

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

WRIT PETITION NO.2945 OF 2023

**SHANKAR S/O DEVRAO KAPSE
VERSUS
DIGAMBAR GANPATI DHEPE AND OTHERS**

...
Advocate for Petitioner : Mr. Bharat N. Gadegaonkar
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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 14th MARCH, 2023

PER COURT :

1. Petitioner is aggrieved by the order dated 26/04/2022, passed by learned Civil Judge, Junior Division, Loha, Dist. Nanded, below Exhibit-18 in R.C.S. No.125/2021, thereby rejecting application filed by the petitioner for appointment of Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure.
2. Admittedly, said application is filed at a premature stage, even before framing of issues and parties leading their evidence.
3. In Writ Petition No.2749/2012 (Ramkrishna Santu Kakad Vs. Reojee Sahadu Kakad & Another), decided by this Court (Coram: S.S. Shinde, J.) on 04/03/2013, it is held thus:-

"4. I have given careful consideration to the rival submissions. I find considerable force in the submissions of the learned counsel for the plaintiff that yet the issues are to be framed by the Trial Court and at the threshold

of hearing of the suit, application filed by the defendants for appointment of the Court Commissioner is entertained by the Trial Court. The plaintiff's or defendants' case should stand or fall on the evidence lead by them. This Court in case of Sanjay Namdeo Khandare Vs. Sahebrao Kachrau Khandare and others, reported in 2001(2) Mh.L.J. 959, has taken a view that the Court Commissioner can not be appointed for collecting evidence.

5. In that view of the matter, in my opinion, the stage of the proceeding for appointment of the Court Commissioner is pre-mature. It is different matter if the Court starts recording the evidence and finds it difficult to locate the correct position about the questions of controversy involved in the matter and at that stage, by invoking powers u/s. 26 Rule 9 of the C.P.C. appoints the Court Commissioner. Therefore, in my opinion, the impugned order can not sustain for the afore stated reasons. Therefore same is quashed and set aside. However, the parties will have liberty to file an application for appointment of the Court Commissioner at appropriate stage of the proceeding. Setting aside the impugned order will not come in the way of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit."

4. In Writ Petition No.8877 of 2013 (Chandrakant Kashinath Dike & Ors. Vs. Smt. Satyabhama Vishwanath Dike & Anr.) decided by this Court (Coram: S.V. Gangapurwala, J.) on 17/01/2014, it is held thus:-

"4. There can not a dispute with the proposition that to appoint the court commissioner as per Section 75 of the Code of Civil Procedure is the discretion of the Court. The said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised as per the judicial norms.

5. The parties have not yet stepped into witness box. The Court commissioner could have been appointed if the Court finds it necessary for the just decision of the

case. No doubt, in case of encroachment, dispute with regard to the identity of the property, the assistance of expert such as Cadestral Surveyor to measure the property can be considered by the Court. However, the stage is too premature. Even the application for temporary injunction is not decided. The report of the T.I.L.R. if disputed by either party, is not admissible in evidence unless the T.I.L.R. is examined.

6. At the stage of evidence, from the evidence on record i.e. documentary evidence if the Court finds that the appointment of court commissioner is necessary, then at that stage a party can file an application for appointment of T.I.L.R. as court commissioner, which application would be considered by the Court on its own merits."

5. In Writ Petition No. 234 of 2015 (Balkrushna Mahadeo Dongre and Another Vs. Seva Niketan English School, Kopergaon and another), decided by this Court (Coram: R.V. Ghuge, J.) on 19/01/2015 it is held thus:-

" 9. Since the scheme of Section 75(b) r/w Order 26 Rule 9 of the Code of Civil Procedure is aimed at elucidating information through local inspection in order to assist the Trial Court in resolving the real controversy at issue, this Court has laid down the law as referred above that such an application for appointment of the Court Commissioner can be filed after commencement of the recording of evidence. It is not disputed that the recording of evidence is yet to commence."

6. In the light of aforesaid observations, it is clear that this Court has consistently taken a view that application for appointment of Court Commissioner, filed before recording of evidence, is premature. Since the trial Court has rejected the application, the impugned order is in consonance with the settled legal position. Hence, no interference is called for in the impugned order.

7. Writ petition being devoid of merits is dismissed, by granting liberty to the parties to move application under Order 26 Rule 9 of CPC after commencement of recording of evidence. If such application is filed at that stage, trial Court shall consider it on it's own merits without being influenced by the order impugned in the present petition.

(NITIN B. SURYAWANSHI, J.)