



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

9 WRIT PETITION NO. 8703 OF 2024

Alimunbi Wahed Kotwal & anotherPetitioners

VERSUS

Gangadhar Sugriv Kochewad & anotherRespondents

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Mr. G. B. Rajale, Advocate for the Petitioners.

Mr. K. P. Rodge, Advocate for the Respondents.

CORAM : R. M. JOSHI, J.

DATE : 21st APRIL, 2025.

PER COURT :

1. This petition takes exception to the order passed below Exhibit 18 in Regular Civil Suit No. 640/2023 whereby the Trial Court has allowed the application under Order 26 Rule 9 of Code of Civil Procedure for appointment of Court Commissioner to measure the suit property even before any evidence was led by the Plaintiffs.

2. Learned counsel for the Petitioners raises objection to the impugned order solely on the ground that at a pre-mature stage, Trial Court has allowed this application. It is his contention by referring to Order 26 Rule 9 of Code of Civil Procedure that the appointment of

Court Commissioner can be done only for elucidating the matter in issue and not for collecting evidence through the order of the Court.

3. Learned counsel for Respondents/Plaintiffs supported the impugned order. According to him, the issue involved in the suit is of demarcation of the boundaries of Plaintiffs and Defendants. Thus, it is his contention that the same can only be done by way of appointment of Court Commissioner for this purpose. To support his submission, he has placed reliance on judgment of coordinate bench of this Court in case of Kashinath s/o ramkrishna Chopade vs. Purushottam Tulshirm Tekade and others, **2005(4) Mh.L.J. 471** and judgment of Supreme Court in case of Haryana Waqf Board vs. Shanti Sarup and others, **(2008) 8 Supreme Court Cases 671**.

4. In order to appreciate scope of Order 26 Rule 9 of Code of Civil Procedure, a perusal thereof is necessary. No doubt it is open for the Court to pass order of appointment of Court Commissioner for local inspection in any suit, but the same cannot be done by way of collecting evidence through the Court. The whole purpose of this provision is that such appointment is done for elucidating the matter in dispute. Needless to say that elucidation means any explanation

required. Thus a condition precedent for appointment of Court Commissioner is that evidence led by the parties requires some clarification. Since admittedly, application for appointment of Court Commissioner has been filed before the evidence of the parties could begin, such order cannot sustain. Hence, impugned order is set aside.

5. It is however open for the Respondents/Plaintiffs to file application of appointment of Court Commissioner at appropriate stage. If such application is filed, the same be decided in accordance with law.

(R. M. JOSHI)
Judge

dyb