

SA Pathan

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

WRIT PETITION NO.9059 OF 2023

Kailash Damodar Rath

... Petitioner

V/s.

Rita Sanjay Amin & Ors

... Respondents

Mr. Narayan Bubna, for petitioner.

Mr. Manoj Harit a/w Ms. Mallika Kochetta i/by Manoj
Harit & Co., for respondent Nos.1 & 2.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 3, 2023

PC.:

1. By the impugned order dated 2 May 2023, the Trial Court has rejected an application under Order 26, Rule 9 of the Code of Civil Procedure, 1908 in a suit for injunction filed by the petitioner restraining defendant from disturbing plaintiffs' possession over the suit property.
2. It appears that the petitioner had filed an application under Order 26, Rule 9 apprehending encroachment at the hands of defendant.
3. On perusal of the averments in the plaint and prayer, it appears that the suit as on the date of filing of application for appointment of Court Commissioner is simplicitor suit for injunction restraining defendant from creating third party rights. It

is well settled that the appointment of Court Commissioner cannot be made to collect evidence. The appointment of Taluka Inspector of Land Records (TILR)/ DSLR in a suit for encroachment can be allowed; however, in the facts of the case, the plaint reflects relief of simplicitor suit for injunction. Therefore, in such a suit, the reason in the impugned order that in case the plaintiff seeks relief of encroachment, he would be entitled to file application for appointment of Court Commissioner appears to be correct proposition of law. Hence, no interference under Article 227 of the Constitution of India is called for.

4. It is made clear that, it will be always open for the petitioner to file appropriate application for appointment of Court Commissioner in case suit is permitted to be converted in suit for removal of encroachment.

(AMIT BORKAR, J.)