necessary to appoint TILR as Court

Commissioner. It is submitted that, if necessary, the earlier order of appointing Court Commissioner be cancelled and new Court Commissioner be appointed. The said Application is allowed by impugned order dated 22/10/2018 and TILR has been appointed as a Court Commissioner. The present Writ Petition challenging said order was filed on 30/01/2019. However, during the pendency of the Writ Petition, the Court Commissioner appointed pursuant to impugned order dated 22/10/2018 carried out Commission work on 27/05/2019 and submitted his report. This Court thereafter by order dated 06/09/2019 requested the learned Trial Court to defer the hearing of the Suit and thereafter by order dated 04/10/2019 directed the learned Trial Court not to act upon the Court Commissioner's report submitted pursuant to the impugned order.

2. Ms. Shraddha Pawar, learned counsel appearing for the Petitioner submitted that the earlier Court Commissioner report was not rejected by the learned lower Court by giving cogent reasons and the objections in that behalf are not considered. According to her submission, unless the earlier Commissioner's report is rejected by giving reasons, the Court will have no power to appoint another Court Commissioner. She has relied upon the judgment of the Madras High Court reported in **R.**

Viswanathan v/s. P. Shanmugham and anr. 1985 1 MLJ 254 to substantiate her case. She has also relied upon the judgement of this Court in ***Sanjay Kisan Thorat and ors. v/s. Ramchandra Parsu Thorat and anr.*** reported in ***2018(3) ALL MR 487***, to support her submission.

3. Mr. Vaibhav Gaikwad, learned counsel for Respondent No.1, on the other hand, at the outset, submitted that he is not supporting the contention in the Application at Exhibit – 36 which is filed by the Respondent No.1 to the effect that lady advocate was appointed as Court Commissioner and therefore, work was not done properly. However, he states that the nature of dispute which is involved in the present suit requires that the TILR be appointed as the Court Commissioner. Learned counsel for the Respondent No.1 has also relied upon the objections submitted by both the parties to the Commissioner's report and submitted that as both the parties have raised objections to the report submitted by the earlier Court Commissioner, and therefore the said report is required to be rejected. He pointed out that TILR was appointed as the Commissioner by the impugned order and as the TILR has already submitted the report (hereinafter referred to as the "Second Commissioner's Report"), the impugned order need not be interfered with, as it has been already

implemented. He has relied upon the judgment of the Hon'ble Supreme Court in the case between ***Ram Lal and ors. v/s. Salig Ram and ors.*** reported in ***2020(1) Mh.L.J.170*** , particularly paragraph nos.17 and 18 of the same. He has also relied upon the judgment of this Court in the matter between ***Vijay Shrawan Shende v/s. State of Maharashtra*** reported in ***2009(4) ALL MR 601*** and submitted that in the type of dispute which is involved in the suit, TILR should have been appointed as Court Commissioner.

4. A perusal of the plaint filed in Regular Civil Suit No.58 of 2013 by the Respondent No.1 shows that allegations are regarding some open space and construction made on the same, by the Defendant No.1 i.e. the present Petitioner. It appears that the Plaintiff i.e., the Respondent No.1 has earlier filed Application bearing Exhibit – 30 for appointment of the Court Commissioner and at the instance of the Respondent No.1, Court Commissioner was appointed by order dated 13/06/2016. It appears that as per that order, an advocate was appointed as Court Commissioner. It is significant to note that the Respondent No.1 has not taken any objection for appointment of an advocate as Court Commissioner and in fact the said appointment was at the instance of the Respondent No.1.

5. The said learned advocate appointed as Commissioner had conducted the Commissioner's work on 06/05/2016 from 11:00 a.m. to 12:30 p.m. and submitted a very detailed report on 20/06/2016 along with the map giving measurements. (Hereinafter referred to as the "First Commissioner's Report"). It further appears that certain objections were taken to the said report by the Respondent No.1 on 22/08/2016 and by the Petitioner on 08/08/2016. It is further to be noted that the Respondent No.1 filed Application dated 30/01/2017 bearing Exhibit – 36 seeking appointment of fresh Commissioner. As mentioned herein above, in the Application it is mentioned that the earlier Court Commissioner was a lady advocate and who has not done the work properly and TILR be appointed as Court Commissioner. The said Application was objected by the Petitioner by filing his objection dated 10/07/2017 *inter alia* on the ground that Court Commissioner earlier appointed had already performed the work.

