

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

CIVIL WRIT PETITION NO. 5477 OF 2018

Shaikh Jaitunbee w/o Shaikh Baban,
Age 54 years, Occ. Agri.,
R/o Village Sheni Pardi (Makta),
Tq. Ardhapur, Dist. Nanded.

**...PETITIONER
(Orig. Def. No.3)**

VERSUS

1. Nadaaf Ayyub s/o MastanSab,
Age : 45 years, Occ. Agri.,
R/o : Village Pardi (Makta),
Tq. Ardhapur, Dist. Nanded.
2. Yamunabai w/o Pandurang
Shinde, Age : 40 years, Occ.Agri.,
R/o Village Sheni Pardi (Makta),
Tq. Ardhapur, Dist. Nanded.
3. Ganesh s/o Gangaram Pannase,
Age : 40 years, Occ.Agri.,
R/o : Sheni, Tq. Ardhapur,
Dist. Nanded.
4. Shaikh Javed s/o Shaikh Habib,
Age : 40 years, Occ.Agri.,
R/o Village Sheni Pardi (Makta),
Tq. Ardhapur, Dist. Nanded.....

(Respondent Nos. 2 to 4 are deleted)

....RESPONDENT.

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Advocate for the Petitioner : Shri T. A. Quadri
Advocate for Respondent No.1 : Shri S. R. Chaukidar
AGP for Respondent Nos. 2 and 3 :- Shri K. S. Patil.

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 28th SEPTEMBER, 2018.

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PER COURT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the learned Advocates for the respective sides.

2. The learned Advocate for the petitioner submits that respondent No.1 being the sole plaintiff, all other respondents are sought to be deleted. Respondent Nos. 2 and 3 are already served. No appearance has been caused. As such, the petitioner is permitted to delete respondent Nos. 2 to 4 and the deletion should be carried out forthwith.

3. Though the learned Advocate for the plaintiff has strenuously supported the impugned order and prays for the dismissal of this petition, I find that the Trial Court has allowed the application Exhibit 9 filed by the plaintiff seeking appointment of a court commissioner under Order 26 Rule 9 of the Code of Civil Procedure, even before the appearance of the

defendants.

4. This Court has consistently taken a view that a court commissioner should not be appointed until the recording of oral and documentary evidence is concluded. Following are few of such orders passed by this Court :-

(a) **Syed Mushtaque Ahmad Syed Ismail and others vs. Syed Ashique Ali Khan Haidar Ali, 2012 (1) ALL MR 80 : 2011 (6) Mh.L.J. 334.**

(b) *Dnyandeo Vithal Salke & others vs. Dagdu Kadar Inamdar, 2017(3) Mh.L.J. 314.*

(c) *Chandrakant Kashinath Dike and others vs. Smt. Satyabhama Vishwanath Dike and another, Writ Petition No. 8877/2013 (Aurangabad Bench) decided on 17.01.2014.*

(d) *Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No. 4756/2014 (Aurangabad Bench) decided on 08/12/2014.*

5. In my view, the Trial Court has completely lost sight of the fact that a court commissioner is not a substitute for the

Court for recording evidence and surely not for collecting evidence. Even if there is a dispute of the boundaries and a joint measurement of the properties for fixing the boundaries and preparing a sketch map, is permissible under Order 26 Rule 9, in view of the judgments of this Court in the matters of *Sanjay s/o Namdeo Khandare Vs. Sahebrao Kachru Khandare, 2001 (1) Bom.C.R. 800* and *Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, Writ Petition No. 6497/2009, decided on 14/03/2011*, the Court should exercise its powers only if it finds that further information deserves to be gathered after the recording of evidence has completed.

6. In view of the above, this petition is allowed. The impugned order dated 12/04/2018 is quashed and set aside and application Exhibit 9 stands rejected. Rule is made absolute in the above terms.

7. Needless to state, after the recording of oral evidence is concluded, if either of the litigating sides files an application seeking appointment of a court commissioner, the Trial Court

would consider the same on its own merits.

(RAVINDRA V. GHUGE, J.)

shp/-