

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13984 OF 2022

Bhimrao Namdeo Thorat & Ors.

...Petitioners

Versus

Anil Bhimrao Thorat & Ors.

...Respondents

Mr. Pratik Rahade i/b Kalpesh Patil for the petitioners
Mr. Nikhil N. Pawar for the respondents.

Coram : Sharmila U. Deshmukh, J.

Date : July 10, 2023.

P. C. :

1. The challenge in the petition is to the order of appointment of Court commissioner.
2. Learned counsel appearing for the petitioners points out that the suit was instituted simpliciter for injunction. The Exhibit-5 application seeking restraining order against the defendant-petitioners came to be rejected and thereafter the present application for appointment of Court Commissioner is filed. He has invited the attention of this Court to the prayers made in the application for appointment of Court Commissioner viz fixation of boundaries, demarcation, location at site and the open space etc. and

would submit that the prayer itself indicates that the same is for collection of evidence.

3. *Per contra*, learned counsel appearing for the respondent has invited the attention of this Court in paragraph No. 8 and 9 of the plaint in which the specific averment is made that the defendants are in the process of carrying out unauthorized construction in the suit property 1D. He would further submit that the construction sought to be carried out by the defendants is in open space and the construction itself is illegal.

4. Considered the submissions.

5. It is well settled that application under Order 26, Rule 9 of CPC is required to be permitted in case of boundary dispute and encroachment and for the purpose of elucidating the matter in dispute. In the present case, as regards the open space in the suit property 1D, the case of the plaintiffs is that, unauthorized construction is being carrying out. It is further case of the plaintiff that the defendants do not have any right in the property and that the same was being used by the plaintiffs.

6. Considering the facts of the case wherein, there is no case of encroachment or the boundary dispute, it cannot be said that the

appointment of the Court Commissioner is necessitated. The plaintiff claim a right of user over the open space and has come with the case that the construction which has been carried out in the open space i.e. suit property 1D is unauthorized construction. It will be necessary for the plaintiffs to first lead evidence in that regard to establish prima facie possession over the open space. At this stage, prior to the evidence being led by the parties, the appointment of court Commissioner will amount the collection of evidence. The Trial Court, in my opinion, erred in construing the present case as a case of encroachment. The Trial Court has misread the averment made in the plaint and has thereby observed that the order to get the exact measurement of encroachment, the Court Commissioner is required to be appointed.

7. Considering the pleadings in the plaint, the plaintiff will have to first lead of evidence to establish his right of user over the open space and to establish that there is an unauthorized construction which has been carried out in the said open space. At this stage prior to the commencement of the evidence, the appointment of Court Commissioner is not necessitated. The impugned order permitting the appointment of Court Commissioner at this stage is hereby quashed and set aside.

8. Liberty to the plaintiff, to renew the request for appointment of Court Commissioner after the evidence has been laid by the parties.
9. Writ Petition stand Allowed.

[Sharmila U. Deshmukh, J.]