

Shabnoor

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

WRIT PETITION NO.2463 OF 2024

Alka Anil Pal & Anr.

... Petitioners

V/s.

Sudhir Gurudas Kulkarni & Anr.

... Respondents

Mr. Ajinkya Jaibhave for petitioners.

Ms. Simantini Mohite a/w Ms. Viveka Truman i/by
Lexicon Law Partners for respondents.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 2, 2024

PC.:

1. The petitioners – original plaintiffs who are challenging an order passed by the Trial Court rejecting the application for appointment of the Court Commissioner under Order 39, Rule 7 of the Code of Civil Procedure, 1908 (CPC). The petitioners filed Special Civil Suit No.231 of 2021 seeking relief of declaration and possession. The petitioners sought possession of property described in Schedule (A) which is a road which according to the petitioners, is legally entitled to enjoy. The petitioners further sought injunction of restraining the defendants from disturbing plaintiffs' possession over the said road.

2. In such a suit, the petitioners filed an application under Order 39, Rule 7 of CPC. The Trial Court by the impugned order

rejected the application for appointment of the Court Commissioner. The Trial Court rejected the application observing that such power cannot be exercised for collection of evidence.

3. Moreover, it is well settled that an application under the provisions of Order 26, Rule 9 or Order 39, Rule 7 of CPC can be allowed, in case where relief sought is in respect of removal of encroachment or the dispute is in relation to identity of the property which cannot be ascertained by way of oral evidence. In the facts and circumstances of the case, the relief sought, and the issues involved in the suit can be adjudicated based on oral and documentary evidence produced by the parties. Hence, in such a case, appointment of the Court Commissioner would amount of collection of evidence which is held to be not permissible. Therefore, no interference in the impugned order is called for.

4. The writ petition stands dismissed. No costs.

(AMIT BORKAR, J.)