

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

949 WRIT PETITION NO.6019 OF 2022

MUKHTAR KHAN BADSHAH KHAN PATHAN AND ANOTHER

VERSUS

SALIMABI SAYYED MUSA AND ANOTHER

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Advocate for petitioners : Mr. Shaikh Tarek Mobin H.

AGP for Respondent – State : Mrs. G.L. Deshpande

Advocate for Respondent No.1 : Mr. Shaikh Mujtaba Gulam

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CORAM : SANDEEP V. MARNE, J.

DATE : 05-12-2022

PER COURT :

. By this petition petitioners have challenged the order dated 04.04.2022 passed by 8th Jt. Civil Judge Senior Division, Aurangabad below Exh.66 in Regular Civil Suit No.932 of 2016 rejecting petitioners' application for appointment of the Court Commissioner for inspection / measurement of the suit property.

2. Plaintiffs – petitioners had earlier instituted Regular Civil Suit No.326 of 2012 for perpetual injunction against the very same defendants alleging that they were interfering with plaintiffs' possession over the suit property. It appears that before institution of that suit, the measurement was carried out by Taluka Inspector Land Records and plaintiffs - petitioners contend that after conduct of such

measurement defendant no.1 had delivered the actual possession of the suit property to them. Be that as it may, Regular Civil Suit No.326 of 2012 came to be dismissed observing that plaintiffs are not in possession over the suit property.

3. In para - 11 and 12 of the plaint in Regular Civil Suit No.932 of 2016, the plaintiffs have averred as under:

“11. That, in view of the findings of the Hon’ble Civil Court in the judgment dated 10.06.2015, the plaintiffs again filed application in the office of Land Record for measurement of the land Gut Numbers 307 and 308 including the suit property.

12. The plaintiffs say and submit that, the Deputy Superintendent of Land Records at Paithan i.e. defendant no.2 measured the above said lands on 24.07.2015. In the measurement it was disclosed that the defendant no.1 has again committed illegal encroachment on the suit property belonging to the plaintiffs. The illegal encroachment of the defendant no.1 over the suit property is shown in the measurement map prepared by defendant no.2 in red lines. The copy of the measurement map of the measurement dated 24.07.2015 is annexed herewith for the kind perusal of this Hon’ble Court.”

4. Thus, the very cause of action for filing the suit was the measurement carried out by the District Superintendent of Land Records on 24.07.2015.

5. In the aforesaid manner, plaintiffs appear to have procured two measurement reports in respect of the suit property.

6. The trial in the suit commenced and the evidence of both the parties is already recorded. Plaintiffs have examined the District Superintendent of Land Records who has carried out the measurement on 27.04.2015 as his witness as the suit itself is premised on that measurement. After the suit was adjourned for arguments, the application was moved for appointment of Court Commissioner for measurement of the land on one more occasion. The application has been rejected by the trial Court by order dated 04.04.2022.

7. The learned counsel for petitioners has relied upon the following judgments:

- (i) **Haryana Waqf Board vs. Shanti Sarup and Others**, (2008) 8 SCC 671
- (ii) **Shri Bhupendra Bhagwat Turkar vs. Shri Homraj Zituji Meshram**, 2014 (3) ALL MR 635.
- (iii) Judgment of this Bench in the case of **Govardhan s/o. Narayan Gaikwad vs. M/s. Sai Baba Estates** (Writ Petition No.7594 of 2020) decided on 21.02.2022.

8. Per contra, the learned counsel for respondent no.1 has opposed the petition submitting that the application for appointment of Court Commissioner was filed solely for the purpose of collecting additional evidence after cross-examination of the Government

Officer, who has carried out the earlier measurement.

9. After having heard the learned counsel for the parties and after considering the provisions of Section 75 and Order-XXVI, Rule-9 of the Code of Civil Procedure (hereinafter referred to as the 'CPC'), it is clear that the Court is entitled to appoint Court Commissioner *inter alia* with a view to ascertain the nature of property. In the present case, the trial Court has not recorded a finding to the effect that after considering evidence on record, it has any doubt about the nature of the property and to clear such a doubt one more measurement of the suit property is necessary. As observed herein above, there have been previously as many as two measurements, one before filing of Regular Civil Suit No.326 of 2012 and one more after dismissal of the same. The suit has been filed for recovery of possession of the suit property. Earlier suit for injunction has been dismissed holding that plaintiffs are not in possession of the suit property. Thus, who is in possession of the suit property does not appear to be under dispute. In such circumstances, measurement of the land on third occasion to decide possession of the suit property would amount to collection of additional material by the plaintiffs.

10. Reliance of the learned counsel for petitioners on the

judgment of the Supreme Court in **Haryana Waqf Board** (*supra*) and this Court in **Shri Bhupendra Bhagwat Turkar** (*supra*) and **Govardhan s/o. Narayan Gaikwad** (*supra*) is of no avail on account of peculiar facts and circumstances of the present case. True it is that there is no specific stage provided under Section 75 or under Order-XXVI, Rule-9 of the CPC for appointment of the Court Commissioner.

11. This Court in **Writ Petition No.14046 of 2021** (Shantaram Dattatray Kekan & Ors. vs. Bhausahab Karbhari Kekan & Anr.) decided on 05.12.2022 has already held that there is no hard and fast Rule about the exact stage of the suit at which the Court can direct appoint the Court Commissioner and it depends on facts and circumstances of each case.

12. I have already discussed the peculiar facts and circumstances of the present case where the trial Court has already measurement map and the evidence of the Officer who has measured the land. The trial Court has not expressed any doubt about the nature of the suit property. It has not reached a satisfaction that re-measurement of the properties is necessary to clear any doubt in its mind. In such circumstances, the application filed by petitioners for appointment of the Court Commissioner at the far end of the suit

before fixing for arguments is clearly misuse of process of law.

13. Writ Petition being devoid of merits is liable to be dismissed and the same is dismissed without any orders as to costs.

(SANDEEP V. MARNE, J.)

GGP