6. A perusal of the impugned order shows that the learned Trial Court without considering the detailed First Commissioner's Report filed by the learned Court Commissioner has passed the impugned order by which the TILR was appointed as the Court Commissioner. It is mentioned in the impugned order that the measurements are not

properly taken by the learned First Court Commissioner and the said report is objected by both the parties. A perusal of the First Commissioner's Report dated 20/06/2016 and the map annexed to the same clearly shows that the learned Court Commissioner has taken measurements and they are specifically mentioned in the report of the First Court Commissioner as well as they are specifically mentioned on the map annexed to the said report. Thus the observation in the impugned order that the measurements are not properly taken, is perverse. The learned Trial Court has not at all given reasons for such observation and completely ignored the contents of the First Commissioner's Report and the map annexed to the same.

7. The reason mentioned in the Application at Exhibit – 36 that lady advocate was appointed as Court Commissioner and she has not done work properly, is not only contrary to the contents of the First Commissioner's Report but it is required to be noted that such gender bias has no place in the administration of justice. It is to be noted that the learned Advocate of the Respondent No.1 has not supported the said contention raised by the Respondent No.1 in the Application at Exhibit – 36.

8. The impugned order clearly shows that the learned Trial Court has not taken into consideration the detailed First Commissioner's Report dated 20/06/2016 filed by the learned Commissioner and has also not discussed whether there is any substance in the objections raised by the Respondent No.1 and the Petitioner to the said First Commissioner's Report. Thus, the impugned order passed is totally perverse.

9. Section 75 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'C.P.C.') is regarding power of Court to issue Commissions. The same is reproduced hereinbelow for ready reference :-

“ 75. Power of Court to issue commissions. - Subject to such conditions and limitations as may be prescribed, the Court may issue a commission -

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts; or

(d) to make a partition;

[(e) to hold a scientific, technical, or expert investigation;

(f) to conduct sale of property which is subject to speedy

and natural decay and which is in the custody of the Court pending the determination of the suit ;

(g) to perform any ministerial act.] ”

In this case, clause (b) regarding local investigation is relevant.

10. Order XXVI of C.P.C. makes elaborate provisions regarding commissions. Orders XXVI, Rule 9 and 10 are regarding commissions for local investigations and the same are relevant for this case and are reproduced hereinbelow for ready reference :-

“ 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.

10. Procedure of Commissioner - (1) The Commissioner, after

such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit. – *The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.*

(3) Commissioner may be examined in person – *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit. ”*

11. Thus the Order XXVI Rule 10(3) very clearly provides that the Court may direct such further inquiry to be made as it shall think fit, which may include appointment of the new Commissioner, but for that purpose the Court should be dissatisfied with the proceedings of the earlier

Commissioner. Thus before appointing Second Commissioner, it is necessary that the Court should be dissatisfied with the report of the earlier Commissioner or proceedings of the earlier Commissioner. It is also very important to note that parties to suit are entitled to examine / cross-examine the Commissioner regarding several aspects of the Commission work and his report as set out in Order XXVI Rule 10(2). As held in the case reported in 2011 (3) Bom.C.R. 807 in the matter between *Kolhapuri Bandu Lakade v/s. Yallappa Chinappa*, it is settled legal position that merely because a Court Commissioner is appointed, it will not prejudice the interest of either of the parties. If any of the parties is aggrieved by the report of the Court Commissioner, an opportunity would be available to that party to cross-examine the Court Commissioner and to point out as to how his conclusions were not correct. It is further held that the party who was not aggrieved would also prove how his conclusions are correct.

12. Ms. Shraddha Pawar, learned counsel for the Petitioner is right in relying upon the judgment in the case of *R. Viswanathan* (supra) of Madras High Court wherein it is held that it is well settled proposition that until the Court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further inquiry, much less the scrapping of the earlier report as a whole and appoint a fresh Commissioner. It is further

held that the power in this behalf is circumscribed by the principles under Order 26, Rule 10(3) of the C.P.C. The power has to be exercised only after the Court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for further inquiry, then only another Commissioner can be appointed.

13. The impugned order clearly shows that the learned Trial Court has completely ignored the contents of the First Commissioner's Report and contents of the map annexed to the same and without considering the same and without going into the objections raised by both the sides, perversely passed the impugned order.

