

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

932 WRIT PETITION NO.6323 OF 2022

**BAPUSAHEB DAMU PACHORE
VERSUS
DNYANDEO NAMDEO PACHORE AND OTHERS**

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Advocate for Petitioner : Mr. Prakash Bhaushaeb Shirsath
Advocate for Respondent Nos.1 to 5 : Mr. V.H. Dighe
Advocate for Respondent Nos.6 to 8 : Mr. S.V. Suryawanshi

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CORAM : SANDEEP V. MARNE, J.

DATE : 15-12-2022

PER COURT :

1. By this petition, petitioner has challenged the order dated 28.04.2022 passed by 2nd Jt. Civil Judge Senior Division, Kopergaon allowing application filed by defendant nos.1 to 5 under order-XXVI, Rule-9 of the Code of Civil Procedure for appointment of Court Commissioner for measurement of lands of plaintiff and defendant nos.1 to 5.

2. It appears that one measurement only of defendants' land is already conducted by the office of the District Superintendent of Land Records. Plaintiff has filed a suit contending that on the basis of such measurement map, the defendants are interfering in plaintiff's possession in the land. The suit is therefore filed for injunction as well as declaration that the measurement map dated 18.09.2020 is illegal. The trial Court has allowed the application for

temporary injunction filed by plaintiff and has restrained defendants from interfering in plaintiff's possession over the suit property and appeal against the said order granting temporary injunction dated 07.09.2021 pending before the District Court.

3. The issues in the suit are yet to be framed. At such a stage, defendant nos.1 to 5, after filing their written statement on 23.11.2021 filed application at Exh.65 on 01.04.2022 seeking appointment of Court Commissioner for measurement of land. The application has been allowed by the trial Court by order dated 28.04.2022. It appears that as of now the trial Court is yet to frame issues and the parties are yet to lead their evidence. Therefore it is incomprehensible as to what was the occasion by the trial Court to measure the land through Court Commissioner especially after it has already decided the application for temporary injunction. It is trite that Court Commissioner cannot be appointed in order to enable the parties to collect evidence. The stage at which the application is allowed by the trial Court would give an indication that the appointment of Court Commissioner is sought by defendant nos.1 to 5 possibly to collect evidence. Parties are yet to elucidate their case by adducing evidence. Defendants are already armed with one measurement map in their favour. They are yet to examine the Officer, who has carried out the measurement. At this stage

appointment of Court Commissioner for measurement of the land was clearly unwarranted.

4. This Court in **Shantaram Dattatray Kekan & Ors vs. Bhausahab Karbhari Kekan & Anr**, Writ Petition No.14046 of 2021 decided on 05.12.2022 held that there is no hard and fast rule that appointment of Court Commissioner can be done by a Court at a particular stage in the suit. However considering the peculiar facts and circumstances of the present case, I am of the view that appointment of Court Commissioner at this stage is clearly unwarranted.

5. In view of the above, the following order is passed.

ORDER

- (i) Writ petition is allowed.
- (ii) The impugned order dated 28.04.2022 is set aside. However defendant nos.1 to 5 will be at liberty to file an application for appointment of Court Commissioner for measurement of land after adducing their evidence and in the event of such application being made, the same shall be decided by the trial Court strictly on its own merits without being influenced either by the order dated 28.04.2022 or by the present order.

(SANDEEP V. MARNE, J.)