

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11047 OF 2021

NARAYAN VITTHAL MOKASE AND ANOTHER THROUGH GPA
KRUSHNA VITTHAL MOKASE
VERSUS
SHAIKH AZIM SHAIKH SAMAD AND OTHERS

Mr.T.M.Venjane, Advocate for the petitioners.

(CORAM : BHARATI H. DANGRE, J.)

DATE : FEBRUARY 11, 2022

PER COURT :

1. Heard the learned Advocate Mr.Venjane for the petitioners who have preferred RCS No.144/2015 seeking perpetual injunction and mandatory injunction.

2. The plaintiffs pleaded in the plaint that they are the owners and possessors of the ancestral land in Gat No.5 situated at village Digar, Tal.Kannad , Dist. Aurangabad. Gat No.6, which was previously owned by defendant Nos. 3 and 4 and which is agreed to be sold to defendant Nos. 1 and 2, is described to be located on the western side of the land of the plaintiffs. It is specifically pleaded that the defendants made

plots in the land without obtaining necessary permission and there is a mention in the plaint about a common *bandh* between Gat Nos. 5 and 6 and that there are various trees planted on the said *bandh*. The plaintiffs pleaded that the defendants raised a wire fencing on the common *bandh*, as they had plotted Gat No.6 and this would contemplate running of a drainage line through it, which would cause loss to the land of the plaintiffs.

3. The defendants appeared in the suit and resisted the claim of the plaintiffs by filing written statement.

On 21/01/2019, i.e. after the cross examination of the plaintiffs, an application vide Exh.50 was taken out for appointment of Court Commissioner. The necessity of appointment of Court Commissioner is pleaded on account of the material that has come on record through the cross examination and it was specifically pleaded that, to understand the real controversy between the parties, local inspection of the suit land through the Court Commissioner is necessary. This application was opposed by the opponent on the ground that the suit is posted for evidence and the evidence of the plaintiffs and defendants is already on record and by appointing a Court Commissioner, it would amount to

collection of evidence for the plaintiffs.

4. By construing the position of Law, the learned Judge has recorded that the plaintiff has filed his evidence affidavit and he was subjected to cross examination and closed his evidence by way of *purshis*. From the side of the defendants, defendant No.1 examined and even his cross examination was over. The learned Judge recorded that both the parties had adduced evidence in support of their pleadings and it is not expected to ascertain the correctness of the contents of the pleadings by bringing evidence in the form of report from the Court Commissioner when the evidence of the witnesses was already brought on record, about prevailing situation.

By recording that whatever deposed by the plaintiffs and defendants in the testimony is a matter of record, which will have to be evaluated at the time of appreciating evidence, the request of appointment of court commissioner by invoking Order 26 Rule 9 has been turned down. The dispute between the parties being very limited and since the parties have adduced their evidence in support of their pleadings, the appointment of Court Commissioner was found to be unwarranted.

5. With the assistance of the learned Advocate Mr.Venjane , I have perused the evidence on record including the cross examination of the plaintiffs where he denied the suggestion that there are no trees standing on the *Bandh*. Whatever is the effect of this denial will have to be appreciated when the evidence is read, in support of pleadings.

The learned Judge is absolutely justified in rejecting the application, since it is clearly observed that the evidence shall be appreciated on merits.

Necessarily by upholding the impugned order, the writ petition is dismissed.

(BHARATI H. DANGRE, J.)