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

**WRIT PETITION NO.6912 OF 2018**

Gangadhar Sakharam Mahalkar and Others

PETITIONERS

VERSUS

Ganesh Bapurao Kathar

RESPONDENT

.....  
Mr. K. F. Shingare, Advocate for the petitioners  
Mr. D. K. Thote, Advocate for the respondent  
.....

**[CORAM : NITIN B. SURYAWANSHI, J.]**

**DATE : 14<sup>th</sup> MARCH, 2023**

**ORDER :**

1. The petitioners are aggrieved by order dated 5<sup>th</sup> May, 2018 of appointment of Court Commissioner passed by the learned Joint Civil Judge, Junior Division, Phulambri, below Exhibit-17 in Regular Civil Suit No. 41 of 2017.
2. Respondent – original plaintiff has filed the suit for removal of encroachment on the part of the defendant-petitioners and for permanent injunction not to encroach on the property of the plaintiff and not to disturb peaceful possession of the plaintiff.
3. The suit was resisted by the defendants, by filing written statement.

4. The plaintiff, thereafter, filed application Exhibit-17 under Order XXVI, Rule 9 of the Civil Procedure Code, for appointment of Court Commissioner, which is allowed by the impugned order. Hence, the present writ petition.

5. Heard learned advocate for the petitioners and the learned advocate for the respondent. Perused the grounds raised in the writ petition and documents filed along with the petition and the impugned order.

6. Admittedly, appointment of Court Commissioner is premature, as the same is passed even before framing of issues and recording of evidence. In view of settled legal position as laid down in *"Mahadeo Kondiba Shinde V/s Nitin Sakharam Shinde"* (2022) 2 ALL MR 593 (Bom) and *"Shantaram Dattatray Kekan and Others V/s Bhausahab Karbhari Kekan and Another"* (2023) 1 AIR Bom R 554, the impugned order cannot be sustained.

7. In the result, writ petition is allowed. Impugned order dated 5<sup>th</sup> May, 2018 passed by the learned Joint Civil Judge, Junior Division, Phulambri, below Exhibit-17 in Regular Civil Suit No. 41 of 2017 is hereby quashed and set aside.

8. During the course of hearing of this petition, it is informed

that the plaintiff has filed his evidence affidavit and he is cross-examined. He is yet to examine his witnesses in the matter. In that view of the matter, after evidence of both the parties is over, if application under Order XXVI, Rule 9 of the Civil Procedure Code is filed, the same shall be considered by the Trial Court on its own merits, without being influenced by the order impugned in the present writ petition.

**[NITIN B. SURYAWANSHI]**  
**JUDGE**