

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

Writ Petition No. 608 of 2022

[Sanjay S/o Laxmanrao Gawande and ors. ..vs.. Sau. Pushpa W/o Dadarao Pundekar and ors.]

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. D. R. Khapre, Advocate for the petitioners

CORAM : ROHIT B. DEO, J.

DATED : 9-2-2022

Hearing was conducted through Video Conferencing and the learned Counsel agreed that the audio and visual quality was proper.

2. The petitioners are the defendants in suit filed by respondent 1 seeking declaration and permanent injunction. In nutshell, the case of the plaintiff Smt. Pushpa Pundekar is that the defendants have erected construction illegally on the D.P./lay-out Road.

3. The defendants have lodged a counter claim alleging that it is the plaintiff who has effected illegal construction on the lay-out road/s.

4. The defendants preferred an application, Exhibit 93 seeking appointment of the District Superintendent of Land Records, Akola as Court Commissioner to measure and demarcate the D.P. Road. The defendants alleged

that the Government of Maharashtra and the Municipal Council, Akot made no attempt to demarcate the D.P Road and to acquire the land under Section 125 to 128 of the Maharashtra Regional and Town Planning Act, 1966. The defendants submitted that since the D.P Road is not demarcated, Court Commissioner be appointed to measure and demarcate the D.P Road. The defendants further averred that if the D.P Road is demarcated, the entire controversy shall be resolved since the suit claim and the counter claim turn on the demarcation of the D.P road.

5. Perusal of the application, Exhibit 93 reveals that the only ground pleaded is that the D.P Road is not demarcated by the municipal council or the State Government. It is not even the case of the defendants in the said application that there is any particular encroachment effected on the D.P Road and that to ascertain the extent of the encroachment, appointment of the Court Commissioner is imperative.

6. Be that as it may, the learned trial Judge was pleased to reject the application, Exhibit 93 since a Court Commissioner who was earlier appointed had already

filed on record map, Exhibit 65, in which the D.P. Road was demarcated. It is, in this view of the matter, that the application seeking appointment of the Court Commissioner was rejected.

7. It is trite law that there cannot be successive appointments of Court Commissioner at the askance of the litigants. As is noted by the learned trial Judge, the D.P. Road is demarcated by the Court Commissioner. The defendants, who preferred Exhibit 93 seeking appointment of Court Commissioner put forth the absence of demarcation as the only ground or reason for appointment of Court Commissioner. This is already done vide Exhibit 65. The Court Commissioner is yet to be cross-examined and the correctness or otherwise of the Commissioner's report is not as yet tested in cross-examination. Needless to observe that if after the entire evidence is adduced by the parties, the learned trial Judge feels that certain aspects need more elucidation or some light will have to be thrown on the evidence adduced, it shall always be open and permissible for the learned trial Judge to invoke the provisions of Order XXVI Rule 9 of the Code of Civil Procedure. Further the defendants also has the option of applying for

measurement and then examining the cadestral surveyor as witness, if so advised.

8. I do not find any error in the view taken by the learned trial Judge.

9. No case is made out for interference in writ jurisdiction. The petition is dismissed.

JUDGE

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