

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO. 8598 OF 2025  
WITH  
INTERIM APPLICATION NO. 7779 OF 2026

1. Vikram Baburao Pawar,  
Age 72 yeas, Occupation: Retired,  
residing at B/2, Shining Star Cooperative  
Society Limited, Daulat Nagar,  
Relief Road, Santacruz (West),  
Mumbai – 400 054.

2. Aishwarya Vikram Pawar,  
through her C.A. Vikram B Pawar,  
Age 42 years, Indian Inhabitant,  
Residing at : 3571 Cydonia Court,  
Dublin, CA 94568, USA.

...Petitioners

**Versus**

1. Mariyam Amin Mukhi  
Age 61 years, Indian Inhabitant,

2. Aaisha Noman Mukhi Alias Aaisha Amin  
Mukhi,  
Age 36 years, Indian Inhabitant,  
both having address at 104, Monin Milk  
Colony, Bungalow No.2, Western  
Express Highway, Mira Road (East),  
Dist Thane 401 104.

...Respondents

Mr. Y. R. Mishra, with Upendra Lokegaonkar, for the Petitioners.  
Mr. Ashutosh Gole, for the Respondents.

CORAM: N. J. JAMADAR, J.  
DATE : 7<sup>th</sup> OCTOBER 2026

**JUDGMENT:**

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India calls in question the legality, propriety and correctness of an order dated 5<sup>th</sup> April 2025 passed by the learned Civil Judge, Vasai, in RCS No. 5 of 2022, whereby District Superintendent of Land Records has been appointed as a Court Commissioner to visit the property, Survey No. 96, Hissa No.4, and the properties bearing Survey Nos. 96/5, 92/11 and 92/12 of village Sasun Navhgar, Taluka Vasai, carry out a joint measurement and ascertain whether the Plaintiffs have made any encroachment on the property of the Defendants, and submit a report to the Court.

3. Background facts can be stated in brief as under:

3.1 The Respondents-Plaintiffs have instituted the suit to restrain the Petitioners-Defendants from encroaching upon the property bearing Survey No. 96 Hissa No.4 (“the suit property”) or any part thereof and/or disturbing or obstructing the physical possession and enjoyment of the Plaintiffs over the suit property.

3.2 The Defendants are the holders of the plots bearing Survey Nos. Survey Nos. 92/11, 92/12 and 96/5 located on the northern and eastern boundaries of the suit property.

3.3 The Petitioners-Defendants assert that the officers of the Land Records Department have also carried out the survey and measurement of the suit property and the properties of the Defendants and demarcated and fixed the boundaries of the respective properties. When the Defendants started development work over their plot of land bearing Survey No. 96/5, the Plaintiffs caused the obstruction. Yet, the Plaintiffs have instituted the suit seeking injunction simplicitor.

3.4 In the said suit, the Plaintiffs filed an Application seeking appointment of Taluka Inspector of Land Records as a Court Commissioner to measure the suit property and the properties of the Defendants.

3.5 By the impugned order, the learned Civil Judge was persuaded to allow the Application opining that the dispute between the Plaintiffs and Defendants was in respect of the boundaries of their respective properties and, thus, a joint measurement of the suit property and the properties of the Defendants was necessary.

3.6 Being aggrieved, the Defendants have preferred this Petition.

4. I have heard, Mr. Y. R. Mishra, the learned Counsel for the Petitioners, and Mr. Ashutosh Gole, the learned Counsel for

Respondents, at some length. With the assistance of the learned Counsel for the parties, I have also perused the material on record.

**5.** Mr. Y. R. Mishra, the learned Counsel for the Petitioners, submitted that the learned Civil Judge committed a manifest error in law in directing the appointment of the Court Commissioner to measure the suit property and the properties of the Defendants, when the Plaintiffs had instituted the suit for injunction simplicitor only. The appointment of the Court Commissioner in such a situation amounts to the Court lending its assistance in the collection of the evidence. No material was placed on record to demonstrate that the Defendants had either committed or threatened to commit encroachment over any portion of the suit property.

**6.** Mr. Mishra submitted that the entire exercise was actuated by a design to pre-empt the action by the Defendants, as the measurements already carried out by the officers of the Land Records Department belied the case sought to be set up by the Plaintiffs. In fact, the Plaintiffs had preferred Appeals against the measurement and demarcation of boundaries and the Second Appeal came to be dismissed by the Deputy Director of Land Records, by a judgment and order dated 3<sup>rd</sup> June 2024. Despite the confirmation of the earlier survey and measurement by the Authorities under the Maharashtra Land Revenue Code, 1966 (“MLRC Code”), the learned Civil Judge directed the appointment of the Court

Commissioner without ascribing any justifiable reason. Therefore, the impugned order deserves to be quashed and set aside, submitted by Mr. Mishra.

