

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.14046 OF 2021**

1. Shantaram Dattatray Kekan,
Age- 70 years, Occupation- Agriculture
 2. Janardan Shantaram Kekan,
Age- 45 years, Occupation- Agriculture
 3. Kamlabai Shantaram Kekan,
Age- 65 years, Occupation_ Household & Agri.
 4. Manisha Janardan Kekan,
Age- 35 years, Occupation_ Household,
All R/o. Jevur Patoda, Tq. Kopargaon,
Dist. Ahmednagar
- ..Petitioners
(Orig. Defendants)

Versus

1. Bhausahab Karbhari Kekan,
Age- 62 years, Occupation- Agriculture & Service
 2. Tarabai Bhausahab Kekan
Age- 55 years, Occupation – Household & Agri.
Both R/o. Jevur Patoda, Tq. Kopargaon,
Dist. Ahmednagar.
- ..Respondents
(Orig. Plaintiffs)

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Mr. Sanket S. Kulkarni, Advocate for the Petitioners.
Mr. Amol S. Gandhi, Advocate for Respondent Nos.1 and 2.

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CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 30.11.2022.
PRONOUNCED ON : 05.12.2022.

JUDGMENT

1. Rule. Rule is made returnable forthwith. With the consent of the parties, matter is taken up for final hearing at the admission stage.

2. Issue that arises for consideration in the present petition is whether a Court Commissioner for measurement of land under the provisions of Section 75 r/w Order 26 Rule 9 of the Code of Civil Procedure, 1908 can be appointed even before a trial in the suit commences or whether such an appointment can be made only after adducing of evidence by both the parties. The issue arises essentially on account of divergence of views expressed by this Court in several of its decisions.

3. The power of Court to appoint Court Commissioner is traceable to Section 75 and Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (*‘the Code’*) which read thus:

75. Subject to such conditions and limitations as may be prescribed, the court may issue a commission-

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts; or

(d) to make a partition;

¹[(e) to hold a scientific, technical, or expert investigation;

(f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;

(g) to perform any ministerial act.]

Order XXVI Rule 9:- Commissions to make local investigations

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the

Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

4. Before advertng to the facts of the present case, it would be necessary first state the views taken by this Court in various decisions as both Mr. Kulkarni, the Ld. Counsel for Petitioner as well as Mr. Gandhi, the Ld. Counsel for Respondent Nos. 1 & 2 have relied upon judgments in support of their respective stands.

5. First I proceed to deal with the judgments relied upon by Mr. Kulkarni in which it is held that Court cannot appoint Court Commissioner to collect evidence before parties adduced evidence and that appointment of Court Commissioner can be made only after evidence of both the parties to the suit is recorded:-

(I) In **Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and Ors., 2001 (2) Mh.L.J. 959**, the Trial Court had appointed Court Commissioner for inspection of the suit property and to submit report regarding actual possession thereof. This Court held that the same would tantamount to Court Commissioner being appointed for collection of evidence regarding possession which is impermissible.

(II) In **Ramkrishna Santu Kakad Vs. Reojee Sahadu Kakad & anr.**, Writ Petition No.2749 of 2012 decided on

04.03.2013, Single Judge of this Court, relying on **Sanjay Namdeo Khandare** (supra) held that appointment of Court Commissioner on an application made by defendant even before framing of issues was premature. This Court held in paragraph no.5 of the judgment as under:

“5. In that view of the matter, in my opinion, the stage of the proceeding for appointment of the Court Commissioner is pre-mature. It is different matter if the Court starts recording the evidence and finds it difficult to locate the correct position about the questions of controversy involved in the matter and at that stage, by invoking powers u/s 26 Rule 9 of the C.P.C. appoints the Court Commissioner. Therefore, in my opinion, the impugned order can not sustain for the aforestated reasons. Therefore same is quashed and set aside. However, the parties will have liberty to file an application for appointment of the Court Commissioner at appropriate stage of the proceedings. Setting aside the impugned order will not come in the way of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit.”

