



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

921 WRIT PETITION NO. 14004 OF 2023

Baban Genu Berad & another

....Petitioners

VERSUS

Sagar Ishwarlal Bhandari & others

.....Respondents

.....

Mr. Y. V. Kakade, Advocate holding for Mr. N. V. Gaware, Advocate for the Petitioners.

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

CORAM : R. M. JOSHI, J.

DATE : 26th NOVEMBER, 2024.

PER COURT :

1. This Petition takes exception to the order dated 27.09.2023 passed by the Trial Court in Regular Civil Suit No. 208/2022 below Exhibit 28 whereby the Court Commissioner is appointed under Order 26 Rule 9 of Code of Civil Procedure to carry out measurement of the suit property.

2. Plaintiffs/Respondents filed this application for appointment of Court Commissioner on the ground that they have filed the suit for relief that the Court Commissioner be appointed and the suit property be measured and the boundaries of their property be fixed and a map be re-issued to that effect. It is the submission of

the Plaintiffs that since the issue involved in the said suit is about measurement of the property and fixing boundaries thereof, except by way of appointment of Court Commissioner to measure the suit property, the suit cannot be decided.

3. The application is opposed by Defendants/Petitioners essentially on the ground that the application for appointment of Court Commissioner is filed even before framing of issues and which, according to them, amounts to collection of evidence through the Court Commissioner.

4. Learned counsel for the Petitioners submits that in absence of any evidence being adduced by the Plaintiffs to substantiate their case, it is not open for them to make an application for collecting evidence through Court.

5. Learned counsel for Respondents submits that though this Court is of the view that such appointment is not to be made at the stage before the Plaintiffs/Respondents lead evidence to substantiate their case, there are judgments of three coordinate

benches of this Court which took different views. He, therefore, relied upon following judgments :-

- (i) Mayuresh Subhsh Sonawane vs. Yashwant Babu Bhoir & another, 2022(2) ALL MR 348.
- (ii) Malhar s/o Ganpat Bokerphod and others vs. Shivaji s/o Vishwanath Pawal, 2014(4) Mh.L.J. 237
- (iii) Sukhdeo Parashramji Bhugul (DR.) vs. Wamanrao Nagorao Charhat, 2004(3) Mh.L.J. 724.

6. There cannot be any dispute with regard to the fact that in appropriate case and at appropriate stage an application can be moved by the parties under Order 26 Rule 9 of the Code of Civil Procedure. Law on the point that parties have to prove their case by leading evidence is fairly settled. Similarly, it is not open for the parties to use the Court as an instrument/tool in order to collect evidence on their behalf. As far as present case is concerned, admittedly, issues are yet to be framed. It is for the Plaintiffs to adduce evidence to prove their contention in the plaint. If the appointment of Court Commissioner is required, it may be open for them to make such application. However, permitting the parties to make application before even an attempt is made to prove the contention with own evidence would amount to abuse of provisions of Order 26 Rule 9 of Code of Civil Procedure.

7. As far as judgment in case of Mayuresh (supra) is concerned, in the facts of the said case, this Court found it appropriate that for the purpose of passing interim order pending trial ascertainment of suit property was necessary and hence the order of appointment of Court Commissioner was justified. In case of Malhar (supra) an objection was raised by the Plaintiff for taking measurement by the Court Commissioner and as such the order was passed practically by the consent of the parties. In case of Sukhdev (supra), there was evidence on record of Cadastral Surveyor but there was no actual measurement being noted down on the map prepared by the Cadastral Surveyor. It is thus clear that for the purpose of clarification of evidence the order of appointment of Court Commissioner under Order 26 Rule 9 of Code of Civil Procedure came to be passed. In view of this Court, these judgments do not help the Respondents/Plaintiffs in any manner to support the impugned order. Hence, Petition is allowed. The impugned order is set aside.

(R. M. JOSHI)
Judge

dyb