

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7471 OF 2024

Sharda Shashikant Pawar and Ors.

.. Petitioners

Versus

Tanaji Ganpati Pawar and Ors.

.. Respondents

.....

- Mr. Dilip Bodake a/w. Ms. Shraddha Pawar, Advocate for Petitioners.
- Dr. Uday P. Warunjikar a/w. Mr. Siddhesh Pilankar and Mr. Sumit Kate, Advocates for Respondent No.1.

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CORAM : MILIND N. JADHAV, J.

DATE : JULY 29, 2024

P.C.:

1. Heard Mr. Bodake, learned Advocate for Petitioners and Dr. Warunjikar, learned Advocate for Respondent No.1.

2. The present Writ Petition impugns the order dated 21.12.2023 rejecting the Application filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short “CPC”) seeking appointment of Court Commissioner for carrying out nimtana measurement as nomenclatured in the Application filed by the Defendants.

3. Dr. Warunjikar, learned Advocate for Respondent No.1 has drawn my attention to the Suit prayers which are appended at page No.139 of the Writ Petition and on perusal of the twin principal prayers it is seen that a declaratory relief alongwith an injunctive relief

is sought for by the Plaintiffs who are the Respondents before me.

4. Mr. Bodake, learned Advocate for Defendants who has filed Application below Exhibit-64 in Regular Civil Suit No.215 of 2011 and which stands rejected by the impugned order would submit that there is already a report of the Taluka Inspector of Land Records (for short “TILR”) which has been placed on record and the said TILR has been examined by both the parties in witness action. He would submit that the said report is infact contrary to the previous report of the TILR under which the TILR had identified the encroached portion and directed to give possession of the encroached portion of the suit property to the Defendants but the subsequent report of the TILR is contrary to the same. In that view of the matter, Mr. Bodake would submit that Applicants were compelled to file an Application below Exhibit-64 to seeking fresh appointment of the TILR as Court Commissioner to carry out nimtana measurement.

5. In the first instance, there is no provision under the CPC for seeking appointment of Court Commissioner for carrying out nimtana measurement which is the case of Defendants. This is a suit which is filed in the year 2011 and we are at present in the year 2024. The Application filed below Exhibit-64 is filed in the year 2023 by Defendants. Ideally, witness action of the parties ought to have been over, but I am informed that witness action of Plaintiffs has not begun

and in the meanwhile, the parties have examined the TILR who was appointed as Court Commissioner by the Court.

6. Be that as it may, in a suit seeking declaratory relief and injunctive relief, it is required to be proceeded with the cause of action stated in the suit plaint. Parties will have to lead cogent evidence in respect of their respective case. Without the parties leading any evidence or the Defendants leading any evidence in rebuttal, for the past 13 years the parties have whiled away their time in filing interlocutory application seeking measurement of the suit property. Such application would add to the woes of the litigants. Once the Plaintiffs lead evidence on the reliefs prayed for in the suit plaint, the Defendants would be entitled to lead evidence in rebuttal. Considering that the suit is of year 2011, learned Trial Court is directed to decide, adjudicate and dispose of the said suit proceedings as expeditiously as possible and in any event within a period of six months from today strictly in accordance with law. Both parties are directed to co-operate with the learned Trial Court. Trial Court is directed not to give adjournments to the parties and to give adjournments only if they are utmost necessary due to any emergency or exigency.

7. Needless to state that learned Trial Court shall be at its discretion to hear any Application seeking appointment of Court Commissioner after considering and ascertaining the evidence led by

Plaintiffs and rebuttal evidence led by Defendants. Needless to state that this Court has not given its imprimatur on Commissioner's Report which is already taken on record or any future application that may accrue to any party pursuant to their witness action.

8. All contentions of Plaintiffs as also Defendants are kept open and while sustaining the impugned order dated 21.12.2023, the Writ Petition is disposed of with the aforesaid directions.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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