

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

WRIT PETITION NO. 13173 OF 2019

SYED KHAIRUNISA BEGUM SYED IMRAL ALI AND
OTHERS

VERSUS

SK. SALIM SK. ABDUL RASHID AND ANOTHER

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Advocate for the Petitioners : Shri G. L. Deshpande

Advocate for Respondent No. 1 : Shri Y. H. Jadhav

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 18th OCTOBER, 2019.

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PER COURT :

1. The petitioners are the original defendant Nos. 1 to 4. They seek to delete respondent No.2, who is the original defendant No. 5 and is not interested in the present controversy. Deletion is permitted.

2. The petitioners are aggrieved by the order dated 03/10/2019, by which, the Trial Court has allowed application Exhibit 25 filed by the plaintiff seeking appointment of a court commissioner in Regular Civil Suit No. 279/2019.

3. The grievance of the petitioners is that the suit was instituted on 06/06/2019 and Exhibit 25 was filed on 26/08/2019 seeking appointment of a court commissioner. A detailed report about the encroachment was called through the court commissioner. By the impugned order, the Trial Court has appointed the DSLR as the court commissioner with the further direction to carry out the measurement of the Municipal House numbers / suit properties and thereafter assess the actual encroachment and prepare a detailed report about the encroachment.

4. The learned Advocate for the plaintiff submits that the defendants have stated in their written statement that a court commissioner could be appointed and measurement of the suit properties could be carried out.

5. This Court has consistently held that a court commissioner can be appointed after the recording of oral evidence is concluded. Some of the orders

passed by this Court are as under :-

(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*

(e) *Dipak Laxman Gadekar and anr. Vs. Trimbak Ravji Shirsath, Writ Petition No. 11593/2015 (Aurangabad Bench), decided on 23/08/2017,*

(f) *Mahadeo s/o Vaijanath Bembalge Vs. Chandrakala w/o Ramesh Athane, Writ Petition No. 832/2018 (Aurangabad Bench), decided on 04/06/2018,*

(g) *Dhondiram Nivrutti Pawar through L.Rs. Vs. Laxman Khashaba Pawar and others, Writ*

***Petition No. 1196/2017, (Bombay Bench),
decided on 23/01/2018,***

***(h) Sanjay Balasaheb Khandare Vs. Vivek
Surinder Mahajan and another, Writ Petition No.
4958/2018,(Aurangabad Bench), decided on
29/01/2018.***

6. I find from Exhibit 25 that the plaintiff had made a request that two house properties be measured, the encroachment be identified and a detailed report about the dimensions of the encroachment should be supplied. This amounts to collecting evidence, *inasmuch* as, a court commissioner could not have been appointed at this stage.

7. In view of the above, this petition is allowed. The impugned order dated 03/10/2019 is quashed and set aside and application Exhibit 25 stands rejected.

8. Needless to state, in the event, after the recording of oral evidence is concluded, any litigant makes an application for appointment of a court

commissioner, the Trial Court would consider the said application on its own merits.

(RAVINDRA V. GHUGE, J.)

shp/-