

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

**918 WRIT PETITION NO.12007 OF 2022**

**ANIKET VIJAY PATIL  
VERSUS  
GOVIND BHAGWAN PATIL**

...  
Advocate for Petitioner : Mr. Shailesh P. Brahme & Mr. Mohit S. Shah

...  
**CORAM : SANDEEP V. MARNE, J.**

**DATE : 05-12-2022**

**PER COURT :**

. Petitioner has filed the present petition challenging the order dated 22.02.2022 passed by the 6<sup>th</sup> Jt. Civil Judge Junior Division, Dhule below Exh.38 in Regular Civil Suit No.25 of 2020 rejecting petitioner's – defendant's application for appointment of Court Commissioner.

2. The suit is filed by plaintiff seeking a declaration of encroachment by defendant by commencing construction over the suit property and for consequential reliefs. Plaintiff's application for temporary injunction has been allowed by order dated 17.10.2020 and defendant has been restrained from entering in the suit property, digging pits, doing any construction activity and encroachment in the suit property till final disposal of the suit. That order has attained finality on account of rejection of Misc. Civil Appeal as well as Writ

Petition filed by the petitioner - defendant challenging that order.

3. After confirmation of the order of temporary injunction upto this Court, petitioner - defendant moved application for appointment of Court Commissioner from the office of Panchayat Samiti to investigate whether the suit property adjoins the property of defendant and whether the pits done by defendant is in the property of defendant or not.

4. This attempt is made after being unsuccessful before trial Court, Lower Appellate Court and this Court in demonstrating that the construction was not carried out in the property of plaintiff. The trial in the suit is yet to commence and parties are yet to lead evidence.

5. Mr. Brahme, the learned counsel for petitioner relies upon certificate issued by the Gram Panchayat in support of his contention that the suit property does not adjoin the property of petitioner - defendant. In my view, this fact can be proved by leading evidence to that effect and if necessary, by examining the person who has issued the certificate. Before such evidence is led, petitioner - defendant cannot be permitted to collect evidence by appointment of

Court Commissioner.

6. Mr. Brahme has relied upon the judgment of this Court in **Govardhan vs. Sai Baba Estates, 2022 DGLS (Bom.) 854**. In that case, the very existence of the suit property was denied. Furthermore, the application of plaintiff therein filed for temporary injunction was already rejected. Also the trial Court had formed an opinion that it was necessary to carry out the measurement of the suit property along with the other properties to trace out the exact location of the suit property. The stage at which the application for appointment of Court Commissioner was moved in that case is unclear. Therefore the judgment in **Govardhan** (*supra*) is clearly distinguishable.

7. Mr. Brahme has also relied upon the judgment of this Court in **Santosh Savlo Kothawale alias Naik and Ors vs. Harishchandra Savlo Kothawale and Ors., 2021 DGLS (Bom.) 1628**. The judgment is passed in Second Appeal, wherein this Court formed an opinion that it was necessary to appoint Court Commissioner under Order-XXVI, Rule-9 of the Code of Civil Procedure to identify the property. Thus, the decision is clearly distinguishable.

8. This Court in **Writ Petition No.14046 of 2021** (Shantaram Dattatray Kekan & Ors. vs. Bhausahab Karbhari Kekan & Anr.) decided on 05.12.2022 has held that there is no hard and fast Rule about the exact stage at which the Court can direct appointment of the Court Commissioner and it depends on facts and circumstances of each case. However, in the present case, in my view, the appointment of Court Commissioner would clearly amount to collection of evidence.

9. Accordingly, the writ petition is dismissed. Petitioner however will be at liberty to file application for appointment of the Court Commissioner, if so advised, after recording of his evidence. If such an application is filed, the trial Court shall deal with such application strictly on its own merits without being influenced by any of the observations either made in the order dated 22.02.2022 or in the present order.

( **SANDEEP V. MARNE, J.**  )

GGP