

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

WRIT PETITION NO. 733 OF 2022

Pandurang Marutirao Nakhate .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

**WITH
WRIT PETITION NO. 771 OF 2022**

Sunil Devidas Sawant and another .. Petitioners

Versus

The State of Maharashtra and others .. Respondents

**WITH
WRIT PETITION NO. 923 OF 2022**

Shaikh Mustafa Shaikh Murad .. Petitioner

Versus

The State of Maharashtra and another .. Respondents

Shri Akash D. Gade, Advocate for the Petitioners in all matters.
Shri S. N. Morampalle, A.G.P. for the Respondent No. 1 in all matters.

**CORAM : SANDEEP V. MARNE, J.
DATE : 19TH DECEMBER, 2022.**

FINAL ORDER :

. By these petitions petitioners challenge orders dated 19.03.2020 passed by the Civil Judge Senior Division, Ambajogai

rejecting their applications for appointment of Court commissioner under Order XXVI Rule 9 of the Code of Civil Procedure. The suits are filed seeking declaration of ownership in respect of the suit properties as well as injunction restraining the defendants from disturbing petitioners' possession over the suit property. The case of defendants, who are public authorities on the other hand is that plaintiffs are encroachers, who have encroached upon public property. Plaintiffs have led their evidence and defendants have filed pursis stating that they do not wish to lead any oral evidence. This is how the evidence in the suits appear to be complete and at that stage applications were moved for appointment of Court Commissioner by plaintiffs. Applications have been rejected by order dated 19.03.2020.

2. Perusal of the applications filed by petitioners would indicate that same were essentially premised on following assertions.

"Further defendants have specifically suggested that plaintiffs are not in possession of the suit property and the entire suit property is in possession of the government in such condition it became highly necessary to have independent picture of the existing situation of the suit property before this Hon. Court in this case for the fair, effective and final adjudication of this case....."

3. Thus the applications for appointment of Court Commissioner were filed by contending that the defendants are denying possession of the plaintiffs over the suit property. These assertions in my view are totally misconceived. It is a specific

case of the defendants that the plaintiffs are encroachers on public property. In that view of the matter, appointment of Court Commissioner to prove possession of the plaintiffs over the suit property would not throw any light on the subject matter of controversy. Since encroachment is alleged possible possession of the plaintiffs on the suit property is intrinsic in such a allegations. Therefore, even if petitioners successfully prove their possession over the suit property through Court Commissioner, same would not assist the Court in deciding issue of title of plaintiffs to the suit property. In my view therefore, the Trial Court has rightly rejected applications for appointment of Court Commissioner.

4. Learned counsel has relied upon the judgment of this Court in the case of **Shantaram Dattatray Kekan and others Vs. Bhausaheb Karbhari Kekan and another in Writ Petition No. 14046 of 2021 decided on 05th December, 2022**, wherein this Court, after considering various judgments on the subject, has held that there is no specific stage provided in the Code when the Court Commissioner can be appointed for measurement of land or fixation of boundaries. Judgment in my view has no application in the present case in view of the fact that there is an allegation of encroachment by the petitioners over the public land. Petitioners are asserting ownership in that land and they will have to prove the same. Mere proving possession over public property would not assist the petitioners in taking ahead their case of title in respect of suit property. The Trial Court has correctly rejected the applications filed by the petitioners. Writ

petitions are devoid of merits. Same are dismissed without any orders as to costs.

5. Needless to say, the trial court shall decide the suits on their own merits based on the evidence led by the parties and shall not be influenced by the observations made in the present order.

[SANDEEP V. MARNE, J.]

bsb/Dec. 22