

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.384 OF 2016**

Smt. Saubai Hari Patil, since
deceased, through her legal
heirs Bharati Maruti Patil and
Ors.

Petitioners

Vs

Shri Nivas Narayan Patil and
Ors.

.. Respondents

Mr. Kalpesh Patil i/b P.D.Dalvi, Advocate for Petitioners.

CORAM : R.G.KETKAR,J.
DATE : 17/03/2016

PC:

1. Not on Board. At the request of Mr.Patil, taken up in production board. Heard Mr. Kalpesh Patil, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the Judgment and order dated 4.11.2015 passed by the learned 5th Jt. Civil Judge, Jr. Dn., Kolhapur below Exhibit 112 in Regular Civil Suit No.123 of 2012. By that order, the learned Judge rejected the application filed by the petitioners, hereinafter referred to as 'plaintiffs', under Order XXVI, Rule 9 of C.P.C. for appointment of Court Commissioner.
3. The plaintiffs have instituted suit for declaration that they are owners and in possession of the suit property and for perpetual injunction restraining the defendants from causing construction to their possession. During the pendency of the suit,

the plaintiffs took out application Exh.112 for appointment of Court Commissioner. The learned trial Judge rejected the application on the ground that suit is not raising boundary dispute in respect of immovable property. Suit is for declaration of ownership and for perpetual injunction. Order of appointment of Court Commissioner would amount to collection of evidence and for such purpose the Court Commissioner cannot be appointed. That apart, the learned trial Judge also observed that the application is filed at a belated stage when the evidence was closed and the matter was fixed for arguments. In view thereof, I do not find that the learned trial Judge has committed any error in rejecting the application. Hence, Petition fails and the same is dismissed.

4. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C

(R.G.KETKAR, J.)