



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.318/2023

Namdeo Waman Kalambe .Vs. State of Maharashtra and Ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. A. Daga, Advocate for petitioner.
Mr. A. Madiwale, A.G.P. for respondent Nos. 1 to 3.

CORAM : ANIL L. PANSARE, J.
DATE : NOVEMBER 25, 2024

Heard.

Petitioner is aggrieved by order dated 07.03.2022, passed below Exh.-27 by learned Civil Judge Senior Division, Bhandara in Regular Civil Suit No.35/2018, thereby rejecting the request made by the petitioner to appoint Court Commissioner under Order XX Rule 9 of the Civil Procedure Code, 1908.

The Trial Court has assigned following reasons to reject the application.

“8. The case of the plaintiff is regarding the declaration and for permanent injunction by filing the suit, the plaintiff is claiming access way to his field from the field of defendant No.4 and to that effect there is specific prayer in the prayer clause. That means, there is no dispute regarding the boundary between the parties nor there is dispute regarding the identification of the property. Neither defendants nor plaintiff have challenged or disputed the identification of the property. The dispute is pertaining to the access way. Therefore, as the plaintiff is coming with the case of having the road or access way to reach his field from the field of the defendant No.4, the burden is upon the plaintiff to prove the same by adducing evidence both oral as well as

documentary evidence on record. The case law relied by the plaintiff also speaks about the same. It is nowhere mentioned in the said judgment that for finding the access way, the Court Commissioner can be appointed. The Order 26 Rule 9 of the Code of Civil Procedure also do not speak about the appointment of Court Commissioner for finding the access way.”

As could be seen, the petitioner has filed suit for declaration and permanent injunction claiming access to his field from the field of respondent No.4 - original defendant No.4. It further appears that there is no dispute as regards boundaries of the field property or, for that matter, identification of the property. The dispute pertains to the access way. The petitioner has set up specific case that he has a right of way through the field belonging to respondent No.4. The Trial Court, therefore, was of the view that the petitioner was under an obligation to adduce evidence in support. In other words, the Trial Court found that it is not necessary or proper to have local investigation at the hands of the Court Commissioner and accordingly rejected the application.

Learned counsel for the petitioner has invited my attention to the judgment passed by Coordinate Bench of this Court in **Yashwant Bhaduji Ghuse .VS. Vithobaji Laxman Ladekar, 2010 (3) Mh. L. J. 956.** In the said case, the suit was for removal of encroachment and in that context the Coordinate Bench held thus:

“6. It is settled position of law that under Order 26, Rule 9 of the Code of Civil Procedure, the Court has discretion to order local investigation. The object of local investigation is not so much to collect evidence which can be taken in Court, but to obtain evidence which from its peculiar nature

can only be had on the spot. Cases of boundary disputes and disputes about identity of lands are instances when a Court should order local investigation under Order 26 Rule 9 of the Code. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out exact area encroached upon, Oral evidence cannot conclusively prove such an issue.”

Thus, considering the genesis of the suit viz. encroachment, Court found that appointment of Commissioner for local investigation was necessary.

Such is not the case here. As stated earlier, the petitioner has come up with a specific case that he has right to have access to his field through field belonging to respondent No.4. This being the position, the Trial Court has rightly held that burden is upon the petitioner to prove the same by adducing evidence.

I do not find any error in such approach. There is no merit in the petition. The petition is dismissed. No order as to costs.

(Anil L. Pansare, J.)