

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

WRIT PETITION NO. 5925 OF 2010

Hanamant Balu Pawar & Ors.	Petitioners
V/s.	
Appaso Laxman Pawar & Ors.	Respondents

Mr. Vijay Killedar for the petitioners.
Mr. Rushikesh C. Barge for R.Nos.1, 3 and 4.
Mr. Ravi Kadam for R.No.7.

**CORAM : MRS. MRIDULA BHATKAR, J.
DATED : 13TH JUNE, 2018.**

P.C.:

. This petition is directed against the order dated 20th February, 2010 passed by the learned Civil Judge, Junior Division, Satara in Regular Civil Suit No. 412 of 2004 thereby rejecting the application filed for appointment of Court Commissioner under Order 26 Rule 9 of Code of Civil Procedure.

2. Mr. Vijay Killedar, learned counsel for the petitioners submits that the Trial Court has fixed the Regular Civil Suit now on 25th June, 2018 and it is stayed due to the order passed in this petition. He

submits that the defendants have encroached upon the land of the plaintiff and have made some construction. There is accumulation of the drainage water because of illegal construction and accordingly, the plaintiff has pleaded. However, the defendants have denied these facts and therefore, it is necessary to appoint the Court Commissioner to bring the facts of the encroachment on record. He further submits that the application was made under Order 26 Rule 9 of the Code of Civil Procedure and the learned Judge while rejecting application has mentioned that the application cannot be allowed in view of the Rule 1, 2, 3 and 4 of Order 26 of CPC and this finding is inconsistent with the legal provision and hence, the finding is perverse. The learned counsel for the respondents opposes the application and supports the order passed by the Trial Court.

3. The plaintiff has filed the suit for mandatory injunction, possession and perpetual injunction. In the said suit, it is necessary for the plaintiff to bring the evidence in respect of the boundaries of the suit property and the encroachment on record. This fact is to be proved through evidence and it cannot be proved through Court Commissioner and Court Commissioner cannot give any opinion in respect of the encroachment when he has no knowledge of the two

boundaries. The Court has readily rejected the said application. The application for the Court Commissioner is made under Order 26 Rule 9. However, it appears that the learned Judge has wrongly mentioned the rule. However, it cannot be said that the order passed by the learned Judge is perverse. Writ Petition stands dismissed. Trial Court to proceed with the matter.

(MRS. MRIDULA BHATKAR, J.)