

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 WRIT PETITION NO. 10546 OF 2024

1. Sahebrao S/o Yashwant Chitalkar,
Age: 61 years, Occu :
R/o. Mandve, Tq. Shrirampur,
Dist. Ahmednagar
2. Annasaheb S/o Yashwant Chitalkar,
Age : 57 years, Occu. : Service,
R/o. Mandve, Tq. Shrirampur,
Dist. Ahmednagar
3. Sunil S/o Ganpat Kulkarni,
Age : 57 years, Occu.: Service,
R/o. Mandve, Tq. Shrirampur,
Dist. Ahmednagar

...Applicants

Versus

Pramila S/o Ramchandra Joshi,
Age : 69 years, Occu: Household,
R/o. Mandve, Tq. Shrirampur,
Dist. Ahmednagar

...Respondent

Mr. K. N. Shermale, Advocate for the Petitioner
Mr. V. B. Deshmukh, Advocate for Respondent/Sole

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...

CORAM : ROHIT W. JOSHI, J.
DATED : 9th JULY 2025

ORAL JUDGMENT :-

1. The petition was initially heard on 04.07.2025. The learned Advocate for the petitioner had appeared through Video Conferencing. On that day, this court had indicated disinclination to grant any relief to the petitioner being not satisfied with the submissions advanced on merits of the matter. However, the learned

Advocate insisted that the matter be listed on Monday in order to enable him to advance further arguments and cite certain judgments. The matter was again listed on 07.07.2025. On 07.07.2025, having argued the matter for considerable length, the learned Advocate for the petitioner wanted to read certain judgments, however, he was not ready with the relevant paragraphs to be relied upon from the judgments on which he wanted to place reliance. At his request, a short accommodation of around 15-20 minutes was granted so as to enable him to go through the judgments and point out relevant paragraphs. The matter thereafter called on three occasions, however, the learned Advocate for the petitioner did not remain present.

2. Today, the learned Advocate for the petitioner has appeared in the matter and has advanced further submissions. He has also tendered across the bar an application for amendment of the petition. By the proposed amendment, four grounds are sought to be added in the memorandum of petition along with a prayer in order to challenge order dated 29.03.2022 passed below Exhibit-21 in Regular Civil Suit No.6 of 2018.

3. The petitioners are defendants in Regular Civil Suit No.6 of 2018 pending on the file of the learned 4th Joint Civil Judge Junior Division, Shrirampur. The suit is filed for perpetual injunction and delivery of possession by removal of encroachment. It is the case of

the plaintiff that the defendants have committed encroachment over northern portion of the suit property owned by him. The defendants have filed written statement in the matter vide Exhibit-12. The learned Trial Court has framed issues in the matter vide Exhibit-17 on 10.03.2021. Issue No.2 pertains to the alleged encroachment by defendant no.1 on the suit property.

4. On 29.01.2022, the plaintiff had filed an application for appointment of Court Commissioner for measurement of the suit land. The prayer was to appoint Tahsil Inspector of Land Records, Shrirampur as Court Commissioner for measurement of the suit property. The defendant opposed the said application by filing reply dated 05.03.2022 at Exhibit-23. Amongst other grounds a contention was raised in the reply that unless the plaintiff establishes his ownership and possession over the suit property application for appointment of Court Commissioner should not be entertained. After hearing rival submissions, the learned Trial Court allowed the application vide order dated 29.03.2022. The learned Trial Court has opined that since the dispute between the parties pertains to encroachment it is necessary to carry out measurement of the suit property. The learned Trial Court appointed the Tahsil Inspector of Land Records, Shrirampur as Court Commissioner for measurement of suit property. The learned Trial Court directed the Court

Commissioner to issue notices to both sides and to prepare a measurement report. The order dated 29.03.2022 appointing Court Commissioner was not challenged by the defendants.

5. The Court Commissioner furnished a report vide Exhibit-30 expressing inability to carry out measurement since survey of village Mandave in which suit property is situated was not done.

6. In this backdrop, the plaintiff filed another application on 17.03.2023 vide Exhibit-31 praying for appointment of any other person as Court Commissioner. The plaintiff has referred to the inability expressed by the Office of Tahsil Inspector of Land Records to carry out commission. The defendants opposed the application by filing reply dated 05.07.2023 which reads as under :-

"याकामी प्र. वादीतर्फे म्हणणे की,

प्रस्तुत अर्ज खरा नाही कायदेशीर नाही. दावा मिळकतीस भुमापन क्रमांक लागू नाहीत, भुमापन योजना लागू नाही, रेकॉर्डला अभिलेख नाही त्यामुळे मोजणी करणे शक्य नाही त्यामुळे कोर्ट कमिशनर यांनी नि.नं. ३० प्रमाण कळविले आहे. अभिलेख कागदपत्रे नाहीत. त्यामुळे मोजणी करता येत नाही.

