



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

956 WRIT PETITION NO. 13696 OF 2023

Mayur Satish Patil And Others

VERSUS

Hiralal Natthu Mache Alias Pardeshi

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Mr. Bipinchandra K. Patil - Advocate for the Petitioner

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CORAM : NEERAJ P DHOTE, J.

DATED : 18TH NOVEMBER, 2025

PER COURT : -

1. By the order dated 31st October, 2023, the notice for final disposal was issued to the Respondents. The office note shows that the sole respondent is served. The previous order dated 4th October, 2025 shows that none appeared for the Respondent. Today also, none appears for the Respondent. Hence, the learned Advocate for the Petitioner is heard in the Petition.

2. Order under challenge in the Writ Petition under Article 227 of the Constitution of India is dated 21.01.2023 passed by the learned Civil Judge, Jr. Division, Soygaon, below Exh. 23, in R.C.S. No. 117 of 2022, allowing the Application for appointment of Court Commissioner filed by the sole Respondent, who is the Plaintiff in the said Suit. The Petitioners herein are the original Respondents.

3. It is submitted by the learned Advocate for the Petitioners that, the impugned order is unsustainable in the eye of law. The Court Commissioner cannot be appointed to collect the evidence. The fee of the Court Commissioner is directed to be borne by both the parties, which is contrary to the provision of Order XXVI Rule 15 of the Code of Civil Procedure. The Application was moved by the Plaintiff at the very initial stage and the impugned order cannot stand scrutiny of the law and the same be set aside. He submits that, the Petition be allowed.

4. Perused the papers on record. The suit by the sole Respondent was for declaration and perpetual injunction. The papers on record indicate that the sole Respondent had filed an Application below Exh. 5 for temporary injunction in the said suit, which came to be rejected by order dated 21.01.2023 by observing that, the Plaintiff failed to establish prima facie case, no balance of convenience was in favour of the Plaintiff and no irreparable loss would cause to the Plaintiff. It is seen that the Application for appointment of Court Commissioner was filed and decided before framing of the issues. It is needless to state that, under the settled position of law, the Court Commissioner cannot be appointed for collection of evidence. The impugned order show that, by relying on one judgment of this Court in Aadhar Vitthal Mali Vs. Jagannath Hiranman Mali, Writ Petition No. 6564 of 2020, decided on 3rd February, 2021, the Application was allowed. The relevant paragraph

nos. 7 and 8 from the impugned order are reproduced below: -

“07. It is no doubt that this is a suit for simplicitor injunction. The Ld. advocate of plaintiff has relied on the judgment of Hon'ble Bombay High Court between Aadhar Vitthal Mali Vs. Jagannath Hiranman Mali, Writ Petition No.6564/2020, decided on 03rd February, 2021. Wherein Hon'ble Bombay High Court in Para07 of the judgment has discussed as follows “Right of way is the subject matter of the suit. The alleged suit way has been described in the plaint and sketch appended thereto. The respondent defendant denied the same. According to him, there exists some other way. Description thereof has been given in paragraph 14 of the plaint. Recording of evidence has already been commenced. To shed light upon the dispute involved in the suit, it has thus become necessary to appoint a Court Commissioner for local investigation. The trial Court ought to have allowed the application. Interference with the impugned order, is therefore, called for.”

08. Therefore, by considering the above judgment it will proper to appoint Court Commissioner to know whether alternative cart-way is exists for the defendants. However, they also necessary to know whether there is any way exists through the suit property.”

5. The impugned order completely lacks the reason for justification to grant the Application. The above paragraphs show that only on the basis of the order passed in the above referred Petition, the Application was allowed. Paragraph no. 7 above show that there was observation in the said Writ Petition that the recording of the evidence had already commenced. This shows that the said case was entirely different from the case at hand where the evidence did not commence as the issues itself were not framed. Clause 5 and 6 of the operative order strengthens the contention of the Petitioner that the Court Commissioner was appointed for collection of the evidence. Moreover,

the direction to bear the expenses of the Court Commissioner equally by both the sides is contrary to the provisions of Rule XXVI Order 15 of the CPC. In this backdrop of the matter, the impugned order is unsustainable in the eye of law and needs interference. Hence, I pass the following order: -

ORDER

- [i] The Writ Petition is allowed.
- [ii] The impugned order dated 21.01.2023 passed by learned Civil Judge Jr. Division, Soygaon, below Exh. 23, is quashed and set aside.
- [iii] Petition stands disposed off.

[NEERAJ P. DHOTE]
JUDGE

SG Punde