

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4124 OF 2016

DADASAHEB BALKRUSHNA SALALKAR AND OTHERS
VERSUS
SHIVAJI MHATARBA RAHINJ AND OTHERS

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Advocate for Petitioners : Shri Dixit Satyajeet S
Advocate for Respondents 1 to 3 : Shri Tambe Rahul A.
AGP for Respondent 16 : Shri Tambe S.K.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 24, 2017

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PER COURT :-

1. I have heard the learned Advocates for the respective parties.
2. Respondents 4 to 15, though served, have not caused appearance in the matter.
3. The petitioners are aggrieved by the order dated 3.3.2016, passed by the trial Court, thereby, rejecting Exhibit 36, by which, the petitioners / plaintiffs had sought appointment of the Court Commissioner under Order XVI Rule 9 of the Code of Civil Procedure.

4. The record reveals that when Exhibit 36 was filed on 6.8.2015, the issues were not cast and the trial in the suit had not commenced. This Court, in several judgments, has concluded that normally an application for appointment of Court Commissioner is not to be entertained until the trial has commenced, since Court Commissioner is not to be utilized for collecting evidence.

5. In the instant case, the plaintiffs had preferred a suit based on the earlier measurement carried out by the Taluka Inspector of Land Records which indicates some encroachment. The defendants filed their written statement alleging that the plaintiffs have encroached. The plaintiffs filed Exhibit 36 on the ground that after the written statement was filed, there was a further encroachment by the defendants.

6. Considering the law that is settled by this Court, the litigating sides would have to lead evidence and during the course of recording of evidence, either of the parties could file an application for appointment of the Court Commissioner, so as to deal with the disputed boundaries and the encroachment. The trial Court could then consider such an application on its own merits, since that would be the appropriate stage at which the

appointment of the Court Commissioner could be sought by either of the parties.

7. Considering the above, this petition is disposed off without causing interference in the impugned order but with the observation that after the commencement of the recording of oral evidence, if either party deems it appropriate to seek appointment of a Court Commissioner for the joint measurements of the lands of the litigating sides, the trial Court would consider the application on its own merits and the reasons assigned in the impugned order dated 3.3.2016 shall not be an impediment.

(RAVINDRA V. GHUGE, J.)

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