(III) In **Dhondiba S/o Bapu Zaware Vs. Santosh S/o Paraji Zawere & others**, Writ Petition No.4756 of 2014 decided on 08.12.2014, the issue was about encroachment by defendants on the property of plaintiff and the Trial Court had appointed Court Commissioner even before framing of issues. This Court, therefore, set aside the order of appointment of Court Commissioner with a liberty to respondents therein to move an application for appointment of Court Commissioner after commencement of the trial.

(IV) In **Arjun Rambhau Dhankude and Another Vs. Bhanudas Ramchandra Murkute and Others**, (2020) 2

Mah LJ 145, this Court held that before any positive case of encroachment at hands of defendants over definite portion of suit lands being made out, the Trial Court could not have directed the appointment of Court Commissioner with further directions to ascertain possession of the parties.

(V) In **Sanjay Kisan Thorat and others Vs. Ramchandra Parsu Thorat**, 2018 (2) Mh.LJ 954, this Court held in paragraph nos.11 and 12 as under:

“11. Hence, as rightly submitted by learned counsel for the Petitioners, the law in this respect is fairly well settled, as held by this Court time and again and also in the authority relied upon by learned counsel for WP(St.)-35269-17.doc the Petitioners that of *Dnyandeo Vithal Salke & Ors. Vs. Dagdu Kadar Inamdar*, 2017 (3) *Mh.L.J.* 314, that, "The appointment of 'Court Commissioner', even that of T.I.L.R., to submit the factual report as regards possession or user of the land is amounting to collection of evidence and it is not permissible in law."

12. When the Respondents are coming before the Court with a specific case of the existence of their house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc., the burden lies upon them to prove the said existence and their location. They cannot, under the pretext of appointment of T.I.L.R. as a 'Court Commissioner', when the measurement of the lands is already done at their instance only and the boundaries are also fixed, seek appointment of 'Court Commissioner' to bring on record the factual position at the site, so as to help them in proving their case for interim injunction. The Trial Court has not considered this settled position of law and, therefore, the impugned order passed by the Trial Court needs to be quashed and set aside.”

(VI) In **Dnyandeo Vithal Salke and others Vs. Dagdu Kadar Inamdar**, 2017 (3) Mh. L.J. 314, this Court held that in a suit filed for injunction simplicitor, order directing appointment of Taluka Inspector of Land Records to submit report on actual possession amounts to collection of evidence which is impermissible in law.

(VII) In **Laxman Sukhdeo Avhad and Others Vs. Parshram Pandurang Avhad and Others**, Writ Petition No.2210 of 2019 decided on 11.02.2021, this Court held in paragraph no.5 as under:

“5. In view of the same, even if the trial court’s order is set aside mainly on the said ground, however, I am informed that the plaintiffs have not examined any witness, so far. In view of the same, the petitioners would be at liberty to file an application for appointment of the Court Commissioner, for which the other side has given no objection, after his evidence is recorded, and upon filing of the same, the trial court shall decide the said application on its own merits, without getting perturbed by the order on earlier application exh.26 impugned in this writ petition. Writ Petition is accordingly disposed off. No costs.”

(VIII) In **Chandrakant Kashinath Dike & Ors. Vs. Smt. Satyabhama Vishwanath Dike & Anr.**, Writ Petition No.8877 of 2013 decided on 17.01.2014, this Court held in paragraph nos.4, 5 and 6 as under:

“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.”

(IX) In **Sitaram Suklal Patil & Anr. Vs. Vasudeo Suklal Patil**, Writ Petition No.9626 of 2016 decided on 31.07.2017, this Court followed the decision in **Ramkrishna Santu Kakad** (supra) and **Chandrakant Kashinath Dike** (supra) and set aside the order of the Trial Court appointing Court Commissioner even before framing of issues with a liberty to file an application for

appointment of Court Commissioner after recording of evidence.

