

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION 8085 OF 2022**

Kamal Abdul Patel & Ors.

...Petitioners

vs.

Dilshadbi Shamsuddin Patel & Anr.s

...Respondents

Mr.R.S. Apte, Senior Advocate i/b. Ghyulam Rasool for Petitioners.  
Mr.Subharadeep Banerje with J.O. Jayswal and Sachin Kanojia for  
Respondent.

**CORAM : ROHIT B. DEO, J.**

**DATED : 13 JULY 2022**

**P.C. :**

1. Several learned Single Judges of this Court have taken a view that application under Order 26 Rule 9 of the Code of Civil Procedure, 1908 is not maintainable before the commencement of evidence.

2. Illustrative reference may be made to the decisions in **Ramkrishna Santu Kakad vs. Reojee Sahadu Kakad<sup>1</sup>** and **Balkrushna Mahadeo Dongre vs. Seva Niketan English School, Kopergaon<sup>2</sup>**

3. In the factual matrix, the respondent 1 - plaintiff brought Regular Civil Suit 568/2016. Prayer (1) of the suit calls upon the civil court to fix the boundaries of the land purportedly in the possession of the plaintiff and the only other prayer seeks consequential relief of injunction.

4. Adverting to the issue involved, the plaintiff preferred an application at a very nascent stage and even before the framing of issues, to

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<sup>1</sup> WP 2749/2012 decided on 4.3.2013 (Aurangabad Bench)

<sup>2</sup> WP 234/2015 decided on 19.1.2015 (Aurangabad Bench)

appoint a commissioner under Order 26 Rule 9 to fix the boundaries. Apart from the tenability or otherwise of prayer (1), which literally calls upon the civil court to do the work of the office of Superintendent of Land Records, the question involved is whether the trial court is justified in allowing the application under Order 26 Rule 9 even before the commencement of evidence.

5. The learned Counsel for the Respondent-plaintiff states that the plaintiff be permitted to withdraw the application under Order 26 Rule 9 in Regular Civil Suit 568/2016 which is allowed by the trial court vide order impugned dated 6 May 2022 with liberty to prefer an application under Order 26 Rule 9 after the commencement of the evidence.

6. Such request is made in view of the fact that more than one learned Single Judge of this court have held that application for appointment of commissioner cannot be entertained before the commencement of trial.

7. The learned Senior Counsel Mr.Apte has no objection to such withdrawal.

8. The petition is disposed of as withdrawn with liberty as prayed.

9. Needless to record that the order impugned does not survive since the application itself is withdrawn.

**(ROHIT B. DEO, J.)**