सबब अर्ज निकाली काढणेत यावा ही विनंती.

ता. ५.७.२३

सही/-

प्र. वादीतर्फे अॅड."

7. The learned Trial Court passed order dated 13.10.2023 calling upon both the parties to suggest name of the Court Commissioner. Thereafter, the learned Trial Court has allowed the application at Exhibit-31 vide order dated 14.06.2024. Perusal of paragraph 4 of the

order will demonstrate that in compliance of order dated 13.10.2023 the plaintiff had suggested name of an advocate for being appointed as a Court Commissioner, however, the defendants did not suggest any name. Likewise, the defendants also did not raise any objection to the name suggested by the plaintiff. In that view of the matter, the learned Trial Court allowed the application thereby appointing the Advocate named by the plaintiff as Court Commissioner.

8. It will be pertinent to mention that in paragraph 3 of the order, the contentions raised by the defendants while opposing the application are recorded. It is not the case of the petitioners (defendants) that the contentions are not rightly recorded. No submission is made before this Court that any contention was raised before the learned Trial Court which is not dealt with in the impugned order dated 14.06.2024.

9. The facts narrated above, will indicate that initially the learned Trial Court had passed order dated 29.03.2022 allowing the application for appointment of Court Commissioner. This order dated 29.03.2022 was not challenged by the petitioner (defendants). In view of the report received from the office of the Court Commissioner appointed earlier the plaintiff filed another application on 17.03.2023 i.e. after a period of around 11 months and 20 days from the date on which earlier application was allowed. The application is allowed vide

order dated 14.06.2024. The present petition is filed on 12.09.2024 in order to challenge the order dated 14.06.2024.

10. During the course of hearing, on 04.07.2025 and 07.07.2025 the emphasis of the learned Counsel for the petitioner was on the fact that since the plaintiff did not lead any evidence, it was not open for the learned Trial Court to allow the application for appointment of Court Commissioner. The contention of the learned Counsel for the petitioner is that since the foundational facts have not been established on record by leading evidence, application for appointment of Court Commissioner was premature. However, the learned counsel for the respondent opposed this contention on the ground that need to appoint a Court Commissioner was felt by the learned Trial Court while passing the earlier order dated 29.03.2022. The learned Counsel for the respondent contended that the said order was not challenged by the petitioners. He further contended that since the Court Commissioner appointed earlier could not execute the commission there was need to appoint some other person to do the needful.

11. The learned Counsel for the petitioner is justified in his submission that normally the Court Commissioner should be appointed after foundational facts established by the party to the suit by leading evidence. However, in the present case the application for

appointment of Court Commissioner was allowed earlier. The said order was not challenged. The learned Trial Court has merely substituted the Court Commissioner since, the Court Commissioner appointed earlier could not execute the Commission. This Court, is of the opinion that since, the basic order appointing the Court Commissioner was not challenged, it was not open for the petitioner to challenge the subsequent order by which name of Court Commissioner was substituted. This Court had therefore expressed that the petition warrants dismissal.

12. Today in the backdrop of development that had occurred during the course of hearing on earlier two dates, the learned counsel for the petitioner has tendered application for amendment of petition across the bar. The said application is filed when the hearing on merits of the matter was almost over. The entire matter was heard and hearing was deferred only because of the learned Advocate for the petitioner could not point out the relevant paragraphs of the judgments on which he wants to place reliance. In such circumstances, today in a part heard matter which was rather almost fully heard an application for amendment is filed.

13. By this amendment application dated 09.07.2025, order dated 29.03.2022 is sought to be assailed. The learned Counsel for the respondent has serious objection to the application on the ground of

delay for which no plausible explanation is offered. He also raises objection to the conduct of the petitioner in the matter and contends that it is unfortunate that an application for amendment is filed after the hearing was almost concluded.

