

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

31 WRIT PETITION NO.3306 OF 2022

**GOVIND SHANKARRAO KADAM AND ANOTHER
VERSUS
PANCHAFULABAI ALIAS SHOBHABAI BAPURAO CHITTHE**

...

Advocate for Petitioners : Mr. Suraj R. Bagal h/f Mr.Gadegaonkar
Bharat N.

Advocate for Respondent : Mr.Pathan Hamzakhan I.

...

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 22.02.2023.

PER COURT :

1. Heard.

2. The challenge in this petition is to the order dated 17.01.2022 passed below Exh. 12 in RCS No. 30 of 2020 for appointment of Court Commissioner and for joint measurement of respondent's 60 R land.

3. RCS No. 30 of 2020 was instituted by the respondent for recovery of possession of 20 R land which is alleged to have been encroached by the petitioners herein. In the Written Statement, the possession of respondent over the encroached portion and even over 60 R land of Gut No. 129 was denied.

4. Learned Counsel appearing for the petitioners submits that the suit has been instituted by the respondent on the ground that she is in possession of 60R land and that the petitioners have encroached upon 20R land in her possession. He would further submit that there is specific denial to the aspect of possession and as such it is necessary to lead evidence before the request of appointment of Court Commissioner can be made.

5. Per Contra, the learned counsel appearing for the respondent submits that under the compromise decree dated 04.12.2019 arrived at between the petitioner No. 1, the respondent and the another brother Maruti in RCA No. 8 of 2018, the possession of 60R land was given to the respondent and the respondent is in possession since the execution of compromise decree. This submission is disputed by the learned counsel for the petitioners who submits that the challenge to the compromise decree is pending before this Court.

6. Considered the rival submissions of the parties.

7. The position is that the evidence is not yet been led by the parties before the trial Court and prior to that an application for

appointment of Court Commissioner has been filed. In RCS No. 30 of 2020 it is the case of the Respondent that the property being the ancestral property, the respondent is in possession of the property and there is encroachment by the petitioners. It is not her case that pursuant to the compromise decree executed between the parties the respondent has been put in possession of the suit property. As such, there appears to be a dispute as regards the possession of the Respondent in respect of entire 60R land. It will first be necessary for the Respondent to prove her possession over 60R land before a claim for recovery of possession of encroached portion can be made. The learned counsel for the petitioners relies upon the following decisions:

a. **Mahadeo Kondiba Shinde Vs. Nitin Sakharam Shinde**
LAWS(BOM)-2021-3-295, ALLMR-2022-2-593,

b. **Sanjay Namdeo Khandare Vs. Sahebrao Kachru**
Khandare and Ors. 2001(2)Mh.L.J. 959,

8. Learned counsel for the respondent relied upon the decision in the case of **Kalyan Santram Kawade and Ors. Vs. Khanderao alias Khandu Ganpati Kawade 2015(4)Mh.L.J. 429.**

9. It is settled that it is not the stage of the suit which is necessary for determining as to whether the appointment of the

Court Commissioner is valid or not but what is required to be considered is whether the appointment of Court Commissioner amounts to collection of evidence. In the present case the possession of the respondent itself has been disputed and it is therefore necessary for the Respondent to lead evidence to prove her possession over the property. In my opinion, considering the facts of the case, the appointment of Court Commissioner prior to leading of evidence would amount to collection of evidence. The application for appointment of the Court Commissioner can be preferred after the evidence has been led. It is held by the Single Judge of this Court in the case of **Padmabai @Kamlabai Kachrual Chaudhari Vs. The State of Maharashtra and Others, - Writ Petition No. 14019 of 2019 decided on 20.11.2029** that each case has to be decided on its own facts and there is no strait jacket formula at which stage such application for appointment of the Court Commissioner can be made.

10. In the light of above, the impugned order dated 17.01.2022, appointing Court Commissioner is hereby quashed and set aside.

11. The respondent is at liberty to seek appointment of Court Commissioner after the evidence has been led which application will be considered by the trial Court on its own merits and in accordance with the law.

12. Writ Petition is allowed in above terms.

**(SHARMILA U. DESHMUKH)
JUDGE**

mahajansb/