

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2856 OF 2022

Ashok Vitthal Waske ... Petitioner

vs.

Namdeo Sitaram Waske and ors ... Respondents

Mr. R. C. Barge for Petitioner.

Mr. Balwant Salunkhe for Respondent No.4.

CORAM : SANDEEP V. MARNE, J.

DATED : 25 JANUARY, 2023

P.C. :-

1. By this Petition, Petitioner assails orders passed on applications at Exhibit 120 on 5 January 2022; and at Exhibit 122 on 10 February 2022. Both applications were filed for appointment of Court Commissioner. Plaintiffs have instituted Regular Civil Suit No.204 of 2000 before the Court of Civil Judge, Senior Division, Koregoan. In that Suit, as originally instituted, a relief was sought for removal of compound erected by Defendants on the access road and to restrain Defendants from interfering use of the access road by Plaintiff. During the trial of the Suit, the Court appointed an advocate as a Court Commissioner on 15 March 2001 to inspect the location of fencing erected by Defendants. Accordingly, the Court

Commissioner has submitted his report showing existence of fencing erected by Defendants on the access road. The Suit came to be decreed by judgment and order dated 7 September 2018. In Regular Civil Appeal No.148 of 2019 filed by one of the Defendants, the decree of the Trial Court came to be set aside and the Suit was remanded back to Trial Court for a fresh trial by judgment and order dated 4 August 2021. One of the finding recorded by the Appellate Court was that the Court Commissioner appointed by the Trial Court was an advocate who did not have any expertise in the subject. After remand of the Suit, Petitioners amended the plaint and deleted prayer for removal of compound, possibly on account of the fact that the same no longer continued to exists. Now the only prayer that remains to be decided in the Suit is about mandatory injunction against Defendants not to create obstacles in the access road. Plaintiff moved an application at Exhibit 120 for appointment of Court Commissioner for measurement of road as well as measurement of CTS No.41 and 42 through Taluka Inspector of Land Records. That application came to be turned down by the Trial Court by its Order dated 5 January 2022. Petitioner filed one more application for appointment of the Court Commissioner at Exhibit 122 by slightly altering the

prayer clause and seeking prayer for inspection of the access road, its measurement and verification of availability of alternate road. The second application also met with rejection on 10 February 2022. Both orders of Trial Court are the subject matter of challenge before this Court in the present Petition.

2. I have heard learned counsel for the parties. It is the case of Petitioner/plaintiff that there exists access road leading to his use which is being obstructed by Defendants. On the contrary, it is the case of Defendants that there is alternate road available to Plaintiff to access his house. Plaintiff possibly wants to disprove the assertion of Defendants about existence of alternate road by appointment of the Court Commissioner. Burden of proving the availability of alternate access road would lie upon Defendants and it is incomprehensible as to why Plaintiff wants to embark upon exercise of disproving existence of alternate road.

3. In the unamended Suit, the relief was sought with regard to removal of wire fencing, on account of which the Court Commissioner was appointed to verify existence of fencing.

Now that prayer relating to removal of fencing is deleted by Plaintiff as the very purpose of appointment of the Court Commissioner no longer survives. The learned counsel appearing for Petitioner relies upon the judgment of this Court in *Govardhan versus Sai Baba Estate*¹ in support of his contention that whenever there is disputes about boundaries, appointment of the Court Commissioner is eminent. Facts in that case are entirely different. In that case, there was no dispute about boundaries of the property, but Defendant therein has disputed existence of the Suit property itself. That case did not involve dispute relating to use of access road. The judgment therefore is clearly distinguishable. In the present case, Plaintiff asserts that the open space available next to the house of Defendants is the access road which Plaintiff must be permitted to use. Defendants on the other hand denies that such open space can be termed as the access road. Defendants go ahead and contend that there is alternate road available to Plaintiff to access his house. In these circumstances, the measurement as to the length and width of such an open space (which is termed as access road) would not serve the very purpose. So far as Defendant's assertion about availability of

¹ 2022 DGLS(bom) 854

alternate road is concerned, Plaintiff need not prove its non-existence.

4. Writ Petition is misconceived and deserves summary rejection. Writ Petition is dismissed without any order as to costs..

5. Needless to say that the Trial Court shall not be influenced by any of the observations made in the present order while deciding the Suit finally.

(SANDEEP V. MARNE, J.)