

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

55 WRIT PETITION NO. 11288 OF 2023

**MORESHWAR SAHAKARI GRUHANIRMAN SANSTHA
MARYADIT GARKHEDATHROUGH ITS CHARIMAN
VERSUS
MOHAMMAD KHALEQ MOHAMMAD NOOR SIDDIQUI
AND OTHERS**

Advocate for Petitioner : Mr. Mukul S. Kulkarni
Advocate for Respondent Nos. 5 & 6 : Mr. Jaydeep S. Kadam
h/f. Mr. V.D. Salunke

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CORAM : SHAILESH P. BRAHME, J.

DATE : 22nd JANUARY, 2024

PER COURT :

Heard learned counsel Mr. Mukul S. Kulkarni for the petitioner.

2. None appears for respondent nos. 1 to 4 and 7.

3. By order dated 11.09.2023, notice for final disposal was issued to the respondents, returnable on 10.10.2023 and ad-interim relief was also granted. Office remark shows that respondents are served. Learned Advocate Mr. V.D. Salunke has caused appearance for respondent nos. 5 and 6. The contesting party is respondent no. 1 who is original plaintiff. Despite service, he has not caused his appearance.

4. This petition is directed against the order dated 24.08.2023, passed below Exhibit 5 by learned 21st Civil Judge, Junior Division, Aurangabad, in RCS No. 1207/2022, allowing application preferred under Order XXVI Rule 9 of Code of Civil Procedure.

5. Learned counsel for the petitioner submits that it is an error of jurisdiction to entertain an application for appointment of Commissioner at pre-trial stage when even issues are not settled. He would further point out the order dated 24.08.2023, passed below Exhibit 28 and 28 – A, directing respondent no. 1 / plaintiff to correct the valuation of the suit property and to pay deficit Court fees. Without waiting for compliance of the order passed below Exhibit 28 and 28 – A, the impugned order passed.

6. Record shows that respondent no. 1 has filed RCS No. 1207 of 2022 for declaration and injunction. Application Exhibit 5 has been filed on 18.07.2022, along with suit seeking appointment of Superintendent of Land Records for the measurement and fixing boundaries. Say cum written statement has been filed by the petitioner in the suit contesting claim in the suit and application filed. When impugned order was passed the issues were yet to be settled.

7. In view of consistent view laid down in the matter of *Sarjerao Nathu Bangar Versus Namdeo Keru Bangar*, passed by this High Court in Writ Petition No. 13441 of 2019 and *Sitaram Suklal Patil Versus Vasudev Suklal Patil*, passed by this Court in Writ Petition No. 9626 of 2016, impugned order is unsustainable.

8. Normally, the application under Order XXVI Rule 9 of C.P.C. cannot be entertained at pre-trial stage. Application Exhibit 5 and the impugned order do not exhibit any exceptional and special circumstances to entertain the application at the stage of the proceedings. I am of the considered view that learned Judge has committed perversity in entertaining the application Exhibit 5.

9. In view of the aforementioned facts, Writ Petition is allowed by quashing and setting aside the order dated 24.08.2023, below Exhibit 5 passed by learned 21st Civil Judge Junior Division, Aurangabad, in RCS No. 1207/2022.

[SHAILESH P. BRAHME, J.]