

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH : NAGPUR.**

WRIT PETITION NO.121 OF 2019

Rameshwar Shravan Ghavat
Aged 71 years, Occ. Agriculturist
R/o Kasamur (Samda), Tah. Daryapur,
District Amravati ... Petitioner

Vs.

1. Babarao Kesharao Rane
Aged 65 years, Occ. Agriculturist
R/o Kasamur (Samda), Tah. Daryapur,
District Amravati
2. Shyam Rameshwar Ghavat
Aged 35 years, Occ. Kotwal
R/o Kasamur (Samda), Tah. Daryapur,
District Amravati

Shri A. A. Dhawas, Advocate for petitioner.
Shri P. S. Patil, Advocate for respondent No.1.

**CORAM :- A.S.CHANDURKAR, J.
DATED :- JUNE 15, 2021**

ORAL JUDGMENT

Rule. Heard finally considering the short issue involved.

The petitioner is the defendant No.2 in the suit for perpetual injunction as filed by the respondent No.1 herein. It is the case of the plaintiff that he is using the way as shown in the suit map by letters O, P, Q, R, O. The defendants having caused obstruction to the same the plaintiff approached the Civil Court with the aforesaid suit. The parties led evidence before the trial Court and the plaintiff with a view to prove his case had a map drawn from one Shri Gawli. After

conclusion of the evidence when the suit was fixed for final arguments the plaintiff moved an application below Exhibit-63 praying that since Shri Gawli who had drawn the map had expired and as the plaintiff sought to bring on record the position prevailing at the site it was necessary to examine the Court Commissioner. This application was opposed by the defendants by stating that the plaintiff had examined the son of Shri Gawli and the application at Exhibit-63 had been moved when the suit was fixed for final hearing. By the impugned order the trial Court allowed the application below Exhibit-63 by observing that since the suit was based on alleged illegal construction it was necessary to gather the actual position on the spot and to know whether so called portion had been constructed by the defendants. This order is the subject matter of challenge at the instance of the defendant No.2.

2. Shri A. A. Dhawas, learned counsel for the petitioner that the parties having led evidence and the plaintiff having closed his side on 23/04/2018 by filing pursis at Exhibit 50, the plaintiff was not justified in moving the application below Exhibit-63 on 22/10/2018 when the case was fixed for final arguments. Placing reliance on the decision in *Shaikh Isak s/o Shaikh Amir vs. State of Maharashtra and Anr. 2011(3) ALL MR 185* it was submitted that the plaintiff intended to fill

the lacunae that had been left and hence the Court Commissioner was sought to be appointed. According to him the parties having led the evidence and the suit being at the stage of final arguments the application was liable to be rejected.

3. Shri P .S. Patil, learned counsel for the respondent No.1 on the other hand supported the impugned order and by placing reliance on the decision in *Dattatray Kashinath Mandlekar vs. Changdeo Dagdu Khule and ors. 2018 (6) ALL MR 540* submitted that as the plaintiff intended to remove the defect in the plaint and wanted to properly describe the suit property, such application was moved. He further submitted that the commission was executed on 15/01/2019 by giving due notice to the parties. However the defendant No.2 remained absent. It was submitted that since the suit was for removal of encroachment such application was rightly allowed and there was no reason to interfere with the impugned order. He therefore submitted that the writ petition was liable to be dismissed.

4. Having heard the learned counsel for the parties and having perused the material on record it is an undisputed fact that after the parties led evidence and closed their respective sides, the plaintiff on 22/10/2018 moved the application below Exhibit-63 seeking

appointment of the Court Commissioner. In the said application it has been stated that Shri Gawli who had drawn the map had expired and hence he could not be examined. At the stage of final arguments the plaintiff wanted to bring on record the actual position existing at the site. It is seen from the reply filed by the defendants that the plaintiff by examining the son of Shri Gawli at Exhibit-43 had brought on record the map prepared by his father. This being the only reason for filing the application, the trial Court was not justified in allowing the application at Exhibit-63 for bringing on record the actual position on the spot. The parties having led evidence and there being no exceptional case warranting such application to be moved at the stage of final arguments the trial Court was not justified in passing the impugned order. Though it was urged that the plaintiff intended to remove the defect in the pleadings by resorting to the provisions of Order VII Rule 3 of the Code of Civil Procedure, 1908 (for short, 'the Code') there is no such reference to this aspect made in the application at Exhibit-63. Hence reliance placed on the decision in *Dattatraya Kashinath Mandlekar* (supra) does not assist the case of the plaintiff. On the contrary the observations made in *Shaikh Isak* (supra) support the stand of the defendant No.2.

5. It is thus found that the trial Court exercised its jurisdiction with material irregularity by allowing such application under Order

XXVI Rule 9 of the Code when the suit was fixed for final arguments. The impugned order being unsustainable, the same is liable to be set aside. Accordingly the order passed below Exhibit-63 on 02/11/2018 is quashed and set aside. The trial Court shall decide the suit on the basis of the evidence led by the parties on its own merit without being influenced by any of the observations made in this order. All questions on merit are kept open.

The Writ Petition is allowed and disposed of. Rule is made absolute in aforesaid terms. The parties shall bear their own costs.

JUDGE