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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.13471 OF 2021

Balasaheb Kishan Ghuge and Another PETITIONERS

VERSUS

Shivkantabai Dadarao Latpate and Another RESPONDENTS

.....
Mr. Mahesh P. Kale, Advocate for the petitioners
Mr. S. B. Solanke h/f Mr. A. R. Gaikwada, Advocate R-1
.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 8th AUGUST, 2023

ORDER :

1. Orders passed by learned Civil Judge, Senior Division, Gangakhed below Exhibits-13 and 82 in Regular Civil Suit No. 155 of 2014 are challenged in the present writ petition.
2. Respondent No.1 – original plaintiff filed the suit for declaration, permanent injunction and for removal of encroachment. The petitioners, being defendants No.1 and 2, appeared and filed their written statement. The Trial Court framed issues on 17th February, 2017 at Exhibit-31. Even prior to the framing of issues, the plaintiff filed application Exhibit-13 on 2nd April, 2015 for appointment of Taluka Inspector of Land Records as Court Commissioner for measurement of the suit

property. The said application is allowed on 24th June, 2015 on the ground that the suit is *ex parte* and no Written Statement order is passed against defendants No.1 to 3.

3. It appears that, thereafter, the “no written statement” order is set aside and the petitioners – defendants No.1 and 2 have filed their written statement.

4. The order passed below Exhibit-1 was not executed. On 9th January, 2020, application Exhibit-82 is filed by the plaintiff seeking police aid at the time of measurement to be carried out in terms of order passed below Exhibit-13. The said application is allowed, hence the present writ petition.

5. Heard learned advocate for the petitioner and the learned advocate for the respondents. Perused the memo of writ petition, its annexures and the impugned orders.

6. This Court has consistently taken a view that order of appointment of Court Commissioner should not be passed at preliminary stage. Admittedly, in the present case, order passed below Exhibit-13 was passed at a preliminary stage, even before framing of the issues. In that view of the matter, the order is unsustainable. Consequential order passed below Exhibit-82 is also, therefore, unsustainable.

7. In the result, writ petition is allowed in terms of prayer clauses "B" and "C".

8. Liberty is granted to the parties to move application seeking appointment of Court Commissioner after conclusion of recording of evidence. If such application is filed, the Trial Court shall consider it on its own merits, without being influenced by the order passed below Exhibits-13 and 82.

[NITIN B. SURYAWANSHI]
JUDGE