

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

WRIT PETITION NO. 12526 OF 2022

Smt. Kamlabai Atmaram Patil & Ors.	...Petitioners
Versus	
Shri. Kanchan Gajanan Patil & Ors.	...Respondents

Mr. Satyajeet Joshi and Mr. Nachiket H. Tarade, for the Petitioners.

CORAM : MADHAV J. JAMDAR, J.
DATED : 17th NOVEMBER 2022

P.C. :

1. Heard Mr. Satyajeet Joshi, learned counsel appearing for the Petitioners.
2. The challenge in this petition is to the order dated 16th July 2022 passed by the learned Joint Civil Judge, Junior Division Palghar below Exhibit 32 in Regular Civil Suit No.118 of 2021. By the impugned order, Court Commissioner has been appointed.
3. It is the contention of Mr. Joshi that as admittedly there is encroachment, Court Commissioner need not be appointed. He states that the suit is at the stage of Exhibit 5 application and therefore, this is not a proper stage to appoint the Court Commissioner.

4. In the judgment between ***Kashinath Chindhuji Shastri vs. Haribhau Nathuji Bawanthade***¹, it has been held that where there is dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same.

5. This Court in the judgment of ***Kolhapuri Bandu Lakade vs. Yallappa Chinappa Lakade***² on the basis of judgment of Supreme Court in the case of ***Haryana Waqf Board vs. Shanti Sarup & Ors.***³, held that in the case of demarcation of the disputed land, it is appropriate for the Court to direct the investigation by appointing a Local Commissioner as provided under Order XXVI Rule 9 of the CPC. In the said judgment it has been clarified that although the appointment of Court Commissioner in such a dispute would assist the Court in arriving at the just decision, it has been consistently observed that report of the Court Commissioner would not be conclusive. It was further held that merely because a Court Commissioner is appointed, it will not prejudice the interest of either of the

1 2004 (2) Mh. L.J. 722

2 2011 (3) Mh. L.J. 348

3 2008 (8) SCC 671

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parties. It has been held that if any of the parties is aggrieved by the report of the Court Commissioner, an opportunity would be available to that party to cross examine the Court Commissioner and to point out as to how his conclusions were not correct. It has further been observed that the party who was not aggrieved would also prove how his conclusions are correct.

6. The first submission of Mr. Joshi that as far as encroachment is concerned, the same is admitted position is not correct. In the plaint Respondents-Plaintiffs have stated in para 8 that Gajanan and Harishchandra about 60 years back divided the property and they are in possession of the same. However, in the counter claim, it is the contention of the Petitioner-Defendant that there is encroachment.

7. Second submission of Mr. Joshi that the Court Commissioner can be appointed at the time of trial but not at the time of hearing of Exhibit 5 application has no substance. There is nothing to indicate in Order XXVI Rule 9 to indicate that said power can be exercised only at the stage of trial. If at the stage of Exhibit 5 also if Court deems fit that actual

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situation on the site in question is to be brought on record, which will assist the Court in passing the order on Injunction Application bearing Exhibit 5, then there is no impediment in granting such order. However, it is needless to observe that before the report of the Court Commissioner also the Trial Court is free to take decision regarding interim order on the basis of material available on record. In view of this, no interference is called for in the impugned order dated 16th July 2022.

8. The Writ Petition is disposed of with no order as to costs.

[MADHAV J. JAMDAR, J.]