

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3109 OF 2023

Raghunath Vithoba Koli
Since deceased through Lrs
1A Shrimati Raghunath Koli & Ors.

...Petitioners.

Versus

Jaywant Ananda Koli & Anr.

..Respondents.

Mr. Nikhil N. Pawar for the petitioner.

Mr. Mahindra Deshmukh for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : July 17, 2023.

P. C. :

1. Heard.

2. The challenge in the petition is to the order dated 17th October 2022 passed below Exhibit-28 allowing the respondent's application for appointment of Court commissioner. The submission of learned counsel for the petitioner-defendant is that without hearing the petitioner, the order of appointment of Court commissioner has been passed. He has invited the attention of this Court to the roznama and would contend that due to the illness of the father of advocate for petitioner, the said advocate did not appear in

the matter before the trial Court, which fact was orally informed to the Court. However, the trial Court has decided the application by the impugned order dated 17th October 2022.

3. *Per contra*, learned counsel appearing for the respondent submits that the application has been filed on 6th March 2021 and after a period of one year, the impugned order has been passed by taking into consideration the reply filed by the petitioner. Learned counsel for the respondent points out that the suit being for the fixation of boundaries, the appointment of Court commissioner is necessitated.

4. Considered the submissions advanced by learned counsel for the respective parties.

5. Learned counsel for the respondent has not disputed the position that on the date when the application for appointment of Court commissioner was fixed for hearing, the advocate for the defendant was not present and the prayer for adjournment was made. If the roznama is perused, it appears that the application was filed on 6th March 2021 and the same was adjourned from time to time to enable the defendants to file their reply, which came to be filed on 4th

August 2022. It is thereafter that the application was kept for hearing on one date on 29th September 2022 and thereafter on 17th October 2022 when the impugned order is passed.

6. The submission of learned counsel for the the respondent that there has been delay of more than one year in deciding the application, cannot be accepted for the reason that it is only in August 2022 that the reply came to be filed and thereafter the matter was listed for hearing. As the Court waited for one year for the purpose of permitting the defendant to file its reply, in my opinion, the adjournment could have been granted on 17th October 2022 particularly considering the reason given for adjournment, i.e., the illness of the father of defendant's advocate. As regards the submission of learned counsel for the respondent that the appointment of Court commissioner is necessitated, the said submission is on the merits of the matter and the present petition has been filed on the ground that the principles of natural justice are violated, inasmuch as the petitioner was not heard prior to the passing of impugned order.

7. In view of the above, the impugned order dated 17th October 2022 is hereby quashed and set aside and the application below

Exhibit-28 is restored to the file. On the next date of hearing, the trial Court to hear the parties and pass appropriate orders. It is made clear that no adjournment is to be granted to the hearing of application for any reason whatsoever.

8. Writ petition stands disposed of.

[Sharmila U. Deshmukh, J.]