



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.2451 OF 2025**

1. Hanmant s/o Govind Mule
Age: 56 years, Occ. Agriculture.

2. Narayan s/o Govind Mule,
Age: 52 years, Occ. Agriculture,

Both R/o. Patoda,
Tq. Ambajogai, Dist. Beed.

..Petitioners
(Orig. Defendants)

Versus

1. Tushar Prasanna Vaidya,
Age: 26 years, Occ. Education,

2. Manisha Prasanna Vaidya,
Age: 46 years, Occ. Household,

Both R/o. Behind Hotel Vishwamitra
Ramnagar, AUSA Road, Latur,
Dist. Latur.

..Respondents
(Orig. Plaintiff No.1 & 2)

...

Mr. A. A. Khande h/f Mr. S. S. Bhise, Advocate for Petitioners.
Mr. P. B. Vaiday, Advocate for Respondent Nos.1 and 2.

...

**CORAM : S. G. CHAPALGAONKAR, J.
DATED : 16th JUNE, 2025.**

JUDGMENT:-

1. Rule. Rule made returnable forthwith. With consent of the parties, matter is taken up for final hearing at admission stage.

2. The petitioners impugn order dated 22.11.2023, passed below Exhibit-65, by Civil Judge Junior Division, Ambajogai in Regular Civil Suit No.173/2013, thereby appointing Court Commissioner for

measurement of land Gut No.302 situated at Patoda, Taluka Ambajogai, Dist. Beed. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

3. The respondents/plaintiffs instituted Regular Civil Suit No.173/2013 before Civil Judge Junior Division at Ambajogai seeking relief of perpetual injunction. According to plaintiffs, one Bapusaheb Balasaheb Deshmukh was owner of land Gut Nos.299 and 302 situated at village Patoda. He sold land Gut No.302 under registered sale deed in favour of plaintiffs. Eventually, mutation entry has been certified. The plaintiffs were put into possession. The defendants, who are adjacent land holders from Southern side started obstruction to peaceful possession of plaintiffs and attempting to remove boundary marks. The plaintiffs requested them to jointly measure land and resolve dispute. However, defendants refused proposal. According to plaintiffs, on 19.05.2013 defendants using muscle power brought Tractor with intention to plough down bandh between lands of plaintiffs and defendants. The plaintiffs approached Police Station Ambajogai and lastly filed present suit. The defendants constantly threatening plaintiffs. Hence, they sought relief of perpetual injunction against defendants from interfering in peaceful possession over suit land.

4. The defendants filed written statement and refuted plaintiffs' claim contending that false, baseless and unfounded suit has been

filed. The plaintiffs are trying to grab 11R land of defendants based on incorrect mutation entry and illegal sale deeds.

5. The plaintiffs filed application below Exhibit-34 seeking appointment of Court Commissioner to measure land and fix boundaries. The said application was rejected vide order dated 04.04.2022 observing that application is an attempt to collect evidence. Similarly, there is nothing to indicate nature of encroachment or its particulars. The plaintiffs again filed second application below Exhibit-65 for similar relief contending that defendants have encroached upon their land. Trial Court observed that there is dispute in respect of encroachment on suit property as well as boundary marks and, therefore, appointment of Court Commissioner is necessary. Consequently, ordered TILR Ambajogai to act as Court Commissioner and measure land of plaintiffs i.e. Gut No.302 situated at Patoda and ascertain encroachment, if any, on the area owned and possessed by plaintiffs and fix boundaries and submit report within two months from the date of deposit of amount.

6. Mr. Khande, learned Advocate appearing for petitioners/defendants submits that Trial court had provisionally rejected prayer for appointment of Court Commissioner made by plaintiffs vide application below Exhibit-34 observing that particulars of encroachment are not provided and Court

Commissioner cannot be appointed to collect the evidence, particularly when suit is simplicitor for injunction. However, ignoring previous order, subsequent application filed below Exhibit-65 by plaintiffs for similar relief has been entertained and Court Commissioner has been appointed. According to Mr. Khande, there is no dispute as to the boundaries as observed by Trial Court. The appointment of Court Commissioner is unnecessary. The Trial Court exceeded jurisdiction under Order XXVI Rule 9 of Code of Civil Procedure.

7. Per contra, Mr. Vaidya, learned Advocate appearing for respondent nos.1 and 2 submits that defendants have encroached upon plaintiffs' land by disturbing band. Therefore, to resolve controversy between parties, appointment of Court Commissioner was necessary. In support of his contentions he relies upon following judgment:

1. ***Pandit Vithal Landage Vs. Vishnu Govind Pawar and Anr (Writ Petition No.5158/2024 dated 30.04.2025).***
2. ***Govardhan s/o. Narayan Gaikwad Vs. M/s. Sai Baba Estate (Writ Petition No.7594/2020 dated 21.01.2022).***
3. ***Sudhakar S/o. Baburao Kulkarni Vs. Gorabai w/o Thansing Marag (Second Appeal No.482/2018 dated 22.04.2019).***

8. Having considered submissions advanced by learned Advocates appearing for respective parties, it can be observed that plaintiffs have instituted suit simplicitor for perpetual injunction asserting that defendants are attempting to encroach upon their land and threatened to do so on 19.05.2013, when they come with Tractor. The suit is pending since 2013. It is evident that previously petitioners had filed application below Exhibit-34 for similar relief and same has been rejected. However, subsequent application date 20.06.2023 filed below Exhibit-65 has been entertained by Trial Court and impugned order of appointment of Court Commissioner has been passed.

9. The learned Trial Court observed in paragraph no.8 of impugned order that petitioners are owners of land Gut No.302 admeasuring 1H 73R and from the pleadings of parties, it can be ascertained that there is dispute in respect of encroachment on suit property and boundary marks and its demarcation and for the purpose of proper identification and exact portion of encroachment, Court Commissioner needs to be appointed for local inspection.

10. It appears that observation of Trial court are contrary to the pleadings in plaint. The plaintiffs have simply asserted that defendants are trying to encroach upon their land and made such an attempt on 19.05.2013, which is date of cause of action. There

are no specific averments as to actual encroachment made by defendants or disturbance of boundaries. The plaintiffs have restricted relief for grant of decree of perpetual injunction against defendants. No prayer is incorporated for removal of encroachment. No particulars of encroachment finds place in pleadings of plaintiffs. It can be observed that without specific pleadings in plaint, averments as to encroachment and disturbance of boundaries, raised in application for appointment of Court Commissioner cannot be considered. Pertinently, specifications of encroachment are absent even in application.

11. It is trite that, in suit simplicitor for perpetual injunction, it is for plaintiffs to establish their possession over suit property. In such cases, there is no necessity to appoint Court Commissioner. The appointment of Court Commissioner is advisable only when there are clear stipulations in pleadings as to the encroachment at the hands of defendants and claim is raised for recovery of possession of encroached portion. In such cases, to support contentions, report of Cadastral Surveyor or expert from Land Records is necessary. In present case, plaintiffs have not specifically averred about encroachment made by defendants in plaint nor given specifications thereof. In that view of matter, order impugned cannot be sustained.

12. However, it is made clear that, in case plaintiffs amend plaint seeking relief of possession or removal of encroachment, specifying area thereof, he would be at liberty to make fresh application for appointment of Court Commissioner and in that case, Trial Court would be at liberty to consider such prayer without impeded by observations made hereinabove. In result, following order is passed:

ORDER

- a. Writ Petition is allowed in terms of prayer Clause (C).
- b. Rule is made absolute in above terms.

(S. G. CHAPALGAONKAR)
JUDGE