

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11200 OF 2019

Vishwanath Dnyandeo Pinjarkar Petitioner

Versus

Dnyandeo Tulsiram Pinjarkar Respondent

.....
Mr. Siddharth R. Deshpande, Advocate for the Petitioner
Mr. N.S. Muthiyan, Advocate for the Respondent
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 15th MARCH, 2023

ORDER :

1. The petitioner is aggrieved by the order passed by learned 9th Joint Civil Judge, Senior Division, Aurangabad, below Exhibit-36 in Special Civil suit No.273 of 2016.

2. The respondent/plaintiff filed application under Order XXVI Rule 9 read with section 151 of the Code of Civil Procedure for appointment of Court Commissioner, which was opposed by the petitioner/defendant. The trial Court has allowed the application. Hence, the present petition.

3. Heard the learned advocate for the petitioner and the learned advocate for the respondent. Perused the grounds

raised in the of writ petition and the documents placed on record, and the impugned order.

4. Learned advocate for the petitioner strenuously submits that earlier application filed by the respondent/plaintiff for appointment of Court Commissioner was rejected, and the said order was challenged in Writ Petition No.9924 of 2017. While allowing the said writ petition, this Court has observed that, *"However, it be noted that after the commencement of the recording of oral evidence, if either of the parties desire to seek an appointment of a Court Commissioner, they would be at liberty to file an application and such application would then be considered by the trial Court on it's own merits without being influenced by the observations of this Court."*

5. Learned advocate for the petitioner by placing reliance on the order passed by this Court dated 11/09/2019, would urge that though the present application was filed before commencement of recording of evidence, the trial Court has allowed it, which is contrary to the observations of this Court. By allowing the application, the trial Court has permitted the plaintiff to collect evidence, and therefore, the impugned order is unsustainable, and the same is liable to be quashed and set aside.

6. Per contra, the learned advocate for the respondent points out para No.7 of the order passed by this Court, in which it is observed:

"7. There can be no dispute that after the recording of evidence has commenced, a Court Commissioner can be appointed for eliciting further information which would assist the trial court in the light of the oral and documentary evidence recorded. It is possible that a Court Commissioner could be appointed even before recording of evidence in rarest of rare cases and for strong reasons to be recorded. It is undisputed that a Court Commissioner cannot be appointed for collecting evidence."

7. Learned advocate for the respondent submits that the trial Court has recorded the reason that appointment of Court Commissioner was felt necessary in the facts of the present case.

8. In the impugned order the trial Court has observed that, *"It is admitted to both the parties that, they purchased entire plot No.57 with intention to possess equal half portion by each of them. They also engaged a contractor for doing*

construction to two residential houses for both of them in equal half share. Hence, to determine as to whether there is any such encroachment over the suit property, measurement should be carried out. In measurement the the things will be clear as to how much portion is in the possession of plaintiff and the defendant, so also as to whether the defendant is having access area in his possession. Unless and until this measurment is carried out, no effective finding can be recorded on the point of encroachment only on the basis of oral evidence adduced by the parties. Thus, whenever the issue of encroachment is to be determine, appointment of Court Commissioner is an effective option to decide real controversy between the parties".

9. There appears substance in the contention of learned advocate for the respondent/plaintiff. This Court in para 7 of the order observed that Court Commissioner could be appointed even before recording of evidence in rarest of rare cases and for strong reasons to be recorded, and the trial Court has recorded strong reasons as to why application for appointment of Court Commissioner is allowed.

10. Order passed by the trial Court is the well reasoned. No error or illegality is found the order impugned in the

present petition. No prejudice is likely to be caused to the defendant, by appointment of Court Commissioner.

11. For the aforestated reasons, there is no substance in the challenge raised in the petition. No case is made out by the petitioner to warrant interference in exercise of extraordinary writ jurisdiction under Article 227 of the Constitution of India.

12. The writ petition is, therefore, dismissed.

[NITIN B. SURYAWANSHI]
JUDGE

S.P Rane