7. Per contract, Mr. Ashutosh Gole, the learned Counsel for the Respondents, supported the impugned order. It was submitted that though the suit was for injunction simplicitor, yet, the real dispute between the parties was that of demarcation of the boundaries. In such situation, according to Mr. Gole, appointment of the Court Commissioner to have a joint measurement of the suit property as well as the adjoining properties of the Defendants was necessary for a just decision of the case. Without disputing the fact that the Plaintiffs had preferred an Appeal against the order passed by the Superintendent of Land Records, confirming the earlier measurements maps, Mr. Gole would urge that, the said decision would not bear upon the exercise of discretionary power by the Civil Court under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (“the Code”).

8. Mr. Gole further submitted that, this Court, in exercise of its supervisory jurisdiction, need not interfere with a such a discretionary order passed by the trial Court.

9. To buttress the aforesaid submission, Mr. Gole placed reliance on a judgment of a learned Single Judge of this Court in the case of

**Vachhalabai W/o Kundlik Gavane and Ors Vs Chinkaji S/o Malhari Gavane and Ors.<sup>1</sup>**

**10.** I have given anxious consideration to the submissions canvassed across the bar.

**11.** To start with, it is necessary to note the nature of the Plaintiffs claim. The Plaintiffs assert that the Defendants who are the owners of the adjoining plots started development of the suit property. The District Superintendent of Land Records, according to the Plaintiffs, had carried out the survey and measured the properties on 24<sup>th</sup> March 2021 in a hurried manner and in collusion with the Defendants. The map prepared pursuant to the survey carried out by the District Superintendent of Land Records, does not depict the correct position at the site. On the basis of the said map, the Defendants threatened to cause obstruction to the possession and enjoyment of the Plaintiffs over the suit property. Thus, reserving their right to file an Appeal before the Appellate Authority qua the map dated 24<sup>th</sup> March 2021, prepared by the District Inspector of Land Records, the Plaintiffs instituted the suit for injunction simplicitor.

**12.** Evidently, from the very averments in the Plaint, it becomes abundantly clear that the Plaintiffs professed to assail the legality and correctness of the survey and measurement carried out by the District Inspector of Land Records on 24<sup>th</sup> March 2021 and the map prepared

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<sup>1</sup> 2012 (4) Mh L J 198.

pursuant thereto. It would be contextually relevant to note that, the Plaintiffs had preferred an Appeal before the Superintendent of Land Records in respect of MR No. 8541/2021, dated 24<sup>th</sup> March 2021. By a judgment and order dated 30<sup>th</sup> December 2022, the said Appeal, came to be dismissed and the said map prepared by the District Inspector of Land Records, came to be affirmed. The Plaintiffs carried the matter further in Appeal S.R. No. 191/2023/2024, before the Deputy Director of Land Records, Konkan Division. The said Appeal was also dismissed by the Deputy Director of Land Records, by a judgment and order dated 3<sup>rd</sup> June 2024.

**13.** It appears that the aforesaid developments and orders passed by the Authorities under the MLRC, 1966, were brought to the notice of the learned Civil Judge, yet, the learned Civil Judge was persuaded to again appointed District Superintendent of Land Records as the Court Commissioner to have a joint measurement on the properties as the dispute between the Plaintiffs and Defendants was in respect of the boundaries and, thus, the joint measurement was necessary.

**14.** Whether the aforesaid approach of the learned Civil Judge is justifiable? First and foremost, it is necessary to note that the suit was instituted for injunction simplicitor. It was nowhere the case of the Plaintiffs that the Defendants had committed encroachment over a particular portion of the suit property. On the contrary, the suit was in

the nature of a pre-emptive action in the wake of the survey and measurement carried out by the District Inspector of Land Records on 24<sup>th</sup> March 2021. The Plaintiffs explicitly assailed the legality and validity of the said measurement and map prepared pursuant thereto.

15. Undoubtedly, where the dispute is in respect of demarcation of the boundaries, to elucidate the matter in controversy, it would be appropriate for the Court to direct the local investigation in the nature of joint survey and measurement of the properties by appointing a Commissioner, under the provisions of Order XXVI Rule 9 of the Code. However, the said power ought to be exercised in a judicious manner. A host of factors like the nature of the suit, reliefs sought therein, the stage of the suit and existence of such a dispute as would warrant the appointment of the Court Commissioner to elucidate the matter in controversy, bear upon the exercise of discretion. It is trite, the Court Commissioner cannot be appointed for the purpose of collection of evidence.

16. In the case of **Sanjay Namdeo Khandare Vs Sahebrao Kachru Khandare and Ors,**<sup>2</sup> the trial Court had appointed the Court Commissioner, empowering him to visit and inspect the spot, being the suit field, and to submit a report regarding actual possession of the suit field. This Court interfered with the said order observing that, that would tantamount to appointing Court Commissioner for collecting

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<sup>2</sup> 2001(2) Mh LJ 959.

evidence regarding possession. It was well-settled law that the Court Commissioner cannot be appointed for collecting evidence.

17. In the case of **Dnyandeo Vithal Salke and Ors Vs Dagdu Kadar Inamdar**<sup>3</sup> this Court interfered with an order passed by the Civil Court appointing Taluka Inspector of Land Records with a direction to submit his report as regards possession or user of the land. It was observed that, such an order amounts to collection of evidence, which was not the object of the provisions of Order XXVI Rule 9 of the Code.

