



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9082 OF 2022

Ramlal Devchand Gomladu And Another
VERSUS
Ramesh Ananda Salve And Others

- Mr. M. K. Deshpande, Advocate for the Petitioners
- Mr. Y. L. Bidve, Advocate for the Respondent Nos. 1 to 5

CORAM : R. M. JOSHI, J
DATE : FEBRUARY 17, 2025

PER COURT :

1. This Petition takes exception to the order passed below Exh.5 in RCS No. 121/2019 whereby the Trial Court has allowed the application filed by the Plaintiff for appointment of the Court Commissioner to measure the disputed property.

2. Learned Counsel for the Petitioner submits that the Trial Court has committed error in passing the impugned order at this stage. It is his argument that this amounts to collecting evidence for and on behalf of the Plaintiff, which is wholly impermissible in law. To support his submissions, he placed reliance on the judgment of this Court in case of Mahadeo Kondiba

**Shinde vs. Nitin Sakharam Shinde and Another (Writ
Petition No. 215/2019).**

3. On the other hand, learned Counsel for the Respondents supported the impugned order by contending that in case of suit for removal of encroachment, the same cannot be decided except by the appointment of the Court Commissioner to measure the subject property. To support his submissions, he placed reliance on following judgments:

1. Kalyan Santram Kawade and Ors vs. Khanderao alias Khandu Ganpati Kawade, 2015 (4) Mh.L.J. 429,
2. Balkrishna S/o Gangabishanji Zawar vs. Azmast Khan S/o Suban Khan and Anr, 2016 SCC OnLine Bom 8797,
3. Sunita Ashok Kachre and Other vs. Santram Bapurao Patkal, Writ Petition No. 6541/2017,
4. Satish Prakash Mane and Others vs. Dhanraj Abhangrao Mane and Others, Writ Petition No. 2873/2017,
5. Mayuresh Subhash Sonawane vs. Yashwant Babu Bhoir and Another, 2022 SCC OnLine Bom 179,
6. Govardhasn S/o Narayan Gaikwad Vs. M/s. Sai Baba Estates, Writ Petition No. 7594/2020.

4. There is no dispute about the fact that the RCS No. 121/2019 is filed by Plaintiff/Respondent herein for removal of encroachment. Exhibit 5 is filed for the purpose of appointment of Court Commissioner. It is settled position of law that the initial responsibility is on the party to prove his case by leading evidence. It is not permissible for the party to collect evidence through the Court.

5. Perusal of the Order XXVI, Rule 9 of Code of Civil Procedure indicates that the Court Commissioner can be appointed for the purpose of elucidating the matter in dispute. Dictionary meaning of word 'elucidate' is to make something clear or explain. Meaning thereby, if there is any explanation is required on the evidence on record, the appointment of the Court Commissioner could be done. But that would not allow a party to collect evidence through Court.

6. Herein this case, Plaintiff is seeking appointment of the Court Commissioner immediately on filing of the suit by filing application to that effect. Allowing such application and relief sought therein practically decide the suit at this stage. One

more question would arise, as to whether it is open for the Trial Court to decide the rights of the parties on the basis of said measurement, if allowed at this stage. Needless to say that in case where there is a dispute with regard to the measurement, the same cannot be considered at this stage and its correctness would be decided at final stage of the suit after recording evidence. In such circumstance, the Trial Court has committed error in appointing Court Commissioner, which has practically resulted into permitting Plaintiff to collect evidence through Court.

7. In view of above, Petition deserves to be allowed and the same is allowed in terms of prayer clause 'C'.

8. It is however clarified that setting aside of the order impugned shall not be construed to create bar to the parties to the suit to file any application at appropriate stage. If any such application is filed by the parties for appointment of the Court Commissioner, the Trial Court to decide the same in accordance with law and not for reason that such liberty is granted by this Court.

9. Petition stands allowed in above terms.

(R. M. JOSHI, J.)