14. The learned Advocate for the respondent (plaintiff) states that it is well settled by a catena of judgments that disputes pertaining encroachment can never to set at rest without carrying out measurement for which appointment of Court Commissioner is necessary. In support of his contention he relied on the following judgments :-

(i) ***Kashinath Chinduji Shastri Vs. Haribhau Nathuji Bawanthade*** reported in ***2004 (2) Mh.L.J. 722***

(ii) ***Vijay s/. Shrawan Shende and Others Vs. State of Maharashtra and Others*** reported in ***(2009) 5 Mah. L. J. 279***

(iii) ***Kisanlal Maniklal Rathi Vs. Dinkar Yashwant Patil*** reported in ***(2004) 1 Mah.L.J. 138***

(iv) ***Ramchandra s/o Bhikaji Jagtap Vs. Dudharam Langruji padvekar Dead Through L. Rs. Bulkabai Padvekar and Others*** reported in ***(2004) 1 Mah.L.J. 278***

15. Having regard to the totality of circumstances, this Court is not inclined to allow the application for amendment tendered across the bar today. The application for amendment is rejected. As regards

merits of the petition, the earlier order dated 29.03.2022 was not assailed before. By the subsequent order, the learned Trial Court has merely appointed another person as Court Commission in place of the Commissioner appointed earlier.

16. As regards the contention of the learned counsel for the petitioner that the Court Commissioner should not be appointed prior to the plaintiff leading evidence in order to establish foundational facts, the said contention is liable to be rejected on the ground that earlier order dated 29.03.2022 appointing Court Commissioner was not challenged initially and an application for amendment in order to raise such challenge is filed at a stage when hearing was almost over.

17. The learned Trial Court has merely substituted the Court Commissioner. The need for appointment of Court Commissioner was already recorded in the order dated 29.03.2022. An issue which was settled by deciding the earlier application by an order dated 29.03.2022 could not be reopened during the course of hearing subsequent application for appointment of some other person as Commissioner. It is well settled that principles of resjudicata are applicable to different stages of the same suit.

18. As regards the appointment of Advocate as Court Commissioner, evidentiary value of the report by the Court

Commissioner can be decided by the learned Trial Court during the course of hearing of the suit. It will be pertinent to mention that the learned Trial Court had granted chance to both the parties to suggest name of Court Commissioner. Likewise, the learned Trial Court has also observed that the petitioners(defendants) did not raise any objection to the name of Court Commissioner suggested by the respondents(plaintiff). In that view of the matter the objection pertaining to the name of Commissioner also needs to be rejected.

19. As stated above, the evidentiary value of Commissioner Report and the evidence of Court Commissioner, if he is examined as a witness, the same shall be determined by the learned Trial Court while deciding the suit on merits.

20. The learned Advocate for the petitioner has placed reliance on judgment of the Hon'ble Supreme Court in the matter of S. *Kasi Vs. State Through The Inspector of Police Samaynallur Police Station Madurai District* reported in (2021) 12 SCC 1 referring to paragraphs 31 and 32 of the judgment, the learned Advocate contends that to reject the petition will amount to gross indiscipline of this Court in as much as earlier in different cases view is taken that appointment of Court Commissioner should not be made before the party praying for appointment of Court Commissioner leads evidence with respect to foundational facts to establish the need for such appointment.

21. With respect, the facts of the present case are slightly different. Here an application for appointment of Court Commissioner was already granted and the said order was not assailed. The learned Trial Court merely substituted the name of Court Commissioner by the order impugned in the petition. The objections pertaining to need for appointment of Court Commissioner could not have been entertained by the learned Trial Court since that issue was decided by allowing earlier application for appointment of Court Commissioner. The scope of the present petition is also circumscribed by the application and the order out of which present petition arises which is restricted to substitution of Commissioner. In view of the distinguishing feature the contention with respect to appointment of Court Commissioner before recording evidence of the plaintiff respondent(original plaintiff) is rejected.

22. The learned Counsel for the petitioner also places reliance on judgment of the Hon'ble Apex Court in the matter of ***Moh. Inam Vs. Sanjay Kumar Singhal and Ors.*** reported in ***(2020) 7 SCC 327*** to contend that it is not necessary for a party to lis the challenge each and every interlocutory order and when appeal is filed against decree, the correctness or otherwise of an order passed below interlocutory application can be raised as a ground of challenge in the substantive appeal to be filed against the decree. The relevant observation from

the judgment of the Hon'ble Supreme is extracted herein below for ready reference :-

“An interlocutory order which had not been appealed from, either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order.”

23. There cannot be any quarrel with the said legal proposition. The said proposition infact has statutory recognition under Section 105 of the CPC. However, as observed by the Hon'ble Supreme Court this can be a ground raised in an appeal arising out of a decree. The present petition does not arise out of any decree passed by the learned Trial Court. The contention of the learned Advocate is therefore rejected.

24. As regards the objection that the Court Commissioner is appointed prior to foundational facts being brought on record, the same can also be taken care of by directing that the evidence of Commissioner be recorded, if the respondent(plaintiff) desires to examine him as witness, after the evidence of plaintiffs is recorded.

25. Writ Petition is disposed of accordingly.

26. Civil Applications, if any stands disposed of.

[ROHIT W. JOSHI, J.]