

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

WRIT PETITION NO.3339 OF 2019

**KISHANRAO BAPURAO KADAM
VERSUS
ANKUSH BAPURAO HEMPLE**

...
Advocate for Petitioner : Mr. Vivek Vasantrao Bhavthankar
Advocate for Respondent : Mr. S. V. Warad
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 15th JULY, 2022

PER COURT :

1. The petitioner is aggrieved by the order dated 09/10/2018 passed by the learned 3rd Joint Civil Judge, Junior Division, Ahmedpur below Exhibit-17 in Regular Civil Suit No.95/2018 filed under Order 26 Rule 9 of the Code of Civil Procedure, thereby allowing the application filed by respondent for appointment of Court Commissioner.
2. Heard learned advocate for petitioner and the learned advocate for respondent.
3. Respondent/plaintiff has filed Regular Civil Suit No.95/2018 for possession of the suit land as the petitioner/defendant has encroached on the suit land.
4. The application for appointment of Court commissioner

is filed at preliminary stage when only issues are framed. The parties are yet to lead evidence. This Court in similar facts in ***Writ Petition No.8877/2013 (Chandrakant Kashinath Dike & Others Vs. Smt. Satyabhama Vishwanath Dike & Another)*** has held:-

"4. There can not a dispute with the proposition that to appoint the court commissioner as per Section 75 of the Code of Civil Procedure is the discretion of the Court. The said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised as per the judicial norms.

5. The parties have not yet stepped into witness box. The Court commissioner could have been appointed if the Court finds it necessary for the just decision of the case. No doubt, in case of encroachment, dispute with regard to the identity of the property, the assistance of expert such as Cadestral Surveyor to measure the property can be considered by the Court. However, the stage is too premature. Even the application for temporary injunction is not decided. The report of the T.I.L.R. if disputed by either party, is not admissible in evidence unless the T.I.L.R. is examined.

6. At the stage of evidence, from the evidence on record i.e. documentary evidence if the Court finds that the appointment of court commissioner is necessary, then at that stage a party can file an application for appointment of T.I.L.R. as court commissioner, which application would be considered by the Court on its own merits."

5. I respectfully agree with the above observations. In the light of above ratio, impugned order cannot be sustained and the same is hereby quashed and set aside.

6. Parties are at liberty to move application seeking

appointment of Court Commissioner at a subsequent stage, after the evidence is adduced. If such application is filed, the same shall be considered by the trial Court on merit, without being influenced by the order impugned in the present petition. With these observations, writ petition is allowed. No costs.

(NITIN B. SURYAWANSHI, J.)

SVH