

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

WRIT PETITION NO. 789 OF 2025

Suresh Shamrao Bhale and anr.

...Petitioners

Versus

Vijay Krushnaji Walke

...Respondent

Mr. Sandeep Pathak, for the Petitioners.

None for the Respondent.

CORAM: N. J. JAMADAR, J.

DATED: 22nd JANUARY, 2025

ORDER:-

1. Heard the learned Counsel for the petitioners.
2. This petition assails the legality, propriety and correctness of an order passed by the learned Civil Judge on 24th September, 2024 in Special Civil Suit No.214 of 2021, whereby an application for appointment of Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 ("the Code") came to be rejected. The petitioners have instituted the suit for perpetual injunction to restrain the defendant from causing obstruction to the peaceful possession and enjoyment of the petitioners over the suit property and for compensation. The plaintiffs had filed an application for temporary injunction. By an order dated 15th October, 2022 the said application came to be rejected. The plaintiffs thereafter filed an application seeking

appointment of the Court Commissioner to find out the correct boundaries of the land in dispute as the description of the property was disputed by the defendants. By the impugned order, the learned Judge was persuaded to reject the application as it was in the nature of an exercise to collect the evidence through Court machinery.

3. Mr. Pathak, the learned Counsel for the petitioners, submitted that the learned Civil Judge did not properly appreciate the case of the plaintiffs in the light of the resistance put-forth by the defendant in the written statement. The defendant has disputed the correctness of the description of the suit property and the boundaries thereof. Therefore, it becomes necessary to appoint a Court Commissioner to have a clear position as to the situation at site. Mr. Pathak placed reliance on the judgment of the Supreme Court in the case of *Haryana Waqf Board vs. Shanti Sarup and others*¹ and the judgments of this Court in the cases of *Bento Antonio Gomes alias Antonio Bento Gomes vs. Rosario Salvador Carneiro and others*² and *Malhar s/o Ganpat Bokerphod and others vs. Shivaji s/o Vishwnath Pawar*³.

1 (2008) 8 Supreme Court Cases 671.

2 2014(4) Mh.L.J. 366.

3 2014(4) Mh.L.J. 237.

4. I am afraid to accede to the submissions of Mr. Pathak. The legal position is absolutely clear. In a case where there is a dispute about encroachment over the suit property, the appointment of the Court Commissioner to have demarcation of the land and ascertain encroachment, is imperative. However, where there is no allegation of encroachment and the plaintiff approaches the Court with a plain and simple case of obstruction to possession, and the consequent relief of injunction, the appointment of the Court Commissioner would not be of any assistance in elucidating the matter in dispute.

5. In the case at hand, the plaintiffs have simply asserted that the defendant has tried to disturb the peaceful possession of the plaintiffs. There are no averments which even remotely indicate any dispute as to the demarcation of the land or encroachment over any portion of the suit property. In that view of the matter, the learned Civil Judge does not seem to have committed any error in rejecting the application for appointment of Court Commissioner.

6. Petition, thus, stands dismissed.

[N. J. JAMADAR, J.]