

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

16 WRIT PETITION NO.12543 OF 2022

GURUNATH MALLAPPA KASEKAR AND OTHERS
VERSUS
BABURAO GOVINDRAO POTDAR AND ANOTHER

...
Advocate for Petitioners : Mr. Abhay G. Deshmukh
...

CORAM : SANDEEP V. MARNE, J.

DATE : 12-12-2022

PER COURT :

. By order dated 08.07.2019, the trial Court allowed application for appointment of Court Commissioner for measurement of the property in question. Petitioners filed application under the provisions of Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') for setting aside the order dated 08.07.2019. That application has been rejected by order dated 20.10.2022.

2. Mr. Deshmukh, the learned counsel for petitioners submits that the Court Commissioner can be appointed only in a suit and not in an application filed under the provisions of Order-XXXIX, Rule-2 of the CPC. He further submits that the only objective of plaintiff (respondent herein) behind seeking appointment of Court

Commissioner was to collect evidence. He submits that it is the primary duty of plaintiff to establish the breach of the order of interim injunction, if any and that he cannot seek appointment of Court Commissioner for collecting evidence. In support of his contentions, he relies upon the judgment of this Court in **Shantaram Dattatray Kekan & Others vs. Bhausahab Karbhari Kekan & another**, Writ Petition No.14046 of 2021 decided on 05.12.2022.

3. Mr. Deshmukh further submits that Court can appoint Court Commissioner only at the end of the trial of the suit and since the trial in the suit is yet to commence, the appointment of Court Commissioner cannot be done.

4. I have heard the learned counsel for petitioners and I have perused the record of the case.

5. I first deal with the contention of Mr. Deshmukh that Court Commissioner cannot be appointed while deciding application filed under Order-XXXIX, Rule-2 of the CPC.

6. In support of his contention, Mr. Deshmukh relies upon the provisions of Order-XXVI, Rule-9 of the CPC, which provides as

under:

“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.”

7. Mr. Deshmukh highlights the words “in any suit in which Court”. He submits that since the word ‘suit’ is used under Order-XXVI, Rule-9 of the CPC, appointment of Court Commissioner can be made only in a suit and not on an application filed under the provisions of Order XXXIX, Rule-2 of the CPC.

8. His submission in my view is preposterous. The power of a Court to appoint Court Commissioner is also traceable to Section 75 of the CPC, which provides thus:

“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.]”

9. Under Section 75 of the CPC a Civil Court has been conferred with wide powers to issue commission to do any of the acts specified in clauses (a) to (g) thereof. The power conferred upon Civil Court under Section 75 is not restricted only while deciding a suit. The same can be exercised even while deciding any interlocutory application. Even otherwise, an interlocutory application is also a part of the suit. Therefore it cannot be contended, by any stretch of imagination, that there is any circumspection on the power of a Civil Court in issuing commissions while deciding interlocutory applications filed in a suit.

10. Even otherwise, while deciding application filed under the provisions of Order-XXXIX, Rule-2 of the CPC, the Court is required to record a satisfaction that there has been breach of an order of temporary injunction. To reach that satisfaction, it is for the Court to decide whether appointment of the Court Commissioner under Section-35 r/w. Section 75 r/w. Order-XXVI, Rule-9 of the CPC would be necessary or not. In a given circumstance, the Court may find it necessary to verify the exact picture prevailing at the site for

the purpose of recording a satisfaction whether there has been breach of order of injunction or not. In such a case, it would always be open for a Civil Court to issue commission for arriving at a finding of breach of order of injunction. Therefore, the submission of the learned counsel for petitioners summarily deserves to be rejected.

11. While it has been strenuously argued before the Court that Court Commissioner cannot be appointed on an application filed under the provisions of Order-XXXIX, Rule-2 of the CPC, petitioners, in their reply dated 19.10.2018 filed to the application seeking appointment of Court Commissioner did not raise such an objection. Such an objection came to be raised for the first time after the application was allowed by order dated 08.07.2019 by filing application under Section 151 of the CPC. The application was in the nature of appeal by raising new grounds which were never raised earlier. Such an act on the part of petitioners who are facing allegation of breach of order of injunction is clearly deplorable.

12. The next submission of Mr. Deshmukh is that the Court Commissioner cannot be appointed before commencement of the trial. In support of his contention, he relies upon the judgment of this Court in **Shantaram Dattatray Kekan** (*supra*). However in that judgment, this Court has held in para - 8 as under:

“8. After having considered the provisions of Code under which Civil Court is empowered to appoint Court Commissioner as well various decisions of this Court on the subject it is clear that, there is no hard and fast Rule that Court Commissioner can be appointed only at a particular stage. This Court in few decisions has permitted appointment of Court Commissioners even before commencement of trial and in some cases appointment of Court Commissioners before commencement of trial is held to be erroneous. In my view, the decisions are rendered in facts of each case. However, common thread that runs through all the above decisions is as regards the principle that a Court Commissioner can never be appointed in order to enable parties to collect evidence. It is on account of this principle that in most of the cases this Court has held that even before a party adduces his evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court's power to appoint Court Commissioner at any stage does not appear to be circumscribed. It all depends upon facts and circumstances of each case.”

13. Thus, this Court has held that there is no hard and fast rule that Court Commissioner can be appointed only at a particular stage. It is for the Court to decide whether appointment of Commissioner at a particular stage is warranted or not. Therefore, this submission of the learned counsel for petitioners also deserves to be rejected.

14. The next submission of Mr. Deshmukh is that Court Commissioner is being appointed to collect evidence which is impermissible in law. In the present case, petitioners are facing accusation of breach of the order of injunction. There is a factual dispute as to whether there has been a breach or not. The trial Court

has recorded a satisfaction that the factual aspects about the suit house property and the exact construction need to be brought on record through a site visit by the Court Commissioner.

15. In the present case, the Court has recorded a finding that status of construction and its location is required to be brought on record. This Court would not in exercise of extraordinary jurisdiction under Article 227 of the Constitution of India, interfere in that satisfaction reached by the trial Court. In my view therefore it cannot be contended by any stretch of imagination that the appointment of Court Commissioner is for the purpose of collection of evidence.

16. In the result, I am of the view that the present petition is gross abuse of process of law. The same deserves to be dismissed and it is accordingly dismissed.

(SANDEEP V. MARNE, J.)