

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

30 WRIT PETITION NO.12076 OF 2022

DINESH DATTATRYA KULKARNI
VERSUS
YOGESH HARESH KULKARNI AND OTHERS

...
Advocate for Petitioner : Mr. Amol S. Gandhi

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 02-03-2023

PER COURT :

. The office noting shows that the respondents are served.

However, none appears for the respondents.

2. As limited controversy arises in the present petition, the petition is taken up for hearing.

3. The petitioner has challenged the order dated 06.07.2022 rejecting his application for appointment of Court Commissioner. The Regular Civil Suit No.245 of 2021 was instituted by the petitioner seeking measurement of the suit property through T.I.L.R. and to produce necessary report and map and for removal of encroachment, if any found, on the suit property i.e. C.T.S. No. 30.

4. The trial Court has rejected the application on the

ground that since the relief claimed in the suit is measurement of the suit property, the appointment of the Court Commissioner for measurement would amount to granting the final relief at the interim stage. It was further held that it is first necessary for the petitioner to lead evidence and then application for appointment of the Court Commissioner can be moved.

5. Heard the learned counsel appearing for the petitioner.

6. The learned counsel for the petitioner has invited the attention of this Court to the written-statement filed by the respondent nos.5 and 6, who are contesting respondents and in particular to paragraph-38 wherein it has been stated that the respondent nos.5 and 6 have no objection to the measurement of C.T.S. No.30. The learned counsel for the petitioner submits that the application for appointment of Court Commissioner was not objected by the respondent nos.5 and 6.

7. Considering that Regular Civil Suit No.245 of 2021 has been filed seeking a relief of measurement of the C.T.S. No.30 and to remove the encroachment, if any, in my opinion the appointment of the Court Commissioner would be necessitated particularly when the

respondent nos.5 and 6 have themselves no objection to the measurement of C.T.S. No.30. Although the substantial relief appears to be of measurement of the suit property, the ancillary relief is of removal of the encroachment which is dependent on the substantial relief. The trial Court has rejected the application by observing that prior to leading of the evidence, the Court Commissioner cannot be appointed. It is well settled by various decisions of this Court that the stage of the application of appointment of Court Commissioner is not important and what is required to be considered is, whether it amounts to collection of evidence. It is equally well settled that in case of boundary dispute and encroachment dispute, it is desirable that the Court Commissioner be appointed.

8. As regards the observation of the trial Court that the final relief is being granted at the interim stage, in my opinion, the suit seeks removal of the encroachment and recovery of the encroached portion and for the said purpose although substantial prayer is for measurement of the suit property, the interim relief is sought for the purpose of securing the recovery of possession of the encroached property. Considering the nature of the suit, it is desirable that the Court commissioner be appointed.

9. In light of the above, the impugned order dated 06.07.2022 is hereby quashed and set aside. Writ petition stands allowed.

(SHARMILA U. DESHMUKH, J.)

GGP