

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8104 OF 2024

1. Shirish Dhanyakumar Bhumkar,
Aged about 71 Years,
Occupation: Doctor,
R/o. Near Vidhya Mandir School,
Vairag, Tal. Barshi, Dist. Solapur.
 2. Anita Rajendra Ghodake,
Aged about 53 Years,
Occupation: Housewife,
Through power of attorney holder,
Rajendra Shivappa Ghodake,
Age about 59 Years,
Occupation: Agriculturist,
R/o. Bhusar Galli, Vairag,
Tal. Barshi, District.: Solapur.Petitioners
- Vs.
1. The State of Maharashtra,
Through Collector, Solapur.
 2. Chief Executive Officer,
Zilla Parishad, Solapur.
 3. Chief Executive Engineer,
Public Work Department No.2,
Zilla Parishad Solapur.
 4. Tahsildar,
Tahsil Office, Barshi,
 5. Dy. Engineer,
Public Works Department,
Sub-Division Barshi.
 6. Village Development Officer,
Vairag Gampanchayat, Vairag,
(Now "Nagar Panchayat, Vairag")

7. Vikas Suryakant Magar,
Age about 42 years,
Occupation: Business,
R/o. Sanjay Nagar, Vairag,
Tal. Barshi, District: Solapur.
8. Shankar Kashinath Chavan,
Age about 37 years,
Occupation: Business,
R/o. Jangale Galli, Vairag,
Tal. Barshi, District: Solapur.
9. Anita Vikas Magar,
Age about 38 Years,
Occupation: Housewife,
R/o. Sanjay Nagar, Vairag,
Tal. Barshi, District: Solapur.

.....Respondents

Mr. Sharad Bhosale with Mr. Amar Dhumal, Mr. Saiprasad Patil & Ms. Sujata Lohar, for the Petitioners.

Mr. Sanjay D. Rayrikar, AGP, for the Respondent Nos.1,4 & 5-State.

Mr. Balaji P. Shinde, i/b. Mr. Hrushikesh Khupgare, for the Respondent No.6.

Mr. Vijay Garad, for the Respondent Nos.7 to 9.

CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON: 1st OCTOBER 2025

PRONOUNCED ON : 7th OCTOBER 2025

JUDGMENT :-

1. Present Writ Petition takes exception to order dated 16th March 2024 passed by Civil Judge, Senior Division, Barshi below Exhibit 79 in Regular Civil Suit No.17 of 2020, by which application filed by plaintiffs seeking appointment of Court Commissioner has been declined.

2. The Petitioners are original plaintiffs in Regular Civil Suit No.17 of 2020 pending before Civil Judge, Senior Division at Barshi, District-Solapur. Plaintiffs filed suit contending that they are owners of plots, which are forming part of Gat No.383/1, more particularly described in plaint paragraph No.1. According to plaintiffs, towards northern side of Plot No.1B, there is open space and thereafter Vairag-Madha road passes. According to plaintiffs, defendant Nos.7 to 9, in collusion with each other, caused encroachment on northern side of plot of plaintiffs, particularly in open space abutting to Vairag-Madha road. Plaintiffs' access way and enjoyment of open space is seriously prejudiced because of illegal act of defendants. Defendant Nos.1 to 6, who are competent authorities who are responsible to prevent encroachment and illegal act of defendant Nos.7 to 9, are indirectly supporting them. Therefore, plaintiffs sought declaration that defendant Nos.7 to 9 are unconcerned with plot of plaintiffs, open space left in Gat No.381/1 and adjacent road. Plaintiffs have further prayed direction for removal of encroachment and perpetual injunction against defendants.

3. Plaintiffs filed application below Exhibit 79 in pending suit seeking appointment of Superintendent of Land Records, Barshi as

Court Commissioner to report as to existence of Vairag-Madha road and open space on southern side of Gat No.388 and encroachment made thereon, so also for fixation of boundaries of plots, open space as well as Vairag-Madha road.

