



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

18 WRIT PETITION NO. 4460 of 2023

Bhausahab Bhanudas Pise & othersPetitioners

VERSUS

Ajay Jaganrao Patil & anotherRespondents

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Mr. S.S. Kulkarni, Advocate for the Petitioners.

Mr. V. D. Patnurkar, Advocate for Respondent Nos. 1 and 2.

CORAM : R. M. JOSHI, J.

DATE : 15th JULY, 2024.

PER COURT :

1. By consent of both sides, heard finally at the stage of admission.

2. Petitioners/Defendants in Regular Civil Suit No. 101/2020 take exception to the order dated 03.02.2023 passed below Exhibit 5 whereby the application filed by Plaintiffs for appointment of Court Commissioner to measure the suit land is allowed.

3. Learned counsel for Petitioners submits that the Plaintiffs cannot be permitted to collect evidence through the Court. It is his specific submission that initially the burden is on the

Plaintiffs to lead evidence to substantiate their case in absence thereof and even prior to framing of issues, such order of appointment of Court Commissioner is not justified.

4. Learned counsel for Respondents/Plaintiffs supported the impugned order by contending that the suit filed by Plaintiffs is for measurement of land and to decide encroachment caused by Defendants. He placed reliance on judgments of this Court in case of Malhar s/o Ganpat Bokerphod and others vs. Shivaji s/o Vishwanath Pawal, **2014(4) Mh.L.J. 237** and Changdeo Nathu Katore and others vs. Trimbak Kisan Kathore and others, in **Writ Petition No. 10180/2018** decided on 21.09.2018.

5. It is settled position of law by various judgments of this Court for a substantial period of time now that though there is no specific stage provided under Order 26 Rule 9 of Code of Civil Procedure for appointment of Court Commissioner, such appointment cannot be done at the initial stage of the suit. The reason for such view is that the initial burden is on Plaintiff or Defendant as the case may be to substantiate his case and it is only thereafter that appointment of Court Commissioner may be sought.

In the instant case, Plaintiffs have made specific allegation against the Defendants that since the Defendants have prevented them from carrying out measurement of the suit property, the suit is filed for the said purpose. It is thus clear from Plaintiffs' own case that they are required to prove first that the Defendants prohibited them from carrying out measurement of the suit land and only thereafter for this reason suit is required to be filed. In case of Changdeo (supra) this Court has allowed appointment of Court Commissioner at the initial stage however, it is also reiterated therein that normally appointment of Court Commissioner is after the parties adduce their evidence. Nothing can be enunciated from the said order that similar facts as involved herein, were forming part of pleadings. Similarly, judgment in case of Malhar (supra) is passed by consent of both sides as the Plaintiff therein has recorded no objection for taking measurement by the Court Commissioner. Hence, both the judgments would not help Plaintiffs herein in any manner.

6. Having regard to the stage at which the application is filed, this will amount of collecting evidence through Court which is not permissible in law. Thus, there is no justification for the impugned order to sustain. Hence, the impugned order is set aside.

It is further clarified that at appropriate stage, it is open for the Plaintiffs to make such application which should be considered by the Trial Court in accordance with law. Petition stands allowed in above terms.

(R. M. JOSHI)
Judge

dyb