



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 255 OF 2024

SADHANA VASANT AWSARE
VERSUS
PRAKASH JAGANATH NAGARGOJE AND ANOTHER

Mr. S. S. Kulkarni, Advocate for the petitioner
Mr. S. R. Andhale, Advocate for respondent Nos.1 and 2

WITH

WRIT PETITION NO. 1411 OF 2024
ANURADHA SHIVAJI DHAGE AND ANOTHER
VERSUS
PRAKASH JAGANNATH NAGARGOJE AND OTHERS

Mr. Z. J. Pathan h/f Mr. G. R. Syed, Advocate for the petitioners
Mr. S. R. Andhale, Advocate for respondent No.1

CORAM : R. M. JOSHI, J.

DATE : 24th JULY, 2024

PER COURT :-

1. These petitions take exception to order passed below Exhibit 24 in Regular Civil Suit No. 72 of 2022 and below Exhibit 59 in Regular Civil Suit No. 120/2020, whereby applications for appointment of Court Commissioner to measure the disputed suit property are allowed.
2. Learned counsel for the petitioner raises objection to the stage at which these applications are allowed. According to him this amounts to collecting evidence on behalf of party which is not permissible in law.

3. Learned counsel for the respondent supported the impugned orders on the ground that having regard to the nature of dispute between the parties, the same can only be decided on measurement of the suit property and not otherwise. He also submits that Order 26 Rule 9 of Code of Civil Procedure does not contemplate making of such application at any particular stage of the proceeding. To support his submission reliance is placed on following judgments.

- (i) Sunita Ashok Kachre and ors. Vs. Santram Bapurao Patkal in Writ Petition No. 6541/2017, dated 06/07/2017.
- (ii) Rajaram Shankar Gawade Vs. Bhimrao Shankar Gawade and others in Writ Petition No. 6024/2013, dated 13/03/2014
- (iii) Ramchandra Bhikai Jagtap Vs. Dudharam Langruji Padvekar dead through L.Rs and ors, 2003 BCI 81.
- (iv) Bento Antonio Gomes alias Antonio Bento Goomes Vs. Rosario Salvador Careneiro and Ors., 2014(1) bom. C.R. 678
- (v) Rawanbapu Bhimrao Deshmukh and Others Vs. Rawanbapu Bhimrao Deshmukh and others, 2023 DGLS (BOM) 5165
- (vi) Flavia Cynthia Da Conceicao w/o Adelaide Manuel de Conceicao Vs. Shriram Subrai Kamat Tarkar, 2024 DGLS(BOM) 3.

4. There cannot be any dispute with regard to the proposition of law sought to be canvassed on behalf of the respondent that Oder 26 Rule 9 of CPC does not contemplate any specific stage at which an application can be filed for local inspection. It is, however, settled

position of law that there cannot be any application for appointment of Court Commissioner to collect evidence on behalf of the parties. It is expected from the parties to lead his evidence first and for the purpose of clarification if appointment of Court Commissioner is required the same can be sought. It is in this context, stage of the proceeding assumes importance. Admittedly, in both suits issues are yet to be framed. Thus, the suit is not ripened for hearing and at this stage if the respondent is permitted to get suit land measured through Court Commissioner, the same will definitely amount to collect in evidence on his behalf which is not permissible in law.

5. Having regard to the above discussion and considering the stage at which the orders are passed, they deserve to be set aside. Needless to say that it is open for the respondent to move application at appropriate stage of suit. Any such application is filed, Trial Court to decide the said application on merit and not merely because such liberty is granted by this Court.

6. Petitions are allowed in above terms.

(R. M. JOSHI, J.)

ssp