(X) In **Bharat Vithalrao Bhikane Vs. Uttamrao Vithalrao Bhikane and Others**, Writ Petition No.12192 of 2021 decided on 10.12.2021, this Court held in paragraph nos.3 and 4 as under:

“3. Suffice for the purpose to observe that this Court has consistently taken a view in catena of cases that the appropriate stage for appointment of court commissioner could be after a party makes an initial attempt to establish his case which can happen only during the course of recording of evidence. Admittedly, that was not the case when the application was filed by the petitioner for appointment of court commissioner. On can gainfully refer to the decision in the case of **Sitaram Suklal Patil and another Vs. Vasudeo Suklal Patil; Writ Petition No.9626/2016**, decided on **31.07.2017** and the cases referred to therein.

4. In view of this very ground, the writ petition is liable to be dismissed. However, since some observations touching the merits of the case have been made by the learned Judge of the trial court while passing the order under challenge in paragraph No.12, to my mind, it would be prejudging the issue. If the learned Judge was firm in observing that the application was premature, such observations touching the merits of the case are in fact redundant. He could have very well rejected the application for the sole reason of it being premature one. That being not the case, the writ petition can be disposed of keeping open the avenues for the petitioner to move an application for appointment of court commissioner at an appropriate stage.”

(XI) In **Baburao Tulshiram Patil and Another Vs. Natthu Trimbak Choudhary and Others**, Writ Petition

No.9973 of 2021 decided on 30.08.2022, this Court held in paragraph nos.2 and 3 as under:

“2. Having heard the learned advocates for the parties, on merits and after perusal of the impugned order, this Court, at this stage is not inclined to interfere in the impugned order, as the application seeking appointment of Court Commissioner, is filed by the petitioner at a premature stage. This Court has constantly taken a view that application for appointment of Court Commissioner has to be filed after conclusion of oral evidence of both the parties. Admittedly, in the present case, evidence affidavit is filed by the plaintiff and he is yet to be cross-examined. In that view of the matter, the impugned order need to be interfered at this stage.

3. It is also a settled legal position that in cases of suit for removal of encroachment and recovery of possession, it is desirable to appoint Court Commissioner. In that view of the matter, the writ petition is disposed of with liberty to the parties to file application for appointment of Court Commissioner, after conclusion of oral evidence of the parties.”

6. Thus in the aforesaid decisions this Court, has consistently taken a view that appointment of Court Commissioner cannot be done in order to enable the parties to collect evidence. It is further held that, the appointment of Court Commissioner for measurement of the land either for fixation of boundaries or for determination of possession, ideally should be done only after the parties make out a case by recording evidence.

7. On the other hand, Mr. Gandhi, in support of his contention that Court Commissioner can be appointed at any stage, has relied upon following decisions of this Court:

(I) In **Sunita Ashok Kachre & Anr. Vs. Santram Bapurao Patkal**, Writ Petition No.6541 of 2017 decided on 06.07.2017, a Single Judge of this Court held in paragraph nos.5, 6 and 7 as under:

“5. The learned Counsel for petitioners / defendants argued on law points and also on some factual aspects. The learned counsel submitted that, when application for temporary injunction was not yet decided, it was not proper on the part of the Trial Court to appoint court commissioner as that amounts to collection of evidence. He has placed reliance on observations made by this Court, in the case reported as 2013(11) LJSOFT, Page 145, (Ramkrishna Santu Kakad Vs. Raojee Sahadu Kakad & Anr.), and observations made by this Court in Writ Petition No. 8877/2013 (Chandrakant Kashinath Dike & Ors. Vs. Smt. Satyabhama Vishwanath Dike & Anr.) decided on 17.01.2014.

