

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

39 WRIT PETITION NO.4313 OF 2022

**AMOL GAUTAM NALWADE AND OTHERS
VERSUS
KISAN PANDHARI NALWADE AND OTHERS**

...

Advocate for Petitioners : Mr. Shrikant G. Kawade
Advocate for Respondent nos.1 to 4 : Mr. V.C. Patil h/f.
Mr. U.B. Bondar

...

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 24-02-2023

PER COURT :

. The order for appointment of the Court Commissioner is challenged in the present petition.

2. The plaintiffs application for appointment of the Court Commissioner in Regular Civil Suit No.481 of 2016 came to be allowed by the trial Court by the order dated 25.10.2021. R.C.S. No. 481 of 2016 was filed by the respondent nos.1 to 4 seeking possession, declaration of ownership and also for a declaration that the petitioners have encroached upon 41-R land which was in possession of the respondent nos.1 to 4.

3. Heard the learned counsel appearing for the parties.

4. The learned counsel for the petitioners submits that the

application was filed before the evidence was led in the proceedings. He further submits that the appointment of the Court Commissioner amounts to collection of evidence.

5. Per contra, the learned counsel appearing for the respondents submits that if the Court Commissioner is appointed and the report is submitted, the petitioners would be have the liberty of cross-examination and as such no prejudice would be caused to the petitioners by order of appointment of Court Commissioner.

6. Considered the submissions of the parties.

7. The suit has been filed seeking a declaration of ownership and possession in respect of the suit property. It is the case of the respondent nos.1 to 4 - original plaintiffs that the property which is under their ownership and possession has been encroached upon by the petitioners.

8. Considering the settled position that irrespective of the stage of proceeding the appointment of the Court Commissioner cannot be made for the purpose of collection of evidence, in the present case I find that as regards the suit property itself there appears to be a dispute as regards the possession. It is for the parties

to lead evidence to show their possession over the portion, consequent upon which the issue of encroachment will have to be adjudicated. For the said purpose, the appointment of the Court Commissioner at this stage i.e. before the leading of the evidence cannot be done. The Single Judge of this Court in the case of **Shantaram Dattatray Kekan and Others vs. Bhausahab Karbhari Kekan & another** delivered in Writ Petition No.14046 of 2021 on 05.12.2022 held that after considering the various decisions the common thread that runs through the various decisions is that the appointment of the Court Commissioner cannot be made for the purpose of collection of evidence and each case has to be decided in the facts of that case.

9. For the reasons above, the impugned order dated 25.10.2021 cannot be sustained and is hereby quashed and set aside.

10. Liberty to the parties to apply for appointment of Court Commissioner after the evidence is recorded.

11. Writ Petition stands allowed in the above terms.

(SHARMILA U. DESHMUKH, J.)