18. In the case of **Sanjay Kisan Thorat and Ors Vs Ramchandra Parsu Thorat and Anr**,<sup>4</sup> where the suit was instituted for injunction and the Court Commissioner was appointed to bring on record the factual position on site, this Court interfered with the said order observing, *inter alia*, as under:

“10. The main intention and object of the Respondents in filing such application appears to be, only to bring on record the existence of the house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc. In respect of these very matters, Respondents are seeking the relief of interim injunction and in order to get that relief, they want to bring this evidence on record about its location and existence.

11. Hence, as rightly submitted by learned counsel for the Petitioners, the law in this respect is fairly well settled, as held by this Court time and again and also in the authority relied

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3 2017 (3) Mh L J 314.

4 2018 (2) Mh L J 954.

upon by learned counsel for the Petitioners that of **Dnyandeo Vithal Salke & Ors. Vs. Dagdu Kadar Inamdar (Supra)**, that, “The appointment of 'Court Commissioner', even that of T.I.L.R., to submit the factual report as regards possession or user of the land is amounting to collection of evidence and it is not permissible in law.”

12. When the Respondents are coming before the Court with a specific case of the existence of their house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc., the burden lies upon them to prove the said existence and their location. They cannot, under the pretext of appointment of T.I.L.R. as a 'Court Commissioner', when the measurement of the lands is already done at their instance only and the boundaries are also fixed, seek appointment of 'Court Commissioner' to bring on record the factual position at the site, so as to help them in proving their case for interim injunction. The Trial Court has not considered this settled position of law and, therefore, the impugned order passed by the Trial Court needs to be quashed and set aside.”

19. In the light of the aforesaid legal position, reverting to the facts of the case at hand, incontrovertibly, the District Inspector of Land Records had carried out the survey and measured the lands and submitted the report on 24<sup>th</sup> March 2021. The said report was assailed by the Plaintiffs initially before the Superintendent of Land Records and, thereafter, before the Deputy Director of Land Records. The said report, *prima facie*, indicated purported encroachment over the property of the Defendants and that was the reason for the Plaintiffs to assail the said

report, by filing Appeals under the MLRC, 1966. Both the appeals were dismissed.

**20.** In the aforesaid context, it is interesting to note the nature of the directions issued by the trial Court in the impugned order. The trial Court directed the District Superintendent of Land Records to carry out a joint measurement of the properties and to ascertain whether the Plaintiffs have made any encroachment over the property of the Defendants.

**21.** The aforesaid direction, in a suit instituted by the Plaintiffs for injunction simplicitor, clearly partook the character of the Court lending its assistance for the collection of evidence. It is not the case that the cadastral surveyors, who carried out the earlier measurements and submitted maps, were examined by the parties before the Court and, thereafter, the Court considered it necessary to appoint a fresh Commission to elucidate the matter in controversy. On the contrary, the exercise was actuated by a design to pre-empt the action on the part of the Defendants on the basis of the earlier report of the survey and measurement, the challenge to which at the instance of the Plaintiffs failed. Furthermore, the suit was for injunction simplicitor and no declaration was sought in regard to the earlier measurement report and map. *Prima facie*, it appeared that the earlier measurement and map were sought to be obliterated by having a fresh survey and

measurement in the suit, though legality and validity thereof was not under challenge therein.

**22.** Reliance placed by Mr. Gole on the decision in the case of **Vachhalabai W/o Kundlik Gavane (Supra)** is of no assistance to the Respondents as, in that case, the suit was instituted for removal of encroachment and recovery of possession and there were two conflicting reports and, thus, this Court considered it appropriate to direct the appointment of the Court Commissioner to have the joint measurement of the subject land.

**23.** The conspectus of the aforesaid consideration is that the learned Civil Judge did not exercise the discretion to appoint the Court Commissioner in consonance with the settled principles of law. The Court Commissioner was appointed in a suit instituted by the Plaintiffs for injunction simplicitor, to ascertain as to whether the Plaintiffs had committed encroachment over the property of the Defendants. The learned Civil Judge thus completely misdirected himself in appointing the Court Commissioner for the purpose of ascertainment of the encroachment by the Plaintiffs over the property of the Defendants, when the reports of earlier survey and measurement were already on record and had attained finality.

**24.** For the foregoing reasons, the Petition deserves to be allowed.

**25.** Hence, the following order:

**: O R D E R :**

- (i) The Petition stands allowed.
  - (ii) The impugned order dated 5<sup>th</sup> April 2025 stands quashed and set aside.
  - (iii) The Application preferred by the Plaintiffs for the appointment of the Court Commissioner stands rejected.
  - (iv) It is clarified that the observations hereinabove were confined to test the legality, propriety and correctness of the impugned order, and, this Court may not be understood to have expressed any opinion on the merits of the case.
  - (v) Rule made absolute in the aforesaid terms.
  - (vi) In view of the disposal of the Petition, the Interim Application also stands disposed.
- No costs.

**[N. J. JAMADAR, J.]**