



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

WRIT PETITION NO. 4607 OF 2023

1. Chaitanya s/o Laxmikantrao Deshmukh,
Age : 48 years, Occu. :Business,
R/o C/o Baba Petrol Pump, In front
of Cotton Research Centre, Degloor
Naka Road, Nanded.
2. Anandidas s/o Laxmikantrao Deshmukh,
Age : 50 years, Occu. :Business,
R/o C/o Baba Tyres, In front
of Cotton Research Centre, Degloor
Naka Road, Nanded.

.. Petitioners
(Orig. Deft. Nos. 1 & 2)

Versus

1. Dr. Savita w/o Mohanrao Bhalerao,
Age : Major, Occu. : Medical Practitioner,
R/o. Chikhalwadi, Nanded
Through Power of Attorney Holder
Dr. Umesh s/o Mohan Bhalerao,
Age : Major, Occu. : Medical Practitioner,
R/o. Bhalerao Hospital, Gurudwara Road,
Chikhalwadi, Nanded.
2. Dr. Angha w/o Sanjay Ghai,
Age : 53 years, Occu. : Medical Practitioner,
R/o. Baba Deepsingh Nagar,
Bhagatsingh Road, Nanded.
3. Dr. Anuja w/o Vishwas Kulkarni,
Age : 51 years, Occu. : Medical Practitioner,
R/o. Mitra Nagar, Latur, Tq. & Dist. Latur
Through Power of Attorney Holder
Dr. Umesh s/o Mohan Bhalerao,
Age : Major, Occu. : Medical Practitioner,
R/o. Bhalerao Hospital, Gurudwara Road,
Chikhalwadi, Nanded.

4. Surendrasingh s/o Aiyabsingh Kresharwale,
Age : 75 years, Occu. : Nil,
R/o. Plot No. 28, Kela Market Road,
In front of Cotton Research Centre, Degloor
Naka Road, Nanded.
5. Naseer Khan s/o Gaffar Khan,
Age : 55 years, Occu. : Business,
R/o. Plot No. 22, Kela Market Road,
In front of Cotton Research Centre, Degloor
Naka Road, Nanded.
6. Dr. Manish s/o Bhaskarrao Naladkar,
Age : 52 years, Occu. : Medical Practitioner,
7. Sarlabai w/o Bhaskarrao Naladkar,
Age : Major, Occu. : Household,
Petitioner Nos. 5 and 6,
R/o. Vazirabad, Near Tarodekar Market,
Nanded.

.. Respondents

(Resp. Nos. 1 to 3 Orig. plaintiffs and
Resp. Nos. 4 to 7 are Orig. Deft. Nos. 3
to 6.)

Mr. S. S. Gangakhedkar, Advocate for the Petitioners.
Mr. V. S. Kadam, Advocate for Respondent Nos. 1 to 3.

CORAM : KISHORE C. SANT, J.

Date on which reserved for order : 14th February, 2025.

Date on which order pronounced : 13th March, 2025.

FINAL ORDER :-

. Heard by consent of the parties for final disposal at the stage of admission.

2. The present petition is by original defendant Nos. 1 and 2 in

R.C.S. No. 479/2022 against the original plaintiffs i.e. respondent Nos. 1 to 3 and other defendants. The order under challenge is an order passed by the learned 9th Joint Civil Judge Junior Division, Nanded dated 04.02.2023 thereby allowing the application of the plaintiffs for appointment of Commissioner. By way of impugned order the learned Judge has appointed Cadastral Surveyor as Court Commissioner to measure the suit properties and to demarcate the property allegedly encroached by the defendants.

3. The facts in short giving rise to the present petition are as under :

4. The plaintiffs filed the suit for demarcation and fixation of four boundaries by metes and bounds of the suit plots and injunction restraining the defendants from obstructing or interfering in the possession of the plaintiffs over the suit plots. The defendants filed written statement denying any encroachment made over the property. It is stated that, the plaintiffs have not given proper measurement of the suit properties and prayed for dismissal.

5. The suit proceeded further. The plaintiffs filed application for appointment of a Commissioner in the suit. The learned Trial Court held that, the plaintiffs are not expert to ascertain factual aspect of the land and therefore, it is necessary to appoint a Cadastral Surveyor as

Court Commissioner at the cost of the plaintiffs and allowed the application.

6. The learned advocate Mr. Gangakhedkar for the petitioners/defendant Nos. 1 and 2 vehemently argued that, the suit is only at the stage of framing of the issues. The stage is at too premature stage to make an appointment of a Commissioner. The plaintiffs have not given evidence showing any encroachment or making out a case that, in spite of their efforts it is necessary to appoint a Commissioner. The plaintiffs have even not proved the ownership of the property till now. The demarcation of plot and measurement are the main reliefs claimed in the plaint. By allowing the application, in fact, the learned Trial Court has granted main relief in the suit. The same is not permissible. He criticized the reasoning of the learned Trial Court. He submits that, in fact, by way of appointment of a Commissioner, now the plaintiffs would collect the evidence. It is settled position that, Commissioner can be appointed to collect the evidence. He relied upon the following judgments :

(i) Writ Petition No. 1186/2019, Narmadabai Mannalal Agrawal Vs. Dr. Sayed Abdul Gaffar Abdul Razzak Kadri passed by this Court dated 01.07.2019.

(ii) Writ Petition No. 9853/2018, Gangadhar Baburao Gurav and others Vs. The State of Maharashtra and others passed by this Court dated 29.08.2018.

(iii) Writ Petition No. 9089/2011, Ayyaz Shoukatali Sayyed and another Vs. Mohd. Moid @ Ajamtali s/o Mohd. Yasin Shaikh and others passed by this Court dated 17.01.2012.

