



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

WRIT PETITION NO. 2059 OF 2024

Nana Chintaman Rathod And Another
VERSUS
Namdeo Ramaji Pachlore And Others

Mr. A. R. Vaidya, Advocate for petitioner
Ms. S. N. Salunke, Advocate for respondent No. 1
Mr. V. N. Shinde, Advocate for respondent No. 2 and 3

CORAM : R. M. JOSHI, J.
DATE : 03rd January, 2025

PER COURT :-

1. This petition takes exception to the order dated 22.01.2024 passed below Exhibit 26 in RCS No. 896/2017 whereby application filed by plaintiff respondent under Order XXVI Rule 9 of Code of Civil Procedure (for short '**CPC**') for appointment of Court Commissioner to carry out measurement of the suit property was allowed. Plaintiff has filed suit for injunction and possession in respect of the suit property. Defendant opposed the said suit by filing written statement however it is stated therein that if the plaintiff desires to get the land measured then the Commissioner be directed to see the possession of the parties by referring to their respective sale deeds.

2. Learned counsel for the petitioner submits that the trial Court has committed error in placing reliance on the said written statement to

allow application for appointment of Court Commissioner. It is his submission that at premature stage, such application came to be filed. According to him, Order XXVI Rule 9 of CPC cannot be removed for the purpose of collecting evidence and that the plaintiff has to lead independent evidence first to substantiate his case.

3. Learned counsel for the respondent/plaintiff supported the impugned order placing reliance upon the statement of defendant in the written statement with regard to the measurement of the land. According to him, appointment of Court Commissioner in the facts of the case does not amount to collecting evidence through the order of Court.

4. Order XXVI Rule 9 of CPC contemplates local investigation for the purpose of elucidating any matter in dispute and the appointment of Court Commissioner can be done. Thus, the local investigation would be to clear or explain the matter in dispute and not to prove the same with such investigation. Thus, it is imperative for parties to lead evidence first and only for the purpose of clarification, if necessary, Court Commissioner may be appointed.

5. Having regard to the said position of law, order impugned cannot sustain. Hence, order dated 22.01.2024 stands set aside. It is however clarified that at appropriate stage such application could be

moved by the plaintiff. Learned trial Court to decide such application filed if any, in accordance with law.

6. Petition stands allowed in above terms.

(R. M. JOSHI, J.)

bsj