



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

WRIT PETITION NO. 15331 OF 2023

Shaikh Badam Vazir Shaikh .. Petitioner

Versus

Kailash Maganrao Pakhare
and others .. Respondents

Shri Namit S. Muthiyan, Advocate for the Petitioner.

CORAM : SHAILESH P. BRAHME, J.

DATE : 14TH DECEMBER, 2023.

FINAL ORDER :

. The petitioner is original plaintiff, whose application U/O XXVI Rule 9 of the Code of Civil Procedure is rejected by the impugned order is before this Court. The learned counsel for the petitioner submits that the facts and circumstances of the case warrant local inspection. He has filed suit for perpetual injunction, mandatory injunction and possession. The respondents/defendants encroached upon the land. To elucidate the matter it is necessary to have local inspection, for conducting measurement and preparing map of the suit. Hence application at Exhibit 21 is submitted by the petitioner.

2. The learned counsel has drawn my attention to the written statement in para No. 4 to make out a case that even the respondents have also stated to be ready for joint measurement.

If the measurement is conducted that would help both the parties. My attention is invited to para No. 8 of the impugned order, wherein it is observed that just because the petitioner applied for appointment of Court Commissioner did not mean that there is an attempt to collect the evidence and the appointment of the Commissioner would be for elucidating the matter in dispute. Having observed in favour of the petitioner it is impermissible to record contrary finding in para No. 11. The findings are inconsistent and unsustainable. This is special case for a normal rule that appointment of Commissioner be resorted during or after the stage of recording of evidence.

3. The application for appointment of Court Commissioner U/ O XXVI Rule 9 of the C. P. C. can be made at any stage of the proceedings. I do not propose to record my finding whether the present application of the petitioner is an attempt to collect the evidence or not. I prefer to follow the view reiterated in the matter of Sarjerao Nathu Bangar Vs. Namde in Writ Petition No. 13441 of 2019 and Saitaram Suklal Patil Vs. Vasudeo Suklal Patil Writ Petition No. 9626 of 2016.

4. If special and exceptional circumstances are made out, then recourse can be taken to Order XXVI Rule 9 of the C. P. C. at pre-trial stage also. The special and exceptional circumstances cannot be in the form of observations recorded by the Trial Judge. There should be the peculiar situation of the suit property. In the present matter, I am of the view that the

petitioner can take recourse to Order XXVI Rule 9 of the C. P. C. during or after recording of evidence. I do not accept that a case of exceptional circumstance is made out. No interference is called for in the impugned order. The writ petition is disposed of. However, petitioner shall be at liberty to take recourse to Order XXVI Rule 9 of the C. P. C. at the subsequent stage of the proceedings.

[SHAILESH P. BRAHME, J.]

bsb/Dec. 23