6. This Court has carefully gone through the observations made by this Court. The points involved in those matters and facts of the present matter are altogether different. The provision of Order 26 Rule 9 of Civil Procedure Code shows that, there is no prohibition to appoint Court Commissioner at such stage. This is enabling provision and no stage is fixed in the provision. Further facts of the present matter show that the dispute can be resolved effectively after taking the measurement through Government Surveyor, if such measurement is possible.

7. This Court has gone through the copies of sale deeds produced by both sides and property card of CTS No.87. To take care of the grievance of the petitioner/defendant, the property purchased by the defendants under the two sale deeds can be measured first, and then it can be ascertained as to whether any space from the aforesaid city survey

number was left which could have been purchased by the plaintiff. After that, it can be ascertained as to whether there is encroachment. As this way the measurement can be taken, there is no scope for grievance to the petitioner/defendant. In the result following order is made.

Thus this Court held that there is no specific prohibition in the Code to appoint Court Commissioner at a particular stage.

(II) In **Balkrishna s/o Gangabishanji Zawar Vs. Azmat Khan s/o Suban Khan**, Writ Petition No.8608 of 2012 decided on 27.09.2016, learned Single Judge of this Court held in paragraph no.10 as under:

“10. In the case of Ramkrishna Santu Kakad (supra), cited on behalf of the petitioner, it is observed that the Court Commissioner cannot be appointed for collecting evidence. In that case, the dispute was relating to the existence of way. In the present case, the dispute is not in respect of existence of way. It relates to the alleged encroachment by the petitioner over plot No. 13 belonging to respondent no.1. For resolving such type of disputes, the local investigation by the City Survey Officer would be very useful for deciding the controversy between the parties finally and effectually. Moreover, in the case of Ramkrishna Santu Kakad (supra), reliance was placed on the case of SanjayNamdeo Khandare Vs. Sahebrao Kachrau Khandare and others 2001 (2) Mh.L.J. 959, wherein the appointment of the Court Commissioner was sought for the purpose of finding out as to who was in actual possession of the suit land. In that view of the matter, it was held in that case that the Court Commissioner cannot be appointed for collecting evidence. In the present case, the appointment of the Court Commissioner has been sought to ascertain the boundaries of the plots of the parties and

to verify whether the petitioner has encroached upon plot No. 13. In view of these distinguishing facts, the judgment in the case of **Ramkrishna Santu Kakad** (supra) would be of no assistance to advance the case of the petitioner.”

This Court thus distinguished the judgment in **Ramkrishna Santu Kakad** (supra) and held that since the Court Commissioner was appointed for ascertaining boundaries of the plots of parties and to verify whether there was any encroachment it cannot be stated that the appointment of Court Commissioner was for collection of the evidence. The decision, however, does not deal with the issue of the stage at which the appointment of Court Commissioner can be made.

(III) In **Mayuresh Subhash Sonawane Vs. Yashwant Babu Bhoir and Others**, 2022 DGLS (Bom.) 119, learned Single Judge of this Court held in paragraph no.12.6 as under:

“12.6. In the present case, the suit has been filed by the Respondent, who is the owner of the land adjoining the Petitioners. A specific case has been made out that due to construction carried out by the Petitioner and the consequent encroachment, the approach road to the Respondents property is closed. This fact itself is required to be ascertained by the Court at this interim stage so as to enable the Trial Court to pass any interim order pending the trial.”

Thus in this decision, this Court has held that the appointment of the Court Commissioner is warranted even in order to enable the Trial Court to decide the application for temporary injunction. Of course, this finding is recorded in the light of the unique facts of the case where approach

road to the property was alleged to be blocked on account of ongoing construction and by the time this Court upheld the order of appointment of Court Commissioner, the suit remained pending for substantial time and therefore, this Court directed final disposal of the suit itself.