(iv) Writ Petition No. 4756/2014, Dhondiba s/o Bapu Zaware Vs. Santosh s/o Paraji Zawere and others passed by this Court dated 08.12.2014.

(v) Writ Petition No. 8877/2013, Chandrakant Kashinath Dike & Ors. Vs. Smt. Satyabhama Vishwanath Dike & Anr. Passed by this Court dated 17.01.2014.

7. The learned advocate Mr. Kadam for respondent Nos. 1 to 3 vehemently opposed the petition. He submits that, the application was not for collecting the evidence. It is in view to assist the Court so as to come to proper conclusion. The learned Trial Court has rightly considered the pleadings of the parties and it is only thereafter the order was passed. He submits that, the Commissioner can be appointed at any stage of the proceedings. When allegation of encroachment is made, it is very much necessary to appoint a Commissioner.

8. The learned advocate for respondent Nos. 1 to 3 relied upon the following judgments :

(i) Mayuresh Subhash Sonawane Vs. Yashwant Babu Bhoir & Anr.¹

(ii) Govardhan Vs. Sai Baba Estates²

(iii) Writ Petition No. 1039/2024, Prabhakar s/o Baburao @ Babanrao Naik and others Vs. Vitthal Namdeo Naik and other passed by this Court dated 20.12.2024.

(iv) Haryana Waqf Board Vs. Shanit Sarup and others³.

(v) Girish Vasantrao Bhoyar and another Vs. Nimbaji Warluji Bambal⁴.

(vi) Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade, since deceased through Pooja @ Poojari Y. Lakade and others⁵.

(vii) Kalyan Santram Kawade and others Vs. Khanderao alias Khandu Ganpati Kawade and others⁶.

9. It is no doubt that, the appointment of a Commissioner can be made at any stage during the trial. However, the same is to be done by

1 2022 (2) All MR 348.

2 DGLS (Bom.) 854.

3 (2008) 8 SCC 671.

4 2009 (4) Mh.L.J. 371.

5 2011 (3) Mh.L.J. 348.

6 2015 (4) Mh.L.J. 429.

using the discretion of the Court in proper and judicial manner. The submissions of the learned advocates therefore need to be considered in the light of the judgments cited by the rival parties.

10. In the case of **Narmadabai Mannalal Agrawal** (*supra*), this Court by considering various judgments held that, the appointment of Court Commissioner can be made after recording of oral and documentary evidence is concluded.

11. In the case of **Ayyaz Shoukatanli Sayyed** (*supra*), it is held that, a Commissioner can not be appointed to collect the evidence. In that case, even temporary injunction application was not decided and the same was pending. The issues also were not framed and thus, considering that it was held that it would be a premature stage and the order of appointment of a Commissioner was quashed and set aside.

12. In the case of **Dhondiba Bapu Zaware** (*supra*), also the appointment of a Commissioner was set aside leaving it open to the respondents therein to move an application after issues are framed and evidence is recorded.

13. So far as the judgments relied upon by the respondent Nos. 1 to 3 are concerned, in the case of **Haryana Waqf Board** (*supra*), it was

arising out of the second appeal which was summarily rejected. The Hon'ble Apex Court held that, it was necessary for the Court to appoint a Commissioner and to get the proper demarcation of the property done.

14. In the case of Girish Vasantrao Bhoyar (*supra*), it was the appointment made by the Court for appointment of a Commissioner. There is dispute of the proposition in the said judgment that appointment of Commissioner can be made to ascertain as to who is in actual possession of the suit field.

15. In the case of Kolhapuri Bandu Lakade (*supra*), the Court accepted the contention that normally appointment of a Commissioner does not precede the recording of the evidence. It was further held that, the order being within discretionary power it should be left to the Trial Court to assess the necessity of appointment of a Court Commissioner. It is further made clear that, such appointment, however, should not be made to collect the evidence. The Court can interfere only when grave case is made out.

16. Keeping in mind the above judgments, what is clear is that the power to appoint a Commissioner is discretionary power left with the learned Trial Court. Normally appointment shall not be made before

evidence. The appointment shall certainly not be made for collecting of the evidence. Keeping this in view, this Court has to consider the present case.

17. In the present case, it is clear from the averments and the submissions that, the application is made at the stage where even issues are not framed. The evidence is yet to be recorded. Further, this Court has to consider the prayers in the suit as stated above. The prayers itself are for measurement and for demarcation of the suit plots and thereafter, for injunction. When the plaintiffs have asserted their right on the basis of sale deeds, it was necessary for them first to plead and prove their case by giving evidence. In the present case, however, the plaintiffs have not taken pains to try to prove their case and instead have directly filed an application for appointment of a Commissioner.

18. Considering this position, this Court finds substance in the arguments of the petitioners/original defendant Nos. 1 and 2 that, the application is filed only for the purpose of collecting of the evidence. The judgments relied upon by the respondent Nos. 1 to 3 are the judgments which have considered the principles broadly and have justified the appointment of a Commissioner in facts of those cases. The broad principles would be that, no appointment be made for the purpose of collection of evidence and normally it should not be made

before recording of the evidence.

19. In the present case, nothing is appearing on record as to what exceptional case is made out to appoint a Commissioner before even framing of the issues. This Court finds that, the appointment of a Commissioner in the present case is made at premature stage. The learned Court below has not properly considered all the aspects involved in the matter and has lightly passed an order. For all these reasons recorded, this Court is inclined to allow the writ petition. Hence, the following order :

ORDER

- (i) The writ petition is allowed in terms of prayer clause (B).
- (ii) It is open for the plaintiffs to make an application at appropriate stage. The learned Trial Court to consider the application on its own merits without being influenced by the observations made in this order.
- (iii) The writ petition is disposed of. No order as to costs.

(KISHORE C. SANT, J.)

PS.B.