



(1)

919-WP-9854-2023

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

919 WRIT PETITION NO. 9854 OF 2023

Sanjay Sarjerao Thite

VERSUS

Pandurang Dattatraya Thite Dead Through Lrs Shewanta Pandurang
Thite And Another

...

Mr. Dilip B. Rode, Advocate for the Petitioner.

Adv. Ameya Sabnis h/f Mr. Devdatt Palodkar, Advocate for Respondent.

CORAM : KISHORE C. SANT, J.

DATE : 27th MARCH 2025

PC :-

1. Heard the learned Advocate for the parties.
2. By consent of the parties, the petition is taken up for final disposal.
3. The petitioner, original defendant in RCS No.323 of 2012 and respondent in RCA No.338 of 2019, has approached this Court challenging the order dated 17th February 2023 passed by the learned District Judge-2, Shrigonda. The learned Judge by way of impugned order has allowed the application of the respondent-original plaintiff for appointment of the Court Commissioner.

4. The facts, in short, are that, the present respondent filed a suit for rectification of document i.e. sale-deed dated 17th March 2003 and for declaration that, by way of said sale-deed, only 25R land is sold by the respondent to this petitioner. Further it is prayed that, in case, the defendant fails to correct the sale-deed, it be corrected by appointing Court Commissioner. The said suit came to be dismissed by judgment and decree dated 14th February 2018, with costs. The respondent, therefore, filed an appeal. In the appeal, they filed an application for appointment of Court Commissioner and the said application came to be allowed. Thus, the petitioner is before this Court.

5. Mr. Rode, the learned Advocate for the petitioner vehemently argued that, in the suit, the dispute is not about any encroachment, area or boundaries of the suit land. The prayer was simply for declaration and for rectification. There is also no prayer for possession. There is no question of appointment of Court Commissioner in such a situation. He thus, prays that the appointment of the Court Commissioner is wholly unjustified and is not required at all. He thus, prays for quashing and setting aside the impugned order.

6. The learned Advocate for the Respondent vehemently submits that, in the plaint, there is clear averment that the plaintiff has sold only 25R land out of 1H 11R land belonging to him. The land is divided by one canal. The portion of the other side is now more than 25R which is in possession of the petitioner and it is for that purpose, it is necessary to appoint the Commissioner to see the exact holding of the petitioner. He relied upon the judgment delivered in the case of ***Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade***¹. He submits that the court has held that the Commissioner can be appointed even at the appellate stage. He thus, submits that order passed is legal and proper. No interference is required.

7. Having heard the parties. This Court has seen the nature of the suit. From the prayers it is clear that, the suit is not for possession or for removal of encroachment etc., it is also not for measurement of the land. It is pointed out during the course of argument that, even earlier, the respondent had filed a suit that was dismissed in default. It is submitted that in that suit, there was no prayer of rectification and the said was

1 2004 (2) Mh.L.J.

not prosecuted and the present suit was filed.

8. Be that as it may, looking to the dispute and the prayer, this Court finds that the appointment of Commissioner is wholly unwarranted. The learned Court below has committed an error in allowing the application. If the Commissioner is appointed, it would be practically collecting the evidence and giving fresh cause of action to the respondent. The Commissioner's report cannot be used for the said purpose. It is also seen that though the sale-deed sought to be corrected is executed on 17th March 2003, the suit was filed on 2nd July 2016. Under such circumstances, there is every likelihood that such report would be used to carry the litigation further. Even for this reason, the Court is inclined to allow the writ petition. Writ petition is, therefore, allowed in terms of prayer clause (C).

9. As the appeal is pending since 2019, the Appellate Court is expected to decide it as early as possible and preferably within six months from today.

[KISHORE C. SANT, J.]