



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

WRIT PETITION NO. 1328 OF 2024

Bhimabai Nanasaheb Butte And Another
VERSUS
Somnath Khandu Butte And Others

Mr. D. R. Shelke, Advocate for Petitioners
Mr. G. N. Chincholkar, Advocate for Respondent Nos. 1 to 3

CORAM : R. M. JOSHI, J.
DATE : 13th March, 2025

PER COURT :-

1. This petition takes exception to the order passed below Exhibit 38 dated 20.12.2023 in Regular Civil Suit No. 512/2022 by the learned Trial Court whereby the application filed by plaintiffs for appointment of Court Commissioner for instigation and for ascertainment as to whether there is alternate way available for the defendants came to be allowed.

2. Learned counsel for the petitioner submits that it is a settled position of law that the appointment of Court Commissioner cannot be done for the purpose of collecting evidence and it is obligation of the parties to substantiate the case by leading evidence. To support the said evidence he placed reliance on the judgment in case of **Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare and others 2001 (2)**

Mh.L. J. also in case of **Syed Mushtaque Ahmad s/o Syed Ismail and others Vs. Syed Ashique Ali Khan s/o Haridar Ali 2011 (6) Mh. L. J.** and judgment of co-ordinate Bench of this Court in case of **Ashok Hardayal Mehta Vs. Rahul Tatyaram Mandage and others in Writ Petition No. 14551/2019.**

3. Per contra, learned counsel for respondents submits that having regard to the nature of dispute between the parties, the same can only be settled by appointment of Court Commissioner. To support the impugned order, he has placed reliance on the judgment of Co-ordinate Bench of this Court in case of **Malappa Bhikappa Biradar Vs. Aamsidha Bhikappa Biradar & Ors 2022 (4) ALL MR 90** and **in case of Mayuresh Subhash Sonawane Vs. Yaswant babu Bhoir & Anr 2022(2) ALL MR 348.**

4. There cannot be any dispute made with regard to the fact that the suit filed by the petitioners is for the purpose of removal of encroachment on the road which is allegedly done by the defendants. In such circumstances, burden solely lies on the petitioners/plaintiffs to substantiate his case by leading evidence. The appointment of Court Commissioner under Order XXVI Rule 9 is not contemplated for the purpose of collecting evidence but the same is permitted only for the purpose of clarification of the evidence which is led before the Court. This

can be ascertained from wording Order XXVI Rule 9 which refers to appointment of the Court Commissioner for elucidating the matter in issue. The statutory provision clearly shows that it is only for the purpose of elucidating the matter in issue Court Commissioner can be appointed and not for the purpose of collecting evidence on behalf of any party to the suit. This Court concurs with the view taken by this Court in case of Sanjay Namdeo (cited supra), Syed Mushtaque (cited supra) and Ashok Mehta (cited supra). In so far as the judgments cited on behalf of respondents are concerned, these judgments would not taken into consideration the previous judgments and are passed in different set of facts.

5. In any case, this Court is of the view that unless the matter is required for further elucidation, appointment of Court Commissioner is not permissible. Hence, the order impugned cannot sustain.

6. Petition stands allowed. Impugned order is set aside.

(R. M. JOSHI, J.)

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