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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 10596 OF 2019

MALAPPA BHIKAPPA BIRAJDAR

....PETITIONER

V/s.

**AAMSIDHA BHIKAPPA BIRAJDAR
AND ORS**

.....RESPONDENTS

**Mr. Prasad P. Kulkarni for the Petitioner
Mr. Ajit V. Alange for Respondent no. 1**

CORAM : NITIN W. SAMBRE, J.

DATE: JANUARY 27, 2022.

P.C.:

1) This Petition is by Defendant to R.C.S. No. 563/2019. Respondent-Plaintiff took out aforesaid Suit thereby questioning the order of the Mamlatdar passed under Section 5 seeking declaration that the same is not binding. Further injunction is sought in relation to use of a way and also mandatory injunction to re-fix electric gadgets with other ancillary reliefs.

2) Vide impugned order dated 13/09/2019, the Trial Court under

Exhibit 19, in exercise of powers under Order XXVI Rule 9 of Code of Civil Procedure, 1908, appointed Court Commissioner with following directions:

“01. Application is allowed for following purpose.

a) The court commissioner is appointed for inspection of suit property and disclosing correct situation appears in the suit property 1A with detail map

b) The Court commissioner shall inspect the suit property and the drip irrigation, pipeline situated therein and show existing situation and directions thereof on the spot with detail map.

2) The plaintiff to pay charges of commission work.

3) The parties shall suggest name of commissioner, who would carry out commission work as per order of court.

4) Parties shall take note thereof.

5) Issue letter accordingly.”

3) Petitioner-Defendant while questioning the same, while drawing support from the Judgment of this Court in the matter of **Sanjay Kisan Thorat Vs. Ramchandra Parsu Thorat**¹ would urge that powers for appointment of Court Commissioner cannot be passed so as to

¹ [2018 (2) Mh.L.J. 954]

collect the evidence. So as to substantiate his contentions, he has relied on the very claim put forth by the Petitioner-Defendant in the written statement, reply to the Exh. 19, so also observations of the Trial Court. According to him, since the proceedings by way of impugned order cannot be used for the purpose of collection of evidence so as to strengthen the case of the Respondent-Plaintiff, order warrants interference.

4) Counsel for the Respondent-Plaintiff would support the impugned order.

5) With the assistance, I have perused the Plaint and prayers in the aforesaid Suit. Parties to the Suit and Petition are related to each other. Bhikappa Birajdar is blessed with two sons namely Aamsidha and Akash. There appears to be oral partition executed as a consequences of which parties were put into possession of their individual share. Parties are at difference on the issue of right of a way as a consequences of which Suit came to be filed after Respondent-Plaintiff suffered an order under Section 5 of Mamlatdars' Courts Act.

6) No doubt, during conduct of the proceedings under

Mamlatdars' Courts Act, spot inspection was carried out, however, one of the witness has not supported said spot inspection report which is relied on by Mamlatdar for passing the order against the interest of the Respondent-Plaintiff.

7) In the aforesaid background, being alive to the position of the law, order of Mamlatdar is always subject to civil proceedings, Plaintiff took out present proceedings for appointment of Court Commissioner in a Suit for declaration and injunction.

8) While dealing with such prayer, the Trial Court was sensitive to the fact that proceedings under Order XXVI Rule 9 of Code of Civil Procedure, 1908 for appointment of Court Commissioner cannot be used for collection of evidence, hence proceeded to analyze the pleadings, prayer in the Plaint, stage of the Suit and proceeded to order appointment of Court Commissioner. The Trial Court was of the view that appointment of Court Commissioner is necessary for deciding the issue brought before it by the rival parties. In such an eventuality, the Court below, in my opinion was justified in negating the contention of the Petitioner-Defendant that appointment of Court Commissioner is with an intention to collect the evidence. The Trial

Court while dealing with Suit claim is always armed with powers to facilitate itself to take out recourse to procedure, in accordance with law, for adjudication of the claim brought before it.

9) That being so, in my opinion, no case for interference in extraordinary jurisdiction is made out.

10) Needless to clarify that report of the Court Commissioner is always subject to scrutiny by the Civil Court as parties are at liberty to lead their evidence in accordance with law.

11) Keeping such right of the parties in-tact, Petition stands rejected.

[NITIN W. SAMBRE, J.]