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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10509 OF 2022

Mhatardev Bhausahab Tambde

PETITIONER

VERSUS

Bajirao Ramrao Garje and Others

RESPONDENTS

.....

Mr. Vithal M. Chate, Advocate for the petitioner

Mr. Nisargraj B. Gajre, Advocate for respondents No. 1 to 3

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 9th MARCH, 2023

ORDER :

1. This petition, filed under Article 226 and 227 of the Constitution of India, takes exception to order dated 5th September, 2022 passed by learned Civil Judge, Junior Division, Ashti below Exhibit-24 in Regular Civil Suit No. 155 of 2020, thereby allowing the application filed by the respondents - plaintiffs for appointment of Court Commissioner, at a preliminary stage.

2. The respondents – plaintiffs filed Regular Civil Suit No. 155 of 2020 against the petitioner – defendant for removal of encroachment on the suit land. The defendant appeared in the

suit and by filing written statement, resisted the claim of the plaintiffs. Application Exhibit-24 was then filed by the plaintiffs for appointment of Court Commissioner to measure the alleged encroachment and for fixing the boundaries. Said application was resisted by the defendant, however, by the impugned order, the Trial Court has allowed the application.

3. Heard learned advocate for the petitioner and the learned advocate for the respondents – plaintiffs. Perused the grounds raised in the writ petition and the citations relied on by the respective learned advocates.

4. It is settled legal position that an application for appointment of Court Commissioner filed prior to the commencement of evidence in the suit is pre-mature and should not be entertained. This Court has consistently taken this view, which is also reflected in *"Shantaram Dattatray Kekan and Others V/s Bhausaheb Karbhari Kenan and Another"* (2023) 1 AIR Bom R. 554 and *"Mahadeo Kondiba Shinde V/s Nitin Sakharam Shinde"* (2022) 2 ALL MR 593 (Bom).

5. Admittedly, in the present case, the application for appointment of Court Commissioner is moved before commencement of recording of the evidence. In that view of the

matter, the Trial Court was not justified in allowing the application, which was in fact pre-mature.

6. In "*Kashinath Ramkrishna Chopade V/s Purushottam Tulshiram Tekade and Others*" 2005 (4) *Mh.L.J.* 471, relied on by the learned advocate for the respondents, it is held that the Court has discretion to order local investigation or not. The object of local investigation is not so much to collect evidence, but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary dispute and dispute about identity of lands are instances, when a Court should order a local investigation under Order XXVI, Rule 9 of the Code of Civil Procedure.

There cannot be any dispute about the above principle, however, since in the present case, the application filed by the plaintiff is at pre-mature stage, the same could not have been allowed by the Trial Court.

7. For the above reasons, writ petition is allowed. Impugned order dated 5th September, 2022 passed by learned Civil Judge, Junior Division, Ashti below Exhibit-24 in Regular Civil Suit No. 155 of 2020 is hereby quashed and set aside.

The respondents is at liberty to move application for

appointment of Court Commissioner, after commencement of recording of evidence. If such application is filed after recording of evidence of both the parties, the same shall be considered by the Trial Court on its own merits, without being influenced by the order impugned in this writ petition.

[NITIN B. SURYAWANSHI]
JUDGE

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