

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9408 OF 2025

Dnyaneshwar Yeduba Gaikwad And Others

VERSUS

Raju Ganpat Hombre Thr GPA Holder Govind Radhakisan Shelke And
Another

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Advocate for the Petitioners : Mr. Patil Vishnu Yadavrao

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CORAM : S. G. CHAPALGAONKAR, J.

DATED : AUGUST 07, 2025

PER COURT :-

1. Present petition takes exception to order dated 31.01.2025 passed below Exhibit-45 in Regular Civil Suit No.292 of 2022 by which application of respondent/plaintiff for appointment of Court Commissioner has been allowed.

2. Mr. Patil, learned advocate appearing for petitioners/original defendants assails aforesaid order firstly on the ground that it would amount to collection of evidence. Secondly, order is passed at premature stage. In support of his submissions, he relies upon observations of this Court in case of *Syed Mushtaque Ahmad s/o Syed Ismail and Others Vs. Syed Ashique Ali Khan s/o Haidar Ali reported in 2011 (6) Mh.L.J. 334*, so also observations of this Court in the case of Dhondiba s/o Bapu Zaware Vs. Santosh s/o Paraji Zaware and Others in Writ Petition No.4756 of 2014 dated 08.12.2014 and in case of Sagar Panjabrao Sable and Others Vs. Sunil

Sarjerao Sable and Others in Writ Petition No.5089 of 2019 dated 24.06.2019.

3. Perusal of record tendered before this Court shows that respondent/plaintiff instituted suit seeking relief of removal of encroachment and possession. It is contention of respondent that petitioners are adjacent land owners from Gat No.125. They raised construction of hotel and petrol pump over that property and while raising construction, they encroached upon land of respondent from Gat No.144. The petitioners/defendants denied the aforesaid contentions in their written statement. Apparently, the dispute as to boundary has been raised in suit. The Court would be required to decide whether the wall constructed by petitioners is within boundaries of their land from Gat No.125 or whether they had encroached upon land Gat No.144 owned by respondent. Such a controversy can be resolved only with assistance of measurement carried by competent authority i.e. District Inspector of Land Records or Taluka Inspector of Land Records, as the case may be. In such circumstances, the Trial Court is empowered to exercise discretion under Order 26 Rule 9 and 10 of Civil Procedure Code.

4. In case of Syed Mushtaque (supra) relied upon by petitioners, the Commissioner was directed to report on the aspect of possession and to the extent of construction carried out by respondent. In this background, this Court held that appointment of

Court Commissioner would amount to collection of evidence and therefore, the order of Trial Court was set aside. In present case, such is not the case. It is the case of boundary dispute wherein order of appointment of Court Commissioner cannot be faulted. The learned advocate for petitioners relied upon two other judgments of this Court which stipulates that the order of appointment of Court Commissioner cannot be passed unless party records the evidence. However in subsequent judgment, in case of Pandit Vitthal Landage Vs. Vishnu Govind Pawar and Another in Writ Petition No.5158 of 2025 decided on 30.04.2025, this Court took a view that there is no fetters on powers of Court to appoint the Commissioner at any stage of proceeding in appropriate case. Even such an order can be passed before evidence is commenced. In facts of present case, the discretion exercised by the Trial Court appears to be in tune with the law laid down in aforesaid judgment.

5. In that view of matter, no case is made out to cause interference under Article 227 of Constitution of India. Hence, Writ Petition stands rejected.

(S.G. CHAPALGAONKAR, J.)