

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12753 OF 2015**

Shri. Santosh Sakharam Patil & Ors. .. Petitioners
Versus
Mr. Gajanan Shankar Gharat & Anr. .. Respondents

Mr. Vijay V. Nene for petitioners.

**CORAM : K.K. TATED, J.
DATE : 20 FEBRUARY 2019.**

P.C:-

. Heard learned Counsel for the petitioners.

2. By this writ petition under Article 227 of the Constitution of India, petitioner/original plaintiff is challenging the order dated 24.08.2015 passed by 4th Joint Civil Judge, Senior Division, Bhiwandi rejecting their application below Exhibit-57 under Order 26 Rule 9 of Civil Procedure Code for appointment of Court Commissioner to carry out measurement of the suit property.

3. The learned Counsel for the petitioner submits that they filed the suit for injunction and declaration. In that suit, plaintiff preferred an application below Exhibit-5. That application was decided by 2nd Joint Civil Judge, Junior Division, Bhiwandi on 28.08.2003 restraining the defendant no.1 from creating any third party interest, and to sell or dispose the construction over the suit property till disposal of the suit.

4. Plaintiff preferred an application below Exhibit-57 in Regular Civil Suit No.621 of 2003 under Order 26 Rule 9 of Civil Procedure Code for appointment of Court Commissioner. That was rejected by the Court. Hence, present writ petition.

5. The learned Counsel for the petitioner submits that the Court below erred in coming to the conclusion that petitioner failed to make out any case for appointment of Court Commissioner. He submits that to find out exact encroachment on the suit property, it is necessary to appoint the expert person i.e. TILR. He submits that similar view is taken by the Bombay High Court in the matter of **Yeshwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar**¹. He submits that in that case, the High Court held that to find out exact encroachment on the suit property, it is necessary to appoint Court Commissioner. Hence, the impugned order is required to be set aside and the Court below be directed to appoint the Court Commissioner.

6. It is to be noted that, petitioner is original plaintiff who filed the suit for removal of encroachment. Being a plaintiff, he has also to stand on his own leg. He cannot take any support from any other agency like Court Commissioner. Not only that, in the present proceedings, earlier the application was filed by the plaintiff for same cause of action, that was rejected by the trial Court. Thereafter, again the plaintiff filed the present second application for appointment of Court Commissioner and same was also rejected by the trial Court by order dated 24.08.2015.

1 2010 (3) Mh. L.J. 956

7. Considering the fact that earlier order rejecting plaintiff's application for similar relief and same is in force, I do not find any reason to entertain the present writ petition.

8. Hence, writ petition stands rejected.

9. No order as to costs.

(K.K.TATED, J.)