

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

WRIT PETITION NO. 11390 OF 2016

1. Dnyandeo Vithal Salke .. Petitioners
Age. 60 years, Occ. Agri.,
R/o. Bhandare Mala, At post Jawala,
Taluka Parner, Dist. Ahmednagar.
2. Prabhakar Rambhau Raskar
Age. 55 years, Occ. Agri.,
R/o. Malwadi Mala, Jawala,
Taluka parner, Dist. Ahmednagar.
3. Madhukar Bhikaji Dighe
Age. 50 years, Occ. Agri.,
R/o. Ghodoba Fata, At Post Jawala,
Taluka Parner, District Ahmednagar.

Versus

Dagdu Kadar Inamdar .. Respondent
Age. 80 years, Occ. Nil,
R/o. Opp. S.T. Bus Stand,
Jawala, Taluka Parner,
District Ahmednagar.

Mr.Amol S. Sawant, Advocate for the petitioners.
Mr.V.P. Latange, Advocate for the respondent.

CORAM : S.B. SHUKRE, J.
DATED : 13.02.2017

ORAL JUDGMENT :-

1. Heard. Rule. Rule made returnable forthwith and heard finally by consent.

2. Admittedly, the suit has been filed for injunction simplicitor and there is no prayer for removal of encroachment. Application (Exh.5) seeking temporary injunction against the petitioners-original defendants filed by respondent-original plaintiff was rejected on 29.09.2016 on the ground that the original plaintiff could not establish prima facie case in his favour and he could not prima facie show which property was in his possession. When the suit has been filed for injunction simplicitor, I do not understand as to how the Civil Judge, Junior Division could have passed order directing appointment of T.I.L.R., with direction to submit his factual report as regards possession and user of the land. This amounts to collection of evidence which is not the object of the provisions regarding appointment of the Court Commissioner, as contained in Order 26 Rule 9 of the Civil Procedure Code. The learned Single Judge (As the Hon'ble Judge then) in the case of Sanjay Namdeo Khandare Vs. Sahebrao Kachru Khandare & Ors., 2001 (2) Mh.L.J.959 has also taken a view that appointing the Court Commissioner to submit his report regarding actual possession of the suit field would amount to making effort to collect evidence regarding possession and the same is not permissible in the law.

3. It may be true that the petitioners have conceded for appointment of the Court Commissioner, but, such concession firstly was only regarding taking of measurement and not for submitting report to ascertain actual possession and secondly any concession given by the party would be subject to provision of law and if it goes against the provision of law, such concession would be insignificant and will have to be ignored. This principle has been ignored by the learned Trial Court.

4. In this view of the matter, I find substance in this petition and it deserves to be allowed.

5. The writ petition is allowed with costs. The impugned order is quashed and set aside. The application seeking appointment of Court Commissioner is rejected. Rule made absolute accordingly.

[S.B. SHUKRE, J.]