

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

WRIT PETITION NO.8422 OF 2019

Krishna Waman Sawant

...Petitioner

Versus

Ganpati Waman Sawant since
deceased through legal heirs -
1A) Tanubai Ganpati Sawant and
Ors.

...Respondents

....

Mr. C.K. Bhangoji with Mr. B.V. Salunkhe i/b. Mr. H.D. Mulla for the
Petitioner.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 31st MARCH, 2021.

P.C.:-

The Petitioner herein has challenged the order dated 18/06/2019 whereby the learned Civil Judge, Junior Division, Mangalwedha has rejected the application filed under Order XXVI, Rule 9 of the Code of Civil Procedure.

2. Heard learned counsel for the Petitioner. I have perused the record. The Petitioner-Plaintiff has filed a suit alleging that ancestral property was originally partitioned between him and his brother i.e. Respondent -herein. It is stated that half portion of the property towards the eastern side was allotted to the Plaintiff and is in his

possession whereas the half portion of the property on western side was allotted to Defendant and they are in possession of the respective portions. The Petitioner has stated that there was mutual understanding between them that the Petitioner would be allowed to use 5 ft. passage, which is towards the eastern side of the house. The Petitioner has claimed that the Respondent has constructed a house on the said passage and has obstructed the passage admeasuring 5 ft., which served as a nexus. The Petitioner has filed an application for appointment of Commissioner to ascertain whether there was mutual understanding between the parties to leave 5 ft. wide passage. The Trial Court after considering the statements advanced by learned counsel for the respective parties has held that the Commissioner can be appointed under Order XXVI Rule 9 of CPC for elucidating any matter in dispute and not to gather any evidence on behalf of the parties.

3. A perusal of the application reveals that the Petitioner has sought to appoint the Commissioner mainly to ascertain whether there was a mutual understanding between the parties as regards usage of 5 ft. wide road. Suffice it to say that the Commissioner cannot be appointed for such purpose as it would amount to gathering evidence on behalf of the parties.

4. Under the circumstances, impugned order does not suffer from any infirmity or illegality. The Petition has no merits and is accordingly dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)