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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1187 OF 2019

1. Ramdas Baba @ Mhalu Bhise PETITIONERS
Age - 62 years, Occ - Agriculture
and Shepherd

2. Sau. Bayadabai Ramdas Bhise
Age - 60 years, Occ - Agriculture
and Shepherd

3. Ravindra Ramdas Bhise
Age - 35 years, Occ - Agriculture
and Shepherd

All R/o Gundegaon, Taluka - Nagar
District - Ahmednagar

VERSUS

1. Shri. Khandu Balu Bhise RESPONDENTS
Age - 32 years, Occ - Illegal Money
Lending Business,

2. Mangala Khandu Bhise
Age - 30 years, Occ - Household

3. Ankush Balu Bhise
Age - 30 years, Occ -Illegal Money
Lending Business

4. Asha Ankush Bhise
Age - 28 years, Occ - Household

5. Balu Jama Bhise
Age - 65 years, Occ - Agriculture

6. Sindhubai Balu Bhise
Age - 60 years, Occ - Household

All R/o Gundegaon, Taluka - Nagar
District - Ahmednagar

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Mr. Amol K. Gawali, Advocate for the petitioners
Mr. S. S. Kulkarni h/f Mr. D. B. Rode, Advocate for respondents
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 12th FEBRUARY, 2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. Petitioners are plaintiffs in Regular Civil Suit No. 189 of 2017 instituted for declaration that sale deed to be a money lending transaction and for injunction in respect of property referred to therein.
3. During pendency of this suit, an application Exhibit-61 had been moved by the petitioners seeking appointment of commissioner pursuant to Order XXVI, Rule 9 of the Civil Procedure Code to measure suit land and dwelling house standing thereon including other circumstances and to draw a map. The same had been resisted by the defendants and the application came to be rejected observing that there does not appear to be any boundary dispute and it appears at this stage to be an attempt to collect evidence in respect of possession and

having regard to observations of the High Court in the case of *“Nalubai Narayan Shinde and Others V/s Gopinath Dagadu Shinde”* [2011 (2) *Mh.L.J.* 991], appointment as sought under application Exhibit-61 would not be acceded to.

4. Mr. Gawali, learned advocate appearing on behalf of the petitioners vehemently submits that the transaction has been entered into by way of offering security for the amount being lend and the plaint also refers to standing structure on concerned lands. While the plaint is resisted with denial, stating that the transaction is not a money lending transaction and that structures are not within the suit property, in such a case, whether the structures standing are inside or outside the suit property will have to be considered and is possible only by measurement of land. He submits that there is no hard and fast rule that appointment of commissioner cannot be made at any stage before the evidence and he purports to refer to quite a few decisions in this respect *viz.*, orders of this court dated 21st September 2018 in writ petition No. 10180 of 2018, dated 22nd November, 2017 in writ petition No. 2873 of 2017, order dated 6th July, 2017 in writ petition No. 6541 of 2017, order dated 27th September, 2016 in writ petition No. 8608 of 2012 and order of Orissa High Court in the case of *“Mahendranath Parida V/s Purnananda*

Parida and Others” reported in *AIR 1988 Orissa 248*.

5. On the other hand, learned advocate Mr. Kulkarni appearing on behalf of the respondents vehemently submits that apart from the stage at which the application has been moved is premature stage, such an appointment of commissioner could not be made and underlying effort the application is to collect evidence with regard to possession, as observed by the trial court in the impugned order. He submits that the petitioners will have to lend credence to their case about structures standing inside the suit property and such burden will have to be discharged by them. If no credibility is lent to such a claim, appointment of commissioner sought would tantamount to collection of evidence in respect of the same, which burden is to be discharged by the plaintiffs. Commissioner is not to be appointed in such case, as referred to in the decision relied upon on behalf of the defendants before the trial court. He submits that the defendants have claimed that there are no structures inside the property and those are outside. In the circumstances, unless primary burden is discharged, the appointment of court commissioner would not be possible.

6. Having regard to aforesaid submissions and on perusal of

the impugned order, as also considering the observations of the trial court as appearing in paragraph No. 11 of the impugned order, it appears that the reasons which went into rejection of application Exhibit-61 would seldom be liable to be faulted with. Writ petition, therefore, is not entertained in the discretionary powers of this court.

7. Writ petition, as such, is dismissed. Rule stands discharged. Such dismissal, however, would not undermine opportunity to the plaintiffs to make proper application if the circumstances so warrant, at appropriate state.

8. Needless to refer to that observations made in the impugned order while rejecting application Exhibit-61 as well as the decision in the writ petition being at interlocutory stage, would not have influential value and would not affect merits of the case. All points would be open for the parties.

**[SUNIL P. DESHMUKH]
JUDGE**