

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6264 OF 2013

Shri Dattatray Tukaram Chavan & anr. ... Petitioners

Vs.

Shri Pundalik Anada Mane & Ors. ... Respondents

Mr.S.D. Patil for Petitioners

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: APRIL 5, 2017**

P.C. :

1. In this petition, though notices are served on the respondents, none appears for them.
2. This petition is directed against the order dated 5.2.2013 passed by the learned Civil Judge, Junior Division, Ajra, on an application below exhibit 21 in R.C.S. No.85 of 2012 while rejecting the application under Order 26 Rule 9 of the Civil Procedure Code, filed by the original plaintiffs/petitioners. The plaintiff filed the suit for permanent injunction against the defendant that he should not use a road/access from his land.

3. It is the case of the plaintiff/petitioner that the defendant has encroached on his land.

4. The learned Counsel for the petitioner has submitted that it is the case of the petitioner that the respondent has encroached upon his land and, therefore, that obstacle was removed and he is using the land of the plaintiff as a road. The learned Counsel further submitted that the application for appointment of Court Commissioner was preferred for the local investigation, which the trial Court ought to have granted. In support of his submissions, he relied on the judgment in the case of **Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade & Ors.**¹

5. Perused the impugned order passed by the learned Judge of the trial Court. Perused the judgment in the case of **Kolhapuri Bandu Lakade (supra)**. In the said case, a similar issue of the appointment of the Court Commissioner under Order 26 Rule 9 was under consideration. In the said case, the hon'ble Single Judge of this Court had dealt with previous laws laid down by the High Court and also placed reliance on the judgment of the **Haryana Waqf Board vs. Shanti Sarup & Ors.**² The issue in

1 2011 (3) Bom.C.R. 807

2 (2008) 8 SCC 671

Kolhapuri Bnadu Lakade (supra), was regarding construction standing on the suit land and about the measurement of the plot. In the case of **Haryana Waqf Board (supra)**, there was a question of demarcation of the disputed lands. However, in the present case, there is no such issue of measurement or demarcation of the land but on perusal of the averments in the plaint and the prayers made therein, a short issue of access to the defendant through the land of the petitioner is involved.

6. In the circumstances, the impugned order passed by the learned trial Judge rejecting the appointment of Court Commissioner cannot be faulted with.

7. Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)