

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**NAGPUR BENCH : NAGPUR****WRIT PETITION NO.4735 OF 2019**

Mr. Daulatshah s/o Pratapshah Madavi

..VS..

State of Maharashtra, thr. Collector and ors.

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

Court's or Judge's orders

Shri S.R. Kadam, Advocate for the petitioner.

Shri H.D. Dubey, A.G.P. for respondent nos. 1 and 2.

Shri N.S. Deshpande, Assistant Solicitor General for respondent no.
3.**CORAM : MANISH PITALE, J.****DATED : 23/03/2022.**

By this Writ Petition, the petitioner (original plaintiff) has challenged order dated 03.06.2019, passed by the Court of Civil Judge, Senior Division, Gadchiroli (hereinafter referred to as 'the Trial Court'), whereby the application filed on behalf of the petitioner for appointment of Court Commissioner (Exhibit 51) has been rejected.

2. The petitioner has filed the suit for permanent injunction against the respondents for restraining them from undertaking construction in the suit property. It is the claim of the petitioner that the respondents, particularly, respondent no. 3 is likely to undertake construction illegally on the suit property, which belongs to the petitioner. The pleadings in the plaint indicate that there was a Camp of the Central Reserve Police Force near the suit property and that in the year 2014, the suit property for some time was used as a playground by the members of the said Force. When the construction of Wall were imminent, the petitioner was constrained to approach the Trial Court.

3. In this backdrop the aforesaid Application was filed for appointment of Court Commissioner. The application

appears to have been opposed by the respondents, claiming that there was no need to appoint Court Commissioner.

4. By the impugned order, the Trial Court has rejected the application, only on the ground that allowing the application would amount to permitting the petitioner to gather evidence as to his possession.

5. Mr. Sumedh Kadam learned Counsel appearing for the petitioner submits that the reasoning given by the Trial Court in the impugned order, is wholly unsustainable for the reason that the petitioner does not intend to gather any evidence. The application for appointment of Court Commissioner was moved under Order XXVI of the Code of Civil Procedure, only with the view to ascertaining the truth and to assist the Court in deciding the dispute between the parties on merits.

6. Mr. N.S. Deshpande learned Assistant Solicitor General of India appearing on behalf of respondent no. 3 and Mr. Dubey, Assistant Government Pleader appearing on behalf of respondent nos. 1 and 2 have opposed the contentions raised on behalf of the petitioner.

7. This Court has considered the rival contentions in the backdrop of Order XXVI Rules 9 and 10 of the Code of Civil Procedure. A perusal of the said provisions, shows that when a Court deems it necessary to have local investigation for the purpose of investigating any matter in dispute, the Court even on its own motion can appoint a Court Commissioner. In the present case, the petitioner moved an application under Order XXVI Rule 10 of the Code of Civil Procedure, placing cogent reasons on record while seeking appointment of Commissioner.

8. A Perusal of Order XXVI Rule 10 of the Code of Civil Procedure shows that the Commissioner can be examined before the Court in the context of the report and that the report can be submitted by the Commissioner after undertaking necessary local investigation. This Court is of the opinion that in facts of the present case, the application filed by the petitioner ought to have been allowed and since the Court Commissioner can certainly be cross-examined by the respondent, there is no question of such appointment of Court Commissioner leading to gathering of evidence on the part of the petitioner.

9. The reasoning of the Court below is found to be unsustainable. The Writ Petition is allowed. The impugned order is quashed and set aside.

10. The application for appointment of Court Commissioner (at Exhibit 51) filed on behalf of the petitioner, is allowed in terms of prayers made therein.

11. The Trial Court to proceed accordingly.

JUDGE

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