



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

905 WRIT PETITION NO. 742 OF 2021

**KAMALNARAYAN JAGANNATH JAISWAL
VERSUS
SUBHASH RAMGOPAL BHARUKA**

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Mr. M. P. Kale., Advocate for the Petitioner
Mr. Anand V. Patil Indrale, Advocate for Respondent

WITH

**WRIT PETITION NO. 10907 OF 2024
KAMALNARAYAN JAGANNATH JAISWAL
VERSUS
SUBHASH RAMGOPAL BHARUKA**

Mr. M. P. Kale., Advocate for the Petitioner
Mr. Anand V. Patil Indrale, Advocate for Respondent

CORAM : R. M. JOSHI, J.

DATE : 4th OCTOBER, 2025

P.C. :-

1. By consent of both sides, heard finally at the stage of admission.
2. These Petitions take exception to the orders passed by the Trial Court of appointment of Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure (for short 'CPC') at the instance of Defendant.
3. Petitioner filed suit for injunction against the Defendant who

is the owner of the land adjoining the plot of the Plaintiff. The Defendant filed counter claim making allegation of encroachment being carried out by the Plaintiff on the plot of the Defendant and sought possession thereof. Before evidence would commence, Application came to be moved by the Defendant for appointment of Court Commissioner under Order 26 Rule 9 of the CPC. Initially an Advocate was appointed as a Court Commissioner. However, later on another Application was moved for an expert to the appointed at Court Commissioner and consequently, the District Superintendent of Land Record came to be appointed as Court Commissioner to carry out measurement of plot of 4/250A and 4/247 situated at Samarthnagar Mohalla, Talukq Kannad. A correction was sought in the order from the Trial Court since plot of the Defendant was not included in the order issuing direction for the measurement of plots by Expert.

4. Petitioner/Plaintiff is aggrieved the impugned order essentially on the ground that at pre-mature stage Trial Court allowed the Application for appointment of Court Commissioner.

5. Learned Counsel for the Petitioner submits that the parties cannot be permitted to collect evidence by appointment of Court Commissioner. It is his submission that in view of the catena of judgments of this Court that the appointment of Court Commissioner could be done for the purpose of elucidation of the matter in issue and

that could only be done after the parties lead evidence.

6. Learned Counsel for the Respondent-Defendant supported the impugned order by relying upon the judgment of Co-ordinate Bench of this Court in case of ***Pandit Vithal Landage Versus Vishnu Govind Pawar and Another, 2025 DGLS(Bom.) 1617.***

7. There is no dispute about the position of law that the Court Commissioner cannot be appointed for the purpose of collecting evidence on behalf of the parties. Further in number of judgments of this Court it is held that an Application could be filed under Order 26 Rule 9 of the CPC for appointment of Court Commissioner in order to elucidate the matter in dispute, which is clarification of the matter. Needless to say that for the purpose of any clarification by the appointment of Court Commissioner, there must be some evidence led by party, unless facts are undisputed.

8. The judgment in case of ***Pandit Vithal Landage*** (supra) in respectful view of this Court does not taken into consideration the embargo created by law on the parties to collect evidence through Court Commissioner. Herein this case, the evidence is yet to be commenced. It is open for the Defendant to seek appointment of Court Commissioner in order to seek elucidation of matter is controversy. It is however, cannot be permitted to the Defendant to collect evidence by

appointment of Court Commissioner.

9. Having regard to the peculiarity of the facts involved in the present case, this Court is of the view that the order of appointment of Court Commissioner is passed at pre-mature stage. Hence, impugned orders deserve interference. Accordingly, Petitions stand allowed. Impugned orders are set aside. It is, however, clarified that appropriate stage of the proceedings, it would be open for the parties to seek appointment of Court Commissioner. If any such Application is filed, Trial Court to decide the same in accordance with law.

10. Learned Counsels for both sides request for directing Trial Court to decide the said expeditiously since the suit is of year 2015. Having regard fact that the suit is pending for period of about 10 years now, Trial Court to decide the same expeditiously and in any case within a period of six months from today.

(R. M. JOSHI, J.)

ssp