(IV) In **Govardhan Vs. Sai Baba Estates, 2022 DGLS (Bom.) 854**, this Court considered the entire case law on the subject of the stage at which Court Commissioner can be appointed for measurement of lands and held as under:

“It is not disputed that the respondent-plaintiff has given description of the suit property along with the boundaries in the plaint. The petitioner-defendant has disputed the boundaries and denied the very existence of the suit property. The measurement carried out by the respondent-plaintiff through cadastral surveyor on 14.08.2018 is also denied by the petitioner-defendant. The application Exhibit-5 filed by the respondent-plaintiff for temporary injunction is already rejected by the trial Court. It appears that many litigations including criminal complaint are going on between the plaintiff and the defendant. The trial Court has recorded a finding that for deciding the suit on merit, it is necessary to carry out measurement of the suit property along with other properties to trace out exact location of the suit property. By appointing Court Commissioner, no prejudice is likely to be caused to the defendant.

In the case in hand, application Exhibit-5 is already decided and the trial Court, considering the pleadings of the parties, was of the view that to identify the suit property, the existence of which is denied by the defendant, it is necessary to appoint Court Commissioner. Similar view is taken in the other citations relied on by the petitioner.”

(V) In **Kalyan Santram Kawade and others Vs. Khanderao alias Khandu Ganpati Kawade and others**, 2014 DGLS (Bom.) 186, learned Single Judge of this Court upheld the order of appointment of Court Commissioner even before framing of issues. However, it must be added here that the learned Single Judge of this Court (R. V. Ghuge, J.) subsequently on 08.12.2014 held in **Dhondiba S/o Bapu Zaware** (supra) that Court Commissioner cannot be appointed before issues could be cast and the Trial Court commences recording of evidence. In **Dhondiba S/o Bapu Zaware** (supra), the learned Single Judge followed the decision in **Sanjay Namdeo Khandare** (supra) and **Ramkrishna Santu Kakad** (supra) which apparently were not cited while deciding the case in **Kalyan Santram Kawade** (supra).

(VI) In **Satish Prakash Mane and Others Vs. Dhanraj Abhangrao Mane**, Writ Petition No.2873 of 2017 decided on 22.11.2017, this Court considered the decisions in **Dhondiba S/o Bapu Zaware** (supra), **Chandrakant Kashinath Dike** (supra) and **Ramkrishna Santu Kakad** (supra) and held in paragraph no.7 as under:

“7. Learned counsel for the petitioners relied upon the aforesaid cases to demonstrate that it is not desirable to allow such an application seeking appointment of the Court Commissioner before commencement of the trial. However, this court consistently taken said view on the backdrop that if an application for issuance of the temporary injunction is pending, such order should not be passed by taking recourse to the provisions of Section 75 of the Civil Procedure Code. In the instant case, as discussed above, I do not find any prejudice likely to be caused to the

petitioners/defendants. It is well settled that in a case wherein relief is claimed for removal of the encroachment, assistance of an expert is required to fix the boundaries for the just disposal of the case and to resolve the controversy between the parties.”

8. After having considered the provisions of Code under which Civil Court is empowered to appoint Court Commissioner as well various decisions of this Court on the subject it is clear that, there is no hard and fast Rule that Court Commissioner can be appointed only at a particular stage. This Court in few decisions has permitted appointment of Court Commissioners even before commencement of trial and in some cases appointment of Court Commissioners before commencement of trial is held to be erroneous. In my view, the decisions are rendered in facts of each case. However, common thread that runs through all the above decisions is as regards the principle that a Court Commissioner can never be appointed in order to enable parties to collect evidence. It is on account of this principle that in most of the cases this Court has held that even before a party adduces his evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court's power to appoint Court Commissioner at any stage does not appear to be circumscribed. It all depends upon facts and circumstances of each case.

9. Having discussed the broad principles relating to the power of the Civil Court to appoint Court Commissioner for measurement of land or fixation of boundaries thereof, I now advert the facts of the present case to examine whether appointment of Court Commissioner at this stage is warranted.

