



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

WRIT PETITION NO. 1038 OF 2024

Shivaji Nagorao Malegave And Another
VERSUS
Raosaheb Jalba Dhale And Others

Mr. S. B. Gastgar, Advocate for Petitioner

CORAM : R. M. JOSHI, J.
DATE : 13th March, 2025

PER COURT :-

1. This petition takes exception to the order dated 19.08.2023 passed below Exhibit 5 whereby in Regular Civil Suit No. 348/2022 whereby learned Trial Court has rejected application for appointment of Court Commissioner for measurement of the suit land in Order XXVI Rule 9 of the Code of Civil Procedure.

2. Learned counsel for Petitioners submits that Trial Court has committed error in rejecting the application for the reason that before filing of the suit, no application was made to the surveyor for measurement of the land and hence, the application stood rejected.

3. Though, this Court finds substance in the contention of the learned counsel for the Petitioners that the application ought not to have been rejected on this ground. However, as a matter of fact, the suit is at the stage of recording of evidence. Plaintiffs have not led any evidence.

It is settled position of law that the petitioners or any party cannot be permitted to seek appointment of Court Commissioner in order to collect evidence through the order of the Court. Perusal of Order XXVI Rule 9 of the Code of Civil Procedure indicates that it is for the purpose of elucidating of any matter in issue Court Commissioner can be appointed. Thus, only in case there is need of explanation of the natural evidence on record such appointed is justified and not otherwise. In such circumstances, though the reasons recorded by the Trial Court for rejection of application are not correct, this Court does not find it necessary to cause interference in the impugned order.

4. At this stage, learned counsel for Petitioners seeks leave to file application for appointment of Court Commissioner at appropriate stage of proceeding.

5. Petition stands dismissed with liberty as prayed. In case, any application filed by the parties before the Trial Court under Order XXVI Rule 9 of the Code of Civil Procedure, the same shall be heard and decided on merit. It is clarified that application need not be allowed only for the reason that leave is granted by this Court.

(R. M. JOSHI, J.)

bsj