

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5158 OF 2024

Pandit Vithal Landage .. Petitioner

Versus

Vishnu Govind Pawar and Anr. .. Respondents

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- Mr. Aniesh S. Jadhav i./by Mr. Nikhil V. Adkine, Advocate for Petitioner.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 10, 2024

P.C.:

- 1.** Mentioned out of turn.
- 2.** Heard Mr. Jadhav, learned Advocate for Petitioner.
- 3.** Mr. Jadhav would submit that the impugned order dated 05.01.2024 passed below Exhibit-06 in Regular Civil Suit No.201 of 2023 allows appointment of the Commissioner.
- 4.** Suit is filed by the Plaintiff for possession and injunction. He would submit that alongwith filing of the suit on the same date, an Application for appointment of Commissioner is filed under Order XXVI Rule 9 of the Civil Procedure Code, 1908 (for short '**CPC**') which has been allowed by the impugned order passed by the Trial Court on the ground that it has appeared to the learned Trial Court that there is a boundary dispute between the parties.
- 5.** This Court has passed consistent orders in similarly placed matters in suits filed for possession and injunction wherein Application made for appointment of Commissioner in the first instance even

before the Trial has commenced, would undoubtedly lead to gathering of evidence.

6. If the learned Trial Court has derivated that there is a boundary dispute between the parties, the learned Trial Court should have relegated the parties to the appropriate Competent Authority for fixation of boundaries. However, it is seen that suit is for possession and injunction. A suit which is filed for injunction necessitates the possession of the Plaintiff and therefore he seeks restraint against the Defendant. In the present case when the suit is filed for seeking possession of the property, the learned Trial Court also ought to have seen as to why injunction has been prayed for by the Plaintiff in the first instance.

7. Be that as it may, Application under Order XXVI Rule 9 of the CPC having been allowed, the Defendants are aggrieved and before me.

8. An arguable case has been made out by Mr. Jadhav for immediate stay of the order dated 05.01.2024. If the said order is not implemented, it shall not be implemented until the present Petition is heard by this Court on merits.

9. Hence, issue notice to the Respondents. Humdast permitted. In addition to Court's notice, Petitioner is directed to serve the Respondents a copy of this order and copy of the Writ Petition and

inform them about the next date of hearing by any permissible mode of service and file appropriate affidavit of service with tangible proof thereof. Respondents are directed to file Affidavit-in-Reply to the Writ Petition on or before the next date if they so desire.

10. Respondents shall take cognizance of this order and accordingly remain present on the next adjourned date either themselves or through their Advocates.

11. It is clarified that if the Respondents do not remain present, this Court shall not await their presence and determine the Writ Petition strictly in accordance with law and disposed of the Writ Petition on the next adjourned date.

12. Stand over to **03rd May, 2024.**

H. H. SAWANT

[MILIND N. JADHAV, J.]

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by HARSHADA
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Date: 2024.04.10
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