

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

1024 WRIT PETITION NO. 4065 OF 2023

TAJPAL SHIVRAM PAWAR
VERSUS
GANPAT SHIVRAM PAWAR AND OTHERS

...
Advocate for the Petitioner : Mr. S.H. Pathan h/f Mr. Bhide Vinod Y.
Advocate for Respondent Nos. 1 to 3 : Mr. Nagargoje Ankush Nivrutti
...

CORAM : SIDDHESHWAR S. THOMBRE, J.
DATE : 12.12.2025

PER COURT :

1. Heard the learned Counsel for the respective parties.
2. By way of this petition, the petitioner assails the common order dated 14.02.2023 passed below Exh.24 and Exh. 33 in Misc. Civil Appeal No. 36 of 2018 by the learned District Judge-1, Sangamber whereby an application filed by the respondents for appointment of Court Commissioner came to be allowed.
3. Learned Counsel for the petitioner submits that petitioner has filed a suit for pre-emption and perpetual injunction and the same is pending before the trial Court. The learned trial Court allowed the application below Exhibit-5 filed by the petitioner and granted temporary injunction in favour of petitioner. Aggrieved by which, respondents preferred an appeal before the appellate Court and filed application below Exhibit Nos. 24 and 33 for appointment of Court Commissioner to measure the suit premise and also to take photographs of the suit

property. The said application was allowed by the appellate Court. He further submits that the learned appellate Court ought not to have allowed the application as the appeal was filed only against an order of temporary injunction.

4. Per-Contra, learned Counsel for respondent Nos. 1 to 3 submits that the petitioner had started construction on the suit property and therefore, it was incumbent on the part of appellate Court to appoint the Court Commissioner to ascertain the actual situation on the suit property. Therefore, he supports the order passed by the appellate Court.

5. I have considered the arguments advanced by both the Counsels and I have gone through the order passed by the appellate Court. There is no dispute about the fact that the application filed by the plaintiff below Exhibit 5 was allowed and the Misc. Civil Appeal filed against the same is pending. Though there is an allegation that the plaintiff, by taking advantage of temporary injunction granted in his favour, is carrying out construction on the suit property, the appellate Court could have directed the plaintiff to restrain from carrying out the construction and could have directed both the parties to maintain *status quo*. The order of appointing Court Commissioner to ascertain the actual situation on the suit property, carrying out measurement and taking photographs amounts to collection of evidence, which is not permissible under the law. It is settled principle of law that Court Commissioner cannot be appointed unless the party applying for the same has led his

evidence.

6. Therefore, I am of the view that the order passed by the appellate court is not sustainable in the eyes of law.

7. In view thereof, the Writ Petition is allowed. The common order dated 14.02.2023 passed below Exh.24 and Exh. 33 in Misc. Civil Appeal No. 36 of 2018 by the learned District Judge-1, Sangamber is quashed and set aside.

8. In view of the controversy between the parties, they are directed to maintain status-quo till the decision of the Misc. Civil Appeal No. 36 of 2018.

9. The issue of appointment of Court Commissioner, can be considered by the trial Court when the occasion arises after leading of evidence by the parties.

10. The parties are at liberty to file an application for appointment of Court Commissioner before the trial Court after they have led their evidence.

(SIDDHESHWAR S. THOMBRE, J.)

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