

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

WRIT PETITION NO. 9545 OF 2017

BAPUSAHEB KARBHARI BHUSAL
VERSUS
RANGNATH BABURAO BHUSAL AND ANOTHER

...
Advocate for Petitioner : Shri Shinde S.K.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 08th August, 2017

Per Court:

1 The Petitioner is aggrieved by the order dated 12.04.2017 by which his application Exhibit-12 seeking appointment of a Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure has been rejected.

2 I have considered the strenuous submissions of the learned Advocate for the Petitioner, who prays that the impugned order be quashed and set aside.

3 It is not in dispute that Exhibit-12 was filed when the trial in the matter had not commenced. This Court, in a catena of judgments, has crystallized the law that the Court Commissioner is not to be appointed until the recording of oral evidence has commenced, except in rare and exceptional circumstances.

4 In the instant case, the Petitioner/ Plaintiff had applied for measurement of the suit land. The TILR has measured the land and the encroachment to the extent of 8 R by the Defendant is allegedly evidenced. The Defendant has averred in the Written Statement that no joint measurement has been carried out.

5 Considering the fact that the recording of evidence has still not commenced before the Trial Court, it could not have exercised its power under Section 75 r/w Order-26 Rule-9 of the Code of Civil Procedure. I do not find that the impugned order could be faulted at this stage. Exhibit-12 has been filed prematurely.

6 The Writ Petition is, therefore, disposed of.

7 Needless to state, after recording of oral evidence, if any of the litigating sides deem it proper to move an application for a joint measurement of the suit land inclusive of the land of the Defendant, the Trial Court shall consider the same on its own merits and without being influenced by the order dated 12.04.2017 below Exhibit-12.