14. Mr. Vaibhav Gaikwad, learned counsel for Respondent No.1 has relied upon the judgment of the Hon'ble Supreme Court in ***Ram Lal and ors.*** (supra). In this case, the factual position shows that the High Court in the Second Appeal rejected the Court Commissioner's report on the ground that Commissioner had not carried out demarcation in accordance with the applicable instructions and on the basis of the rejection of the Court Commissioner's report, dismissed the suit. The Hon'ble Supreme Court relied on clause (3) of Rule 10 of Order XXVI of

C.P.C. which reads as under :-

“ Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit. ”

15. In view of said provision, the Hon'ble Supreme Court has held that if the local Commissioner's report was found wanting in compliance of applicable instructions for the purpose of demarcation, it was only a matter of irregularity and could have only resulted in discarding of such a report and requiring a fresh report but any such flaw, by itself, could have neither resulted in nullifying the order requiring appointment of local Commissioner and for recording a finding after taking his report nor in dismissal of the suit. In fact, this judgment supports the case of the Petitioner that unless the report of the Court Commissioner which has been submitted, is discarded, new Commissioner need not be appointed.

16. Mr. Vaibhav Gaikwad, learned counsel for Respondent No.1 has also relied upon another judgment which is of this Court in ***Vijay Shrawan Shende*** (supra). In fact, in this judgment also, it is held that it would not be proper to dismiss the suit simply because the Court Commissioner has not adopted a correct procedure of measurement

and the exercise of re-measurement, according to rules, will have to be got done through Court Commissioner again and again, if necessary, because failures of Cadesteral Surveyors are not attributable to parties to the suit. Thus the sum and substance and the ratio of the said judgment is the same as that of the judgment of the Hon'ble Supreme Court in ***Ram Lal and ors.*** (supra), wherein it is held that if the report of the Court Commissioner is not proper, that should not result in dismissal of the suit as failures of Court Commissioners are not attributable to parties to the suit.

17. In any case, in the present case, by the impugned order, the new Commissioner has been appointed without properly considering the contents of the First Commissioner's Report. The impugned order is passed only on the basis that both the parties have filed objections to to the First Commissioner's Report. The learned Trial Court should have taken into consideration the detailed First Commissioner's Report as well as whether there is any substance in the objections raised by both the parties and unless a finding, after perusal of the material, recorded that the First Commissioner's Report is required to be discarded then only the fresh Court Commissioner could have been appointed.

18. The objections raised by the Respondent No.1 to the First Commissioner's Report are to the effect that the Court Commissioner has not recorded the measurements, not shown the position of windows, not shown the place of access, not shown the position of tanks etc. All these aspects are specifically shown in the First Commissioner's Report (Exhibit – 32) and the map annexed to the same. The learned Trial Court has completely ignored the contents of the First Commissioner's Report. It is also required to be noted that in any case, the Respondent No.1 will have the opportunity to cross-examine the First Court Commissioner. However, without recording a finding by giving cogent reasons that the report of the First Court Commissioner is required to be discarded, no new Commissioner could have been appointed by the learned Trial Court.

19. The objections raised by the Petitioner to the First Commissioner's Report are also concerning not mentioning measurement of the distance between two walls on southern side, not mentioning the suit property properly, not mentioning the distance of access etc. Perusal of the First Commissioner's Report clearly shows that all these aspects are set out in detail in the First Commissioner's Report and in any case even the Petitioner will have opportunity to put questions to the Court

Commissioner.

20. In view of the above, following order is passed :-

(i) The impugned order dated 22/10/2018 passed below Exhibit – 36 in Regular Civil Suit No.58 of 2013 by the learned Civil Judge, Junior Division, Khandala is quashed and set-aside.

(ii) This Court by ad-interim order dated 04/10/2019 directed the learned Trial Court not to act upon the Second Court Commissioner's report which was submitted pursuant to the impugned order dated 22/10/2018. As the said impugned order dated 22/10/2018 is quashed and set-aside, the said ad-interim order dated 04/10/2019 is confirmed and the learned Trial Court is directed not to act upon the said Second Court Commissioner's Report. However, it is clarified that the Respondent No.1 who is relying on the said report of the TILR, can examine the said TILR as his witness and can rely on the said report of TILR.

(iii) It is expressly clarified that all the observations regarding First Commissioner's Report made in this order are only *prima facie* observations and all contentions in that behalf are expressly

kept open.

21. The Writ Petition is allowed in the aforesaid terms.

(MADHAV JAMDAR, J.)