4. Defendants opposed application contending that it is for the plaintiffs to prove existence of open space and road. According to defendants, lands Gat No.383/1 and 388 are not adjacent to each other. There is no open space as claimed by plaintiffs.

5. Learned trial Court declined to entertain plaintiffs' application for appointment of Court Commissioner on the ground that plaintiffs can apply to Competent Authority for fixing boundaries and prove his case. It is beyond the jurisdiction of Court to appoint Court Commissioner to find out four boundaries of Gat No.388 or existence of road as claimed. According to trial Court, it is plaintiffs' job to prove if defendants have made encroachment, as such Court Commissioner cannot be appointed for collection of evidence.

6. Learned Advocate appearing for Petitioners would submit that where there is a dispute as to boundaries, it is always advisable to get the assistance of Court Commissioner for purpose of resolving

controversy in suit. In present case, apparently, there is dispute as to encroachment and boundaries, hence this was a fit case to appoint Court Commissioner.

7. Per contra, learned Advocate appearing for Respondents vehemently opposed the petition contending that it is not a case where plaintiffs and defendant Nos.7 to 9 are adjoining plot holders or there is a dispute as to boundaries. Plaintiffs can prove their case on the basis of existing land record. The trial Court has rightly refused to entertain the application.

8. Having considered submissions advanced by learned Advocates appearing for respective parties and on perusal of record tendered into service before this Court, it can be observed that plaintiffs owned three plots within boundaries of Gat No.383/1.

9. It is specific case of plaintiffs that plot described in plaint clause No.1 is situated on northern side of Vairag-Madha old road. The portion of old Vairag-Madha road have been merged in Vairag-Madha State Highway. Plaintiffs further contend that open space was left in Gat No.383/1, while drawing the plot, however defendant Nos.7 to 9

are raising constructions over northern side part of plaintiffs' plot in open space as well as the part of Vairag-Madha State Highway. It is further case of plaintiffs that aforesaid obstruction is creating hurdle in use of his plot.

10. Apparently, defendant Nos.7 to 9 rests their case on sale deed dated 25th August 2020. According to them, open space was never in existence as claimed by plaintiffs or construction raised by them is not part of so called open space or old Vairag Madha road.

11. Learned Advocate appearing for plaintiffs invited attention of this Court to Gat Map of Mouje Vairag @ Pangaon, Tal. Barshi and endeavours to contend that there was old road in between Gat No.388 and 383. *Prima facie*, existence of such road can be seen from the Gat Map. Apart from that, toch map shows position of Gat Nos.383, 387 and 388 and existence of old road. Plaintiffs have placed on record site plan of non-agricultural land in Gat No.383. *Prima facie* in between road and the plot of the plaintiffs, some open space is shown. However, said map is not authenticated or does not bear seal and signature of Competent Authority. However, looking to the controversy involved in the case, when the plaintiffs are

ascertaining existence of open space and old road and encroachment of the defendant Nos.7 to 9 in part of open space and road, creating hurdle to plaintiffs' access to road, this would be the case where issue as to encroachment and fixation of boundaries would arise. It is trite, whenever there is such a dispute, trial Court has to exercise powers under Order 26 Rule 9 of Code of Civil Procedure and endeavour to bring on record authenticate map of joint measurement so as to ascertain position on spot. After getting boundaries fixed from the Competent Authorities, Court can easily reach to a definite conclusion on the issue involved.

12. In that view of the matter, this Court finds that trial Court failed to exercise his jurisdiction in judicious manner in terms of Order 26 Rule 9 of CPC and appoint Court Commissioner. In result, Writ Petition succeeds and is allowed in terms of prayer clause (b).

13. The trial Court shall pass further orders regarding deposit of charges of measurement by plaintiffs and fixing programme of Court Commissioner, etc.

(S. G. CHAPALGAONKAR, J.)