

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7031 OF 2023

Mohan Mahadev Rane.

...Petitioner.

Versus

Rangrao Bapusaheb Hirdekar.

..Respondent.

Mr. Abhijit Adagule for the petitioner.

Coram : Sharmila U. Deshmukh, J.

Date : July 4, 2023.

P. C. :

1. The challenge in the petition is to the order dated 21st March, 2023 passed in Regular Civil Suit No.288 of 2020, allowing the application preferred by the plaintiff – respondent nos.1 and 2 herein for the appointment of Court commissioner.

2. Regular Civil Suit No.288 of 2020 was instituted by respondent nos.1 and 2 stating that the petitioner had encroached upon the space left open by respondent nos.1 and 2 of their own property. Respondent nos.1 and 2 have come with the specific case of the ownership of property and the pleading is that there is encroachment by defendant nos. 1 and 2 and the prayer is sought of the removal of encroachment. In the said proceedings, an application

came to be filed under Order-26 Rule-9 of CPC seeking appointment of Court commissioner, which has been allowed by the impugned order.

3. Heard learned counsel appearing for the petitioner. Learned counsel for the petitioner would submit that the application for appointment of Court commissioner states that there is a boundary dispute, which fact is not pleaded in the plaint. He would further submit that even before the issues are framed, the application for appointment of Court commissioner has been allowed. He seeks to rely upon the decision of learned Single Judge of this Court in ***Rajaram Dadabhau Dhawale v. Shivaji Kondiba Dhawle [Writ Petition No.10200 of 2022 (Aurangabad Bench) decided on 14th December 2022]*** to contend that it is only after the evidence has been concluded, the application for appointment of Court commissioner can be preferred.

4. Considered the submissions. The plaintiff-respondent nos.1 and 2 have come with the specific case that there is encroachment by the petitioner in the suit property. It is settled position in law that in case of boundary dispute or in case of encroachment, it is desirable that the Court commissioner is appointed so that a report is available

on record to assist the Court. Considering that the issue of encroachment can be adjudicated only by ascertaining the position on site, it has been consistently held that in such cases, the appointment of Court commissioner is necessitated.

5. The contention of learned counsel for the petitioner is as regards the stage at which this power can be exercised. According to learned counsel for the petitioner, the decisions of this Court have consistently held that the application for appointment of Court commissioner need not be filed at premature stage of trial. Placing reliance on the decision of this Court in ***Rajaram Dhawle (supra)***, it is the contention of learned counsel for the petitioner that the application in the present case is premature.

6. Learned Single Judge of this Court in ***Rajaram Dhawle (supra)*** after considering various decisions of this Court has held in paragraph 7 and 15 as under :

“7. I have heard learned counsel for the parties and perused the record of the case. There can be no dispute about proposition that Code of Civil Procedure does not prescribe any particular stage at which Court can appoint Commissioner for verifying status of the suit property. In fact, this Court has relied on the Judgment in case of **Shantaram Dattatray Kekan and others v. Bhausahab Karbhari Kekan and Anr in Writ Petition No. 14046 of 2021 decided on 5th December 2022** wherein this Court, after considering various

judgments on the subject, has held that there is no specific stage provided in the code when the Court Commissioner can be appointed for measurement of land or fixation of boundaries.”

“15. Consequently, the order passed by the trial Court is ineffective. The same is set aside. The plaintiff will however be at liberty to file an application for appointment of the Court Commissioner after elucidating his case by adducing evidence and if such an application is filed, the same shall be decided by the trial Court on its own merits without being influenced by its own order dated 7.7.2022 or by the order passed by this Court.”

. The ratio of above decision is that there cannot be any stage at which the Court can exercise the power of appointment of Court commissioner and if the trial Court comes to a conclusion that the appointment of Court commissioner is necessitated to ascertain the nature of property, the powers can be exercised at any stage. This Court in the facts of that case, considered that the application for appointment of Court commissioner had been filed by the plaintiff along with the suit and as such held that the purpose seems to be to gather the evidence in support the final reliefs in suit. In the facts of that particular case, this Court had held that the application filed before framing of issues and before commencement of trial is not permissible.

7. Considering the catena of decisions on the subject of appointment of Court commissioner, it is clear that the power can be

exercised at any stage of the proceedings and the common thread that runs through all the decisions is that the appointment cannot be made for the purpose of collection of evidence. Equally settled is the position that in the cases of boundary disputes or encroachment, the appointment of Court commissioner is necessitated.

8. In view of the above, in my opinion, there is no infirmity in the impugned order allowing the application for appointment of Court commissioner before the evidence is led by the parties. Writ petition being devoid of merits, stands dismissed.

[Sharmila U. Deshmukh, J.]