

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

WRIT PETITION NO. 12784 OF 2017

**DATTU TUKARAM MASKE
VERSUS
ANNASAHEB GANGADHAR KAVALE AND ANOTHER**

...
Advocate for the Petitioner : Shri P.S.Koshti
Advocate for Respondents Nos.1, 2 and 4 : Shri M.B.Kolpe

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**CORAM : RAVINDRA V. GHUGE, J.
DATED : 15th JUNE, 2018.**

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PER COURT :

1. The petitioner- original plaintiff is aggrieved by the order dated 30/03/2017 passed by the Trial Court by which, application Exhibit 17 filed by defendant No.1 in Regular Civil Suit No. 233/2015 has been allowed and a court commissioner has been appointed under Order XXVI Rule 9 of the Code of Civil Procedure for taking inspection of the suit land and for submitting the report as to what structure exists on the suit land.

2. I have heard the learned advocates for the respective sides for quite some time.

3. The plaintiff has instituted the suit for seeking perpetual injunction over the suit property. The contention is that there is one temple of Lord Amreshwar Mahadeo and one temple of Goddess Sati and the plaintiff cultivates the land between these temples for agricultural purposes. The defendants have come forward with a case that no agricultural activity is undertaken by the plaintiff and the common space between the said two temples is being used by the persons belonging to the Bhakte, Chaughule and Kawle communities, for performing the last rites (cremation) of the dead bodies.

4. In this backdrop, application Exhibit 17 was filed by defendant No.1 even when the pleadings were not completed, application Exhibit 5 under Order 39 Rules 1 and 2 of the Civil Procedure Code was pending and issues were not cast. The Trial Court has allowed the application by the impugned order and has appointed an advocate as the court commissioner.

5. This Court has consistently taken a view that the appointment of a court commissioner before recording of oral evidence would not be permitted. After evidence is recorded

and an application is filed, the Trial Court will consider the application if it finds that further material is required for proper adjudication.

6. Considering the above, this petition is partly allowed. The impugned order dated 30/03/2017 is set aside and application Exhibit 17 stands rejected.

7. Needless to state, after the oral evidence is recorded, either of the litigating sides would be at liberty to move an application under Section 75(b), Order 26 Rule 9 of the C.P.C. for appointment of a court commissioner and in the event such an application is filed, it would be considered on its own merits.

(RAVINDRA V. GHUGE, J.)

shp/-