10. The plaintiffs/respondents have instituted Regular Civil Suit No.186/2016 against defendants/petitioners seeking removal of possession of encroached land admeasuring 20R of suit property and injunction from creating any encroachment by defendants. In prayer Clause (D), plaintiffs have also sought relief for measurement of the land and for fixation of boundaries. The defendants filed written statement raising various defences including *res judicata* on account of decision of suit involving same issues in Regular Civil Suit No.222/2005 decreed in their favour on 31.10.2007. The issues are framed in the suit and the plaintiffs were directed to file list of witnesses. Before filing list of witnesses, plaintiffs moved an application at Exhibit-23 for appointment of Deputy Superintendent of Land Records, Kopergaon as Court Commissioner for measurement and fixation of boundaries of the suit land. The defendants resisted the application. The Trial Court proceeded to allow the same by its order dated 23.11.2021 appointing Taluka Inspector of Land Records, Kopergaon as Court Commissioner to carry out joint measurement of suit properties and to fix boundaries after giving advanced notice to both the parties. The Court Commissioner has been directed to specify whether any encroachment is found in the suit property. The defendants are aggrieved by the order of the Trial Court dated 23.11.2021 and have filed present petition.

11. Thus in the present case plaintiffs are yet to adduce their evidence. There is a specific prayer in Clause (D) of the plaint for measurement of suit property and fixation of boundaries. By order dated 23.11.2021 the said prayer Clause (D) in the suit is virtually granted.

12. As observed hereinabove, there is a peculiar circumstance in the present case where original defendant no.1 Shantaram Dattatray Kekan had instituted Regular Civil Suit No.6/2008 against both the plaintiffs for injunction from interfering in his possession in respect of very same property which form subject matter of Regular Civil Suit No.186/2016. In that suit a counter claim was filed by defendants therein (plaintiffs in present suit) seeking injunction against plaintiff therein (Df. no.1 in present suit) from interfering in their possession of the suit land. The suit was decreed by judgment and order dated 22.02.2014 and counter claim filed by defendants therein (respondents herein) was rejected. It appears that appeal against that decree has been dismissed by the District Court. Therefore, defendants in R.C.S. No.186/2016 (petitioners herein) have raised defence of *res judicata*.

13. In such circumstances, the issue that arises is whether plaintiffs can seek appointment of Court Commissioner for the purpose of establishment of alleged encroachment over the suit property by defendants even before elucidating their case by production of evidence. The defendants contend that, their possession over the suit property is already established in RCS No.6/2008. The plaintiffs have ascertained the exact area of encroachment as 20R and have prayed for removal of encroachment of the ascertained portion in the suit. The plaintiffs are yet to adduce evidence in support of their claim that land admeasuring 20R has been encroached by defendants. Therefore, seeking appointment of Court Commissioner at this stage would definitely amount to collection of evidence. Also there is a

substantive prayer for measurement of suit property, which is virtually granted by directing appointment of court commissioner. Furthermore, in the light of previously concluded litigation between same parties over the same land would raise the issue about maintainability of the suit itself. I do not wish to record any findings on this aspect as issue involved in the present petition is limited. However, in my view considering the peculiar facts and circumstances of the present case, appointment of Court Commissioner for measurement of land and fixation of boundaries atleast at this stage before plaintiffs adduced there evidence is not warranted.

14. Accordingly, the Writ Petition is allowed. The order dated 23.11.2021 passed by the Civil Judge, Junior Division, Kopergaon on application at Exhibit-23 in R.C.S. No.186/2016 is set aside. However, plaintiffs will be at liberty to file appropriate application for appointment of Court Commissioner for measurement of land and fixation of boundaries, if they so desire, after conclusion of evidence of parties. In case such an application is made and only if the Trial Court is satisfied that appointment of Court Commissioner is necessary after considering the evidence on record, the Trial Court shall decide such application on its own merits without being influenced by any of the observations made in this order.

15. Rule is accordingly made absolute in above terms. No costs.

(SANDEEP V. MARNE)
JUDGE