

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.1074 OF 2023**

SADASHIV WAMAN BAGAL
VERSUS
OMPRAKASH WAMAN BAGAL AND ANOTHER

...
Mr. S. G. Chincholkar, Advocate for the Petitioner.
...

**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 02nd FEBRUARY, 2023.**

PER COURT:-

1. Heard.
2. By this petition, the petitioner challenges the order dated 02.12.2022 rejecting the petitioner's application for appointment of Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure.
3. Petitioner is the original plaintiff, who instituted suit for perpetual injunction against respondent nos.1 and 2, who are his brothers. It is the case of the petitioner that the property bearing Gut No.264 was purchased in the name of defendant no.1 being the Karta of the Joint Hindu Family and in the year 1996 there was a partition amongst the brothers, whereafter each brother was occupying portion admeasuring 22 X 66 sq. feet. It is the case of the petitioner that respondent no.2 has constructed a building on his portion of the property and on the East side the petitioner has constructed a cattle shed, which is a semi permanent construction and restraining orders were sought as respondent no.2 is interfering in his possession.

4. The application for appointment of Court Commissioner was preferred during the pendency of the proceeding for the purpose of inspecting the suit property and ascertaining the position of the structures.

5. Learned counsel for the petitioner relies upon the decision of this Court in case of ***Kalyan Santaram Kawade and Others Vs. Khanderao alias Khandu Ganpati Kawade and Others, reported in 2014 DGLS (Bom.) 186.***

6. Considered the submission of learned counsel for the petitioner.

7. It is the case of the petitioner that the property was divided and each brother is in possession of their separate portion. In the suit being filed for relief for perpetual injunction, it is for the petitioner to prove the possession over his respective portion and for that purpose the appointment of the Court Commissioner is not warranted and would amount to collection of evidence. Learned counsel for the petitioner has also placed reliance on the photograph, which is at page no.32 of the petition, wherein the position of the structure is demonstrated. The clear position of the suit structure can be demonstrated by way of photograph and there is no cause for interference with the impugned order rejecting the petitioner's application for appointment of the Court Commissioner.

8. The decision in the case of the ***Kalyan Santaram Kawade and Others*** (supra) does not assist the case of the petitioner for the reason that, in that case there was a dispute about the boundaries and the adjacent property and it is settled

position that in event of dispute as regards the encroachment or boundary dispute an appointment of the Court Commissioner is necessitated.

9. Writ Petition being devoid of merits stands dismissed.

10. Liberty to the petitioner to file an affidavit reiterating the prayer of appointment of the Court Commissioner after the evidence is laid, which application will be considered by the Trial Court on its own merits and in accordance with law.

(SHARMILA U. DESHMUKH)
JUDGE