

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

38 WRIT PETITION NO.4150 OF 2022

**SHARANAMMA BANDEPPA DEVARSHI ALIAS SWAMI AND OTHERS
VERSUS
JAYSHREE GANGADHAR MATHPATI AND OTHERS**

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Advocate for Petitioners : Mr. Parag Vijay Barde
Advocate for Respondent Nos.1 & 2 : Mr. V.C. Patil h/f.
Mr. Milind Patil

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 24-02-2023

PER COURT :

. The challenge in the petition is to the order dated 14.02.2022 allowing the respondents no.1's application for appointment of the Court Commissioner to carry out the measurement of the house property bearing no.2-2-284 (new no. 3-2-316) and for a production of the report along with the map with the specific finding about the existence of the number of the rooms in the property.

2. The learned counsel appearing for the petitioners has invited the attention of this Court to the issues which are framed by the trial Court and submits that the suit which has been filed by the respondent no.1 is for partition and the issues to that effect have been framed. He further submits that the appointment of the Court

Commissioner is not necessitated in a suit for partition inasmuch as it is the duty of the trial Court to determine the shares of the parties and thereafter for executing the final decree, it is the Collector, who is the appropriate authority.

3. Per contra, the learned counsel for the respondents submits that as there was a dispute in respect of number of rooms in the suit property, the trial Court has directed the appointment of the Court commissioner. He has invited the attention of this Court to the previous order of the trial Court dated 08.04.2021, whereby the application came to be rejected as the evidence had to be led.

4. Considered the rival submissions.

5. The settled position is that the appointment of the Court Commissioner is not permitted for the purpose of collection of evidence. In the present case, the admitted position is that the evidence of the parties has been led and from the evidence, there appears to be some dispute as regards the number of rooms which are in existence inasmuch as the respondent no.1 contends that rooms are 25 in numbers, which is contrary to the municipal record and as per the contention of the petitioners. Considering the dispute the trial Court was of the opinion that the appointment of the Court

Commissioner is just and necessary to elucidate the matter in dispute.

6. Considering that the suit is filed for partition and there appears to be dispute as regards existence of the rooms, whether for the purpose of determining the shares or for executing the final decree the appointment of the Court Commissioner would be necessitated. In the present case for adjudication of the proceeding, in my opinion, the appointment of the Court Commissioner cannot be faulted with. As the evidence has already been led, the appointment of the court commissioner cannot be said for the purpose of collection of evidence. The report of the Court Commissioner on the other hand would be necessary for the effective adjudication of the controversy between the parties.

7. From the reasons above, in my opinion, there is no infirmity in the impugned order dated 14.02.2022, however there is a necessity to modify the order inasmuch as the application sought appointment of the Court Commissioner to ascertain the existence of the number of rooms in the property and the trial Court by the impugned order at clause-4 has directed the Court Commissioner to record the nature of construction of the property and to undertake the individual measurement of the each and every room and to

prepare a comprehensive map of the situation of the suit property covering each and every aspect which is germane to the present proceedings. In my opinion, such a commission cannot be executed as it would expand the scope of appointment of the Court Commissioner. Clause-4 of the impugned order is therefore quashed and set aside and the rest of the order is upheld.

8. The writ petition stands disposed of in the aforesaid terms.

(SHARMILA U. DESHMUKH, J.)

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