

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

967 WRIT PETITION NO. 12937 OF 2024

Prashant Sundarlal Savaji

..Petitioner

Versus

Mahebubkha Karimkha Pathan Died

Through LRs Asef Khan Mahebub Pathan and Others

..Respondent

.....

Mr. Pravin N Kalani, Advocate for the Petitioner

Shri. S. P. Deshmukh, Advocate for Respondent Nos.1/A, 1/b

Shri. N. R. Pawade, Advocate for Respondent No.17

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CORAM : NEERAJ P DHOTE, J.

Dated : MAY 05, 2026

PER COURT :-

1. By the present Petition under Article 227 of the Constitution of India, the Original Defendant No.14 has challenged the order dated 31.01.2024 passed by the learned Civil Judge (J.D.), Jintur, below Exhs.62 and 78, which were the Applications by the Plaintiffs and Defendant No.16, respectively in RCS No.13/2021, for appointment of the Court Commissioner for conducting the measurement of the suit property.

2. The aforesaid civil suit came to be filed by Respondent Nos.1-a, 1-b and 2 for measurement of the suit property, fixing the boundaries by making demarcation and perpetual injunction against the Defendants including the Petitioner who is the Orig. Defendant No.14. The Plaintiffs

and Defendant No.16 filed the above referred Applications for appointment of Court Commissioner for measurement of the suit property and fixing the boundaries and demarcation.

3. The said Applications were resisted by the Petitioner. After hearing both the sides, the learned Trial Court passed the impugned order allowing the Applications.

4. Heard the learned Advocate for the Petitioner, the learned Advocates for Respondent Nos.1-a, 1-b and 2 and the learned Advocate for Respondent No.17, who are the contesting parties. With their assistance, perused the papers on record.

(a) It is submitted by the learned Advocate for the Petitioner that, the prayer clause-1 in the Plaint and the prayers in the Applications for appointment of the Court Commissioner are identical and by allowing the said Applications, the learned Trial Court has granted final relief without the trial in the suit. The Petitioner is disputing the area of the suit property and until the Plaintiffs prove their preliminary case, the impugned order amounts to collection of the evidence for the Plaintiffs. The Applications for appointment of Court Commissioner is premature and the impugned order be set aside. In support of his submissions, he cited the decisions of this Court in Writ Petition No.3342/2019 dated 13.01.2020, Writ Petition No.4705/2022 decided on 27.04.2022, and

Writ Petition No.11997 of 2023 decided on 20.07.2024, wherein this Court set aside the order of appointment of the Court Commissioner.

(b) It is submitted by the learned Advocate for Respondent Nos.1-a, 1-b and 2 / Plaintiffs that the prayers made in the suit are very clear i.e. measurement of the suit land, fixing the boundaries and demarcation and also Perpetual Injunction. The order impugned is not harmful to the Petitioner in any manner. The Petitioner can always cross-examine the Court Commissioner before the learned Trial Court. In support of his submissions, he relied on decisions in (i) **Haryana Waqf Board vs. Shanti Sarup and others, (2008) 8 SCC 671**, (ii) **Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade, [2011 Vol.(3) MhLJ] 348**, (iii) **Pandit Vithal Landage vs. Vishnu Govind Pawar and another, Writ Petition No.5158 of 2024** decided on **30.04.2025**. He submits that, no interference is called for in the impugned order and the Petition be dismissed.

(C) It is submitted by the learned Advocate for Respondent No.17 that he adopts the submissions made by the learned Advocate for the Respondent Nos.1-a, 1-b and 2 / Plaintiffs. The dispute in the suit was regarding the boundaries of the suit property and the learned Trial Court has rightly passed the impugned order and no interference is called for and the Petition be dismissed.

5. Perusal of the above referred orders relied upon by the learned

Advocate for the Petitioner shows that, this Court set side the order of appointment of the Court Commissioner on the ground that it was passed at the initial stage.

6. In **Haryana Waqf Board** (*supra*), it was the Appeal against the decision in the Second Appeal. The observations made therein show that, ‘the wakf board had failed to prove that the Respondents therein had encroached upon any land belonging to the Appellant board. The second appeal was summarily dismissed. The dispute that was raised by the parties before the Court was, whether the Respondent had encroached upon any land belonging to appellant Board and it was not disputed that the dispute was in respect of the encroachment of the suit land and the Application for Court Commissioner was rejected and it was observed that, it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner.’

7. In **Kolhapuri Bandu Lakade** (*supra*), the suit was for declaration, restoration of possession, and removing the encroachment of the Defendant. The contention of the Plaintiff was that the suit land was owned by the Plaintiff and the defendant was allowed to reside in the rooms constructed on the said property and later on the defendants refused to hand over the same. Considering the previous judgments on

the point of appointment of the Court Commissioner, it was observed that, to find out as to whether the defendants have, in fact, encroached upon the suit property or not, it was found appropriate to appoint the Court Commissioner in arriving at the just decision. It was observed that, the Report of the Court commissioner would not be conclusive and the parties aggrieved may be entitled to cross examine the Court Commissioner’.

8. In **Pandit Vithal Landage** (*supra*), the order impugned was of appointment of the Court Commissioner to have the joint measurement of the suit land and the adjacent land and submit a map showing encroachment, if any. One of the contentions was that, the said appointment of the Court commissioner was at the initial stage and the issues were not yet framed. This Court by considering the provisions of Section 75 and Order-XXVI, Rule-9 of the Code of Civil Procedure observed that, it was not possible to lay down the cast iron rule that the Court Commissioner cannot be appointed before the parties have adduced the evidence. It is observed that, whether the question is of the removal of encroachment and demarcation of the boundaries, it is necessary to have a joint measurement of the adjoining lands.

9. Coming to the case at hand, undisputedly, this is not a case of encroachment. The prayers in the suit as is clear are not of encroachment or removal of encroachment. The prayers in the suit are

for Perpetual Injunction against the Defendants, measurement of the suit property, fixing the boundaries and demarcation of boundaries. The prayer clauses as can be seen from Exhs.62 and 78 and the prayers in the said Applications and prayer no.1 in the suit are identical. I find substance in the contention of the learned Advocate for the Petitioner that, by way of the Court Commissioners report, the Plaintiff wants to decree the suit and it would amount to granting final relief. Undisputedly, the prayer no.2 in the suit is to restrain the Defendants from creating hurdle in the peaceful possession of the suit property of the Plaintiffs. The facts of the case at hand and the facts of the case relied upon by the learned Advocate for the Plaintiffs and the Orig. Defendant No.16 are different. It is needless to state that, it is settled position under the law that, the Court Commissioner cannot be appointed for collection of evidence. By the impugned order it is clear that, by allowing the Applications, the Court has permitted to collect evidence. The learned Trial Court by allowing these Applications has almost allowed one of the prayers in the suit which is at preliminary stage. The Plaintiffs will have to prove their case by themselves. In this view of the matter, the order impugned needs interference and hence, the following order.

ORDER

- (i) The Writ Petition is allowed.
- (ii) The order impugned dated 31.01.2024 passed by the learned

Civil Judge (J.D.), Jintur, below Exh.62 and 78 is quashed and set aside.

- (iii) The parties are at liberty to file the Application for appointment of the Court commissioner in future which may be considered by the learned Trial Court in the facts and circumstances of the case and in accordance with law.

10. The learned Advocate for the Plaintiffs seeks stay to this order for eight (8) weeks. The order dated 28.11.2024 shows that, the proceedings of RCS No.13/2021 are stayed and the stay is continued till date. The same shall continue further for a period of eight (8) weeks.

(NEERAJ P. DHOTE, J.)

GGP