

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10200 OF 2022

1. Shri. Rajaram Dadabhau Dhawle,
Age: 45 years, Occ: Agri.,
R/o.: At post Rajapur, Tq.: Shrigonda,
Dist.: Ahmednagar.
2. Shri. Sampat Dadabhau Dhawle,
Age: 40 years, Occ: Agri.,
R/o.: At post Rajapur, Tq.: Shrigonda,
Dist.: Ahmednagar.
3. Shri. Delip Dadabhau Dhawle,
Age: 55 years, Occ: Agri.,
R/o.: At post Rajapur, Tq.: Shrigonda,
Dist.: Ahmednagar.
4. Shri. Subhash Dadabhau Dhawle,
Age: 53 years, Occ: Agri.,
R/o.: At post Rajapur, Tq.: Shrigonda,
Dist.: Ahmednagar.

Versus

Shri. Shivaji S/o. Kondiba Dhawle,
Age: 70 years, Occ: Agri.,
R/o.: At post Rajapur, Tq.: Shrigonda,
Dist.: Ahmednagar.

Mr Uday D. Dalvi, Advocate for Petitioners
Ms Manjushri V. Narwade, Advocate for respondent sole

CORAM : SANDEEP V. MARNE, J.
DATE : 14th DECEMBER, 2022

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of both the sides.
2. By this petition, petitioners challenge order dated 7th May, 2022 passed by the 2nd Jt. Civil Judge, Senior Division, Shrigonda allowing

plaintiffs application for appointment of Court Commissioner for measurement of land and for ascertaining the extent of encroachment.

3. The suit is filed by the plaintiff seeking relief of removal of encroachment by the defendants and possession of encroached portion of land. Along with the suit, plaintiff filed an application at Exh. 5 seeking a prayer for appointment of Court Commissioner. Ordinarily, the application at Exh. 5 is filed to seek temporary injunction. However, in the present case, it appears that the plaintiff has not filed any application seeking temporary injunction. However, both the suit as well as application for appointment of Court commissioner has been filed on the same day i.e. 22nd October, 2018. The trial court took period of four years to decide that application and by order dated 7th July, 2022, the application is allowed directing the Dy. Superintendent of Land Records, Shrigonda to measure the land and ascertain the extent of encroachment.

4. Learned counsel for petitioner relied upon the Judgment of this Court in **Sitaram Patil Vs. Vasudeo Patil in Writ Petition No. 9626/2016 decided on 21st July, 2017**, in which this Court has held in para Nos. 6 to 9 as under :-

6. This court (Coram : S.S.Shinde, J.) has held in Writ Petition No. 2749/2012 decided on 04.03.2013 that an application for appointment of Court commissioner need not be filed at a premature stage in trial. The relevant paragraph Nos. 4 and 5 are reproduced hereinbelow:-

"4. I have given careful consideration to the rival submissions. I find considerable force in the submissions of the learned counsel for the plaintiff that yet the issues are to

be framed by the Trial Court and at the threshold of hearing of the suit, application filed by the defendants for appointment of the Court Commissioner is entertained by the Trial Court. The plaintiff's or defendants' case should stand or fall on the evidence lead by them. This Court in case of Sanjay Namdeo Khandare Vs. Sahebrao Kachrau Khandare and others, reported in 2001(2) Mh.L.J. 959, has taken a view that the Court Commissioner can not be appointed for collecting evidence.

5. In that view of the matter, in my opinion, the stage of the proceeding for appointment of the Court Commissioner is pre-mature. It is different matter if the Court starts recording the evidence and finds it difficult to locate the correct position about the questions of controversy involved in the matter and at that stage, by invoking powers u/s 26 Rule 9 of the C.P.C. appoints the Court Commissioner. Therefore, in my opinion, the impugned order cannot sustain for the afore stated reasons. Therefore same is quashed and set aside. However, the parties will have liberty to file an application for appointment of the Court Commissioner at appropriate stage of the proceedings. Setting aside the impugned order will not come in the sway of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit."

7. This Court (Coram : S.V. Gangapurwala, J.) while passing an order in Writ Petition No. 8877/2013 dated 17.01.2014 has also echoed the same view in paragraph Nos. 4, 5 and 6, which are reproduced hereinbelow:-

"4. There can not be a dispute with the proposition that to appoint Court Commissioner as per Section 75 of the code of Civil Procedure is the discretion of the Court. The said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised as per the judicial norms.

5. The parties have not yet stepped into witness box. The Court Commissioner could have been appointed if the Court finds it necessary for the just decision of the case. No doubt, in case of encroachment, dispute with regard to the identify of the property, the assistance of expert such Cadestral Surveyor to measure the property can be considered by the Court. However, the stage is too premature. Even the application for temporary injunction is not decided. The report of the T.I.L.R. if disputed by either party, is not admissible in evidence unless the T.I.L.R. is examined.

