

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

WRIT PETITION NO. 14232 OF 2023

LANKABAI ALIAS HIRABAI ASHOK BIDVE AND OTHERS
VERSUS
BABAN DATTU VYAVAHARE AND OTHERS

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Advocate for Petitioners : Mr. Bhagwat Nilesh N

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CORAM : SHAILESH P BRAHME, J.

DATE : 7th DECEMBER 2023.

Per Court :

. Heard the learned Counsel for the petitioners.

1. The petitioners are the original plaintiffs who have filed RCS No.498/2022 for removal of encroachment for fixing boundaries and measuring the suit land through the Court Commissioner. A separate application at Exhibit-11 was filed under Order 26 Rule 9 of the Code of Civil Procedure. It is rejected and therefore the petitioners have filed this petition.

2. The learned Counsel for the petitioners submits that the appointment of Commissioner is necessary because the respondents /defendants are not permitting the petitioners to measure and have encroached upon the land of the petitioners. Learned Counsel submits that the application under Order 26 Rule 9 of CPC is not stage centric.

The statutory provision does not show any embargo in filing application at earlier stage of the proceeding. According to him, the learned Judge committed error of jurisdiction in rejecting application.

3. The learned Counsel has placed on record an order dated 01.03.2017 passed in Writ Petition No.2255/2017 to support the submission that in a suit for removal of encroachment appointment of Court Commissioner is necessary. He has also placed reliance on the judgment rendered by the Single Judge of Karnataka High Court in the matter of Shadaksharappa Veranna Vs. Kumari Vijayalaxmi Pampanna, to buttress that the provision is not stage centric.

4. It is admitted position that application under Order 26 Rule 9 is pressed into service before settlement of issues in the present matter. The provision of Order 26 Rule 9 of CPC does not have any embargo that application cannot be made before the commencement of trial. It provides that the Court has power to entertain application at any stage of the proceeding. I am not of the opinion that the application for appointment of Commissioner cannot be made at all.

5. The provision concerned is not a stage centric. At what stage it is to be made depends on facts and circumstances of each case. It cannot be blanketly held that just because suit is filed for removal of encroachment, the Court is obliged to appoint the Commissioner. In the present case, the prayers are for removal of encroachment, appointment of Court Commissioner for fixing boundaries and measuring the suit

land. In that sense of the matter, allowing application at Exhibit-11 would amount to granting final relief at the interlocutory stage. I do not see any special circumstances or peculiar character of the suit property so as to warrant appointment of Commissioner at this stage of the proceeding.

6. This Court cannot oblivious of the law laid down by this Court in the matters of Sarjerao Nathu Bangar & Ors. Vs. Namdeo Keru Bangar & Ors. in Writ Petition No.13441/2019 and in the matter of Sitaram Suklal Patil Vs. Vasudeo Suklal Patil in Writ Petition No.9626/2016, to indicate that normally appropriate stage for consideration of application under Order 26 Rule 9 would be after commencement of the trial.

7. There is no merit in the petition. It is dismissed. However the petitioners will be at liberty to file application at the later stage of the proceeding as permissible in law.

[SHAILESH P BRAHME, J.]

Najeeb.