

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

5 WRIT PETITION NO. 7144 OF 2025

Khairunnisa Ali Patel Sayyed And Others
VERSUS
Khandu Pandharinath Devkate And Others

...
Advocate for Petitioners : Mr. Shaikh Kayyum Najir

CORAM : S. G. CHAPALGAONKAR, J.

Dated : June 19, 2025

PER COURT :-

1. The order dated 1.3.2025 passed below exhibit-23 in RCS No.820 of 2022 by the Civil Judge J.D. Udgir is subject matter of challenge in this writ petition.

2. The petitioners are original plaintiffs. They instituted the suit seeking the decree of removal of encroachment and perpetual injunction in respect of the land survey no.86/1, 86/2, 86/3 and 86/4 to the extent of 3 acres. It is contention of plaintiffs that their father was owner of land survey no.86/1 to the extent of 10 acres. Their father executed sale-deed in favour of different persons including defendant nos.1 and 2. However, defendants made encroachment on 3 acres of land which was within ownership of plaintiffs father.

3. Defendants refuted plaintiffs claim and relied upon mutation record to demonstrate that plaintiffs or their father were not owner of the suit land. In this background, plaintiffs filed an application under the provisions of Order 26

Rule 9 of the Civil Procedure Code seeking appointment of the Commissioner and measure the land alleged to have been encroached by the defendants. The Trial Court, after considering rival contentions and mandate of provisions contained under Order 26 Rule 9 observed that 7/12 extract placed on record in relation to gat no.86/1, 86/2, 86/3 and 86/4 nowhere shows name of plaintiffs as owner. Position as to the mutation record appears to be consistent since 1974 onwards. On prima facie consideration of material, Trial Court observed that plaintiffs could not establish their possession over suit property. In such a situation, this is not a dispute of encroachment, as claimed. In that view of the matter, learned Trial Court refused to exercise jurisdiction under provisions of Order 26 for appointment of Court Commissioner, as prayed. On consideration of reasoning adopted by Trial Court and conspectus of plaintiffs claim, it can be observed that this is not a case where issue of encroachment is involved. In fact, prima facie record indicates that plaintiffs were not in possession of the suit property.

4. In that view of the matter, there is no justification to interfere in the impugned order. In result, writ petition stands **dismissed**. No costs.

(S. G. CHAPALGAONKAR, J.)

...

aaa-