6. At the 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.”

8. This Court (Coram : Myself), in Writ Petition No. 234 of 2015, dated 19-01-2015 has also taken the same view in paragraph No. 9 which is reproduced hereinbelow:-

“9. Since the scheme of Section 75(b) r/w Order 26 Rule 9 of the Code of Civil Procedure is aimed at elucidating information through local inspection in order to assist the Trial Court in resolving the real controversy at issue, this Court has laid down the law as referred above that such an application for appointment of the Court Commissioner can be filed after commencement of the recording of evidence. It is not disputed that the recording of evidence is yet to commence.”

9. Considering the above, this petition is allowed. The impugned order dated 30th July, 2016 is quashed and set aside and application Exhibit 14 is rejected for the reason that the Court Commissioner was appointed even before the issues have been framed and when a specific ground was raised by the defendants that the application is not maintainable at that stage.

5. Per contra, Ms Narwade, learned counsel for respondent would oppose the petition and support the order passed by the trial court. She would submit that there is no specific stage prescribed under Section 75 r/w under Order 26 Rule 9 of the Code of Civil Procedure when the Court can appoint Commissioner for measurement of land. She would submit that the power of appointment of Court Commissioner is wide as can be exercised by the Court at any point of time.

6. In support of her contention, Ms Narwade has relied upon the Judgment of this Court in ***Yeshwant Vs Vithobaji reported in 2010 3 Mh.L.J.956, Mayuresh Subhash Sonawane Vs. Yeshwant Babu reported***

in 2022 2 ALL MR 348 and Govardhan Narayan Gaikwad Vs. Saibaba Estates Writ Petition No. 7594/2020 decided on 21.02.2020.

7. I have heard learned counsel for the parties and perused the record of the case. There can be no dispute about proposition that Code of Civil Procedure does not prescribe any particular stage at which Court can appoint Commissioner for verifying status of the suit property. In fact, this Court has relied on the Judgment in case of ***Shantaram Dattatray Kekan and others Vs. Bhausaheb Karbhari Kekan and anr in Writ Petition No. 14046 of 2021 decided on 05th December, 2022*** wherein this Court, after considering various judgments on the subject, has held that there is no specific stage provided in the code when the Court Commissioner can be appointed for measurement of land or fixation of boundaries.

8. Having considered the position of law that the Court enjoys wide powers to appoint Court Commissioner for measurement of land at any stage depending on the facts and circumstances of each case, let me now examine whether the appointment of Court Commissioner in the present case was warranted. As observed hereinabove, the application for appointment of Court Commissioner has been filed by the plaintiff along with suit. This itself is a factor to infer that the sole purpose of appointment of Court Commissioner is to gather evidence in support of the final prayers made in the suit. Apart from seeking appointment of Court commissioner, the plaintiff is not seeking temporary injunction against the defendants. Therefore, it is in consequent as to why the trial court is expected to appoint the Court Commissioner immediately upon filing of the suit. There can be

therefore no matter of doubt that the sole purpose for filing an application for appointment of Court Commissioner in the present case is to gather evidence in support of the claim of the plaintiff.

9. It is also seen that the trial court, instead of proceedings ahead kept application for appointment of Court Commissioner pending for four long years and decided the same only on 07.07.2022. Both the counsels for the parties had been claiming that the trial in the said suit has not progressed at all.

10. In this view of the matter, the appointment of Court Commissioner for measurement of land and ascertainment of encroachment, in my opinion, before the plaintiff to elucidate his case by adducing evidence was unwarranted.

11. The Judgments relied upon by Ms Narwade are of no assistance to the case of the respondent. In **Yeshwant Ghuse**, this Court, while deciding second appeal was concerned with the issue of giving weightage to the findings recorded by the Taluka Inspector of Land Records in his report. The judgment has therefore no application to the present case.

12. In **Mayuresh Subhash Sonawane** (supra) , this Court was dealing with the situation that the application for temporary injunction was pending and the Court arrived at the conclusion that the appointment of Court commissioner for deciding the application for temporary injunction was necessary as there was dispute about the boundaries of constructions being carried out at the suit property.

13. In ***Govardhan Narayan Gaikwad*** (supra), the application for temporary injunction was already decided, and therefore, the Court permitted appointment of Court Commissioner.

14. As observed above, there cannot be any such stage at which the Court can exercise power of appointment of Court Commissioner. If the trial court comes at conclusion that appointment of Court Commissioner is necessary to ascertain the nature of the property, the power can be exercised at any stage. In the present case, the stage at which power is exercised i.e. before framing of issues and before commencement of trial, is not appropriate.

15. Consequently, the order passed by the trial court is ineffective. The same is set aside. The plaintiff will however be at liberty to file an application for appointment of the Court Commissioner after elucidating his case by adducing evidence and if such an application is filed, the same shall be decided by the trial court on its own merits without being influenced its own order dated 07.07.2022 or by the order passed by this Court.

16. The writ petition is accordingly disposed of.

17. Rule is made absolute in above terms. There shall be no order as to costs.

[**SANDEEP V. MARNE, J.**]

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