

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

52 WRIT PETITION NO.3610 OF 2020

**VATSALABAI YASHVANTRAO CHAVAN AND ANOTHER
VERSUS
PRABHAKAR APPARAO CHAVAN**

...
Advocate for Petitioners : Mr. Ravindra Vitthal Gore
Advocate for Respondent : Mr. D.K. Thoke
...

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 14-02-2023

PER COURT :

. By this petition, the challenge is to the order dated 03.08.2019 passed below Exh.15 in Regular Civil Suit No.14 of 2017 whereby the application for appointment of Commissioner at the instance of the plaintiff came to be allowed.

2. The learned counsel appearing for the petitioners submits that the application for appointment of Court Commissioner amounts to collection of evidence. In support of his contention, he has invited the attention of this Court to the averments made in the plaint as regards the encroachment. He submits that the alleged encroachment is in respect of common boundary between the lands of the petitioner and the respondent which are adjacent to each other. He further submits that the pleadings made in the plaint are vague and it is not apparent as to the basis on which the alleged

encroachment to the extent of 15-R has been contended.

3. In support of his submission, he relies upon the decision of this Court in the case of **Shantaram Dattatray Kekan & Others vs. Bahusaheb Karbhari Kekan and another** decided on 05.12.2022, wherein this Court has held that the application has to be decided in the facts and circumstances of each case, however the Court Commissioner can never be appointed in order to enable the parties to collect evidence. He further submits that the application for appointment of the Court Commissioner came to be filed before filing of the the written-statement by the respondent.

4. Per contra, the learned counsel for the respondent submits that the grievance of the petitioner that even before the evidence has been led, the application for court commissioner is made and as such amounts to collection of evidence, no longer survives in view of the fact that the evidence of the parties is commenced. He further submits that he be permitted to file a fresh application for appointment of the Court commissioner which can be decided by the trial court. This submission is not opposed by the learned counsel for the petitioner.

5. Considering the above, the writ petition can be disposed of with liberty to the respondent to file an appropriate application under Order-XXVI, Rule-9 of the CPC which would be decided by the trial Court on its own merits and in accordance with law and in particular in accordance with the decision of this Court in the case of **Shantaram Dattatray Kekan & Others vs. Bahusaheb Karbhari Kekan and another** decided on 05.12.2022.

6. Writ petitioner stands disposed of in the above terms.

(SHARMILA U. DESHMUKH, J.)

GGP