

SA Pathan

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.14857 OF 2022

Arjun Balu Mane & Anr ... Petitioners
V/s.
Tukaram Dattu Mane & Ors ... Respondents

Mr. Drupad S Patil a/w Mr. Suyash Sule, for petitioners

Mr. Chetan G. Patil i/by Mr. Mandar G. Bagkar, for
respondent Nos.1 to 4.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 27, 2023

P.C.:

1. The order challenged in this writ petition is passed under Order 26, Rule 9 of the Code of Civil Procedure, 1908, appointing Deputy Superintendent of Land Revenue Record Panhala, Kolhapur, as Court Commissioner to carry out local investigation in relation to Gat No.481, which is the suit property.

2. The respondents/plaintiffs filed Special Civil Suit No.379 of 2018 for removal of encroachment and possession of the encroached portion in the said suit property. The plaintiffs filed an application under Order 26, Rule 9 of the Code of Civil Procedure. The appointment is objected to on the ground that before the commencement of the trial, such application cannot be filed.

3. The Trial Court allowed the application. Hence, the

defendants/petitioners filed a present writ petition.

4. Learned Advocate for the petitioners relying on the judgment of this Court in the case of **Shantaram Dattatray Kekan and Others versus Bhausahab Karbhari Kekan and Another** reported in 2022 SCC OnLine Bom 6466, contended that such prayer cannot be granted before the commencement of the trial.

5. I have considered the submissions made on behalf of the petitioners and respondents. In my opinion, the issue raised on behalf of the petitioner is no longer res integra in view of the authoritative pronouncement of the Supreme Court in **Rahul S. Shah v. Jinendra Kumar Gandhi** reported in (2021) 6 SCC 418 wherein the Supreme Court was considering abuse of procedural provisions having effect of defeating justice by adopting frivolous attempts by unsuccessful litigants by putting up spurious objections and setting up third parties, to delay and obstruct the execution of a decree. In the said context, it is observed as under.

“35. Having considered the abovementioned legal complexities, the large pendency of execution proceedings and the large number of instances of abuse of process of execution, we are of the opinion that to avoid controversies and multiple issues of a very vexed question emanating from the rights claimed by third parties, the court must play an active role in deciding all such related issues to the subject-matter during adjudication of the suit itself and ensure that a clear, unambiguous, and executable decree is passed in any suit.....

37.1. Issue commission under Order 26 Rule 9 CPC—A determination through commission, upon the institution of a suit shall provide requisite assistance to the court to assess and evaluate to take necessary steps such as joining all affected parties as necessary parties to the suit. Before the settlement of issues, the court may appoint a Commissioner for the purpose of carrying out local investigation, recording the exact description and demarcation of the property, including the nature and occupation of the property. In addition to this, the court may also appoint a Receiver under Order 40 Rule 1 to secure the status of the property during the pendency of the suit or while passing a decree."

6. Moreover, once the Trial Court frames the issues, there is no rationale as to why an application for the appointment of an expert for measurement in a suit for removal of encroachment can not be allowed, and the court will have to wait till the commencement of the trial. Once the issues are framed, parties understand the issues which they are required to prove. If issues are framed that cast a burden on the plaintiff to prove encroachment, such burden needs to be discharged by the plaintiff by adducing evidence to the satisfaction of the Court. In the case of encroachment, such a fact is difficult to be proved by leading oral evidence of the parties. Unless an expert in the field is appointed, the encroachment issue cannot be effectively and conclusively decided. The Survey Officer is an expert in the field who is equipped with the knowledge and methods to arrive at a conclusion about encroachment. Commencement of the trial has

no relevance to filing an application for appointment of Court Commissioner. Therefore, in my opinion, there is no error of jurisdiction committed by the Trial Court in appointing a Court Commissioner for local investigation.

7. In the case of **Shantaram Dattatray Kekan** (Supra), no legal proposition of law is laid down by this Court. This court held that each case needs to be decided in the peculiar facts and circumstances of the case. In the absence of a legal proposition of law laid down, the judgment would not operate as on appointing precedent in support of the proposition of law that an application for appointment of Court Commissioner cannot be filed before the commencement of trial.

8. On overall, considering of the aforesaid facts, no interference under Article 227 of the Constitution of India. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)