



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4872 OF 2023

Pornima Balaji Rajee
VERSUS
Shivaji Mahajan Patne And Others

Mr. A. G. Godhamgaonkar, Advocate for the petitioner
Mr. Amit Mukhedkar, Advocate for respondent No.1
Mr. Bhushan Virdhe, Advocate for respondent Nos.2 and 3

CORAM : R. M. JOSHI, J.

DATE : 21st JUNE, 2024

PER COURT :-

1. Petitioner/original plaintiff in RCS No. 419 of 2022 takes exception to the order passed below Exhibit 38 on an application filed by the defendants under Order XXVI Rule 9 of the Code of Civil Procedure (for short 'CPC') for appointment of Court Commissioner to measure the suit property.

2. Learned counsel for the petitioner submits that the petitioner-plaintiff has filed suit for seeking declaration that she is owner of house No. 191 and that deed of supplementary lis executed by the Estate Manager-2 of Aurangabad Gruh Nirman and Area Development Board, Aurangabad in favour of defendant No.1 is in illegal and not binding on the plaintiff. He has also sought perpetual injunction restraining the defendants from interfering into the possession of the plaintiff in the suit property. It is his submission that the suit does not

involve any issue of encroachment or removal thereof in order to carry out the local inspection as sought to be done by the defendants. He further states that the defendants cannot be permitted to call upon the Court to collect evidence to prove his own case. Alternatively it is submitted that considering the stage of the proceeding at which this application is filed makes it not maintainable.

3. Learned counsel for the respondents/original defendants supported the impugned order. It is his submission that though no prayer is made with regard to the encroachment or removal thereof, but averments in the plaint indicates that there is dispute between plaintiff and defendants with regard to a particular portion of the property. Thus, it is his submission that in order to decide the said issue appointment of Court Commissioner is necessary. To support his submission he placed reliance on the judgment in case of ***Mayuresh Subhash Sonawane Versus Yashwant Babu Bhoir and others, 2022 DGLS(Bom.) 119*** and ***Goverdhan Versus Sai Baba Estates, 2022 DGLS (Bom.) 854.***

4. Perusal of the pleading *prima facie* indicate that neither in the plaint nor in the counter claim both sides have put forth case about encroachment being done by each other. Consequently, question of removal of encroachment or handing over possession of encroached portion does not arise. The suit filed by the plaintiff restricts to the

substantive prayer to the extend of declaration of the supplementary lis executed in favour of defendants and injunction. Defendants on the other hand also counter claim only seeks injunction against the plaintiff.

5. It is settled position of law that the Court Commissioner cannot be appointed to collect evidence on behalf of the parties. Admittedly, the learned Trial Court has not framed issues till date. The parties therefore are ignorant about the issues and burden cast upon them in the suit before the Trial Court. Having regard to the averment made in the plaint and counter claim, this Court does not finds this to be a case of encroachment or removal thereof. In such circumstances, it is not permissible to the defendants to make such application at least at this stage. Thus, this Court finds substance in the contention of the petitioner that the application for appointment of Court Commissioner allowed that this stage is not justified.

6. As result of this discussion, impugned order is set aside. It is clarified that at appropriate stage of the suit parties are at liberty to prefer appropriate application for appointment of Court Commissioner and such application, if filed, be decided as per law.

7. Petition stands allowed in above terms.

(R. M. JOSHI, J.)

ssp