

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3026 OF 2025

Bajrang Dattatray Charwad,
Age: 53, Occ: Household,
R/at: Charwadwasti, 358,
Near Ganpati Mandir, Singgad Road,
Wadgaon Budruk, Tal. Haveli,
Dist. Pune.

..Petitioner

Versus

1. Deubai Rajaram Rokade,
Age. 75 years, Occu. Agriculturist,
R/at. Chikhaligaon, Gawthan,
CTS No. 520 & 521 Chintamannagar,
PCMC, Tal. Haveli, Dist. Pune.

2. Satish Rajaram Rokade,
Age. 55 Years, Occu. Agriculturist &
Business, R/at Chikhaligaon,
Gawthan, CTS No. 520 & 521,
Chintamannagar, PCMC, Tal. Haveli,
Dist. Pune.

3. Sharad Rajaram Rokade,
Age. 48 Years, Occu. Agriculturist &
Business, R/at Chikhaligaon,
Gawthan, CTS No. 520 & 521,
Chintamannagar, PCMC, Tal. Haveli,
Dist. Pune.

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4. Bharat Rajaram Rokade,
Age. 45 Years, Occu. Agriculturist &
Business, R/at Chikhaligaon,
Gawthan, CTS No. 520 & 521,
Chintamannagar, PCMC, Tal. Haveli,
Dist. Pune.

5. Nanda Dhondiram Jadhav

Age. 66 Years, Occu. Household,
R/at D 1504, Saidham CHS, Sect No. 48,
Nerul West, Seawood, Navi Mumbai.
Thane 400 706.

6. Suman Uttam Tasgaonkar,
Age. 57 Years, Occu. Household,
R/at Om Niemala, CHS Plot No. 64/5,
Room No.101, Behind HP Petrol Pump,
Sect No. 44, Nerul West, Seawood,
Navi Mumbai, Thane 400 615.

7. Meenakshi Rajan Rane,
Age. 53 Years, Occu. Household,
R/at Room No. 22, Second Floor,
Gowardhandas buildings, b wing,
Dr. Parekh Street, Behind Girgon Court,
Prathanasamaj, Girgaon, Mumbai 400 004.

...Respondents

Mr. Namitkumar S. Pansare, i/b Drupad Patil, for the Petitioner.
Mr. Kalpesh Patil, i/b Rushikesh Patil, for the Respondent.

CORAM: N. J. JAMADAR, J.
DATED : 4th MARCH 2025

JUDGMENT.:

- 1. Rule.**
- 2.** Rule made returnable forthwith and with the consent of the Counsel for the parties heard finally.
- 3.** The petitioner-defendant takes exception to an order dated 22nd February 2024 passed by learned Civil Judge, Senior Division, Pune, on an application (Exhibit “34”) in Special Civil Suit No 591 of 2022, appointing Taluka Inspector of Land Records (“TILR”), Pune, as a Court Commissioner for joint measurement of the properties bearing CTS Nos.

520 and 521 and Gat No. 882 situated at village Chikhali Gaonthan, Tal. Haveli, District Pune.

4. The background facts can be stated as under:

4.1 Respondent nos. 1 to 7 have instituted a suit for recovery of possession under Section 6 of the Specific Relief Act 1963, asserting *inter alia* that on 10th February 2022, the petitioner-defendant forcibly and unlawfully dispossessed them of the suit property bearing CTS No. 520 admeasuring 87125 sq mtrs and CTS No. 521 admeasuring 690 sq mtrs. The defendant claimed to have acquired a portion of the adjacent land bearing Gat No. 882. The defendant allegedly by taking the law in his hand demolished the houses of the plaintiffs by employing hirelings and machines. Hence, the suit for recovery of possession based on previous possession.

5. In the said suit, the plaintiffs filed an application for appointment of the TILR as a Court Commissioner for local investigation.

6. By the impugned order, the learned Civil Judge was persuaded to allow the application observing *inter alia* that there was a dispute between the plaintiffs and defendant about the identification of the properties and a cadastral surveyor is an expert to identify the property which is in the actual possession of the defendant.

7. Being aggrieved, the defendant has invoked the writ jurisdiction.

8. Mr. Pansare, the learned Counsel for the petitioner, submitted that the learned Civil Judge committed a grave error in appointing the Court Commissioner for the purpose of ascertaining as to who is in possession of the particular property. That is not the purpose for which the Court Commissioner could be lawfully appointed. The said exercise clearly falls within the realm of collection of evidence by utilizing the machinery of the Court which is not permissible under the provisions of Order XXVI Rule 9 of the Code of Civil Procedure 1908 (“the Code”). In fact, the plaintiffs are enjoined to establish as a fact that they were in possession and have been dispossessed in order to succeed in a suit for recovery of possession under Section 6 of the Specific Relief Act. The impugned order, in a sense, dispenses with the proof of the said fact by the plaintiffs.

9. To buttress the submission that a Court Commissioner cannot be appointed for the purpose of collection of evidence, Mr. Pansare placed reliance on a decision of this Court in the case of **Sanjay Namdeo Khandare Vs Sahebrao Kachru Khandare**¹ and **Nalubai Narayan Shinde Vs Gopinath Dagadu Shinde**.²

10. Mr. Kalpesh Patil, the learned Counsel for the respondents, however, supported the impugned order. It was submitted that there were categorical averments in the Plaint that the defendant claimed to

1 2001 (2) MhLJ 959.

2 2011(2) MhLJ 991.

have acquired a portion of Gat No. 882 and on that strength demolished the houses of the plaintiffs and dispossessed them of the suit property. Therefore, the question of identity of the property and the demarcation of the boundaries directly arises for determination, though the suit is one for recovery of possession under Section 6 of the Specific Relief Act. It was further submitted that there is no prohibition to appoint a Court Commissioner at the initial stage of the Suit. It is not an immutable rule of law that the Court Commissioner can be appointed only after the parties have adduced evidence.

11. Laying emphasize on the operative portion of the impugned order whereby the learned Civil Judge has directed that the Court Commissioner shall carry out a joint measurement and submit a report to the Court, Mr. Kalpesh Patil would urge that by no stretch of imagination it can be said that the said direction amounts to an exercise which facilitates the collection of evidence.

12. First and foremost, the nature of the Suit. Incontrovertibly, the suit has been instituted for regaining possession of the suit property on the basis of previous possession alleging that the plaintiffs were unlawfully dispossessed. The very frame and the nature of averments in the suit cast a burden on the plaintiffs to establish that they were in possession of the suit property and have been unlawfully dispossessed,

within six months of the institution of the suit. Prior possession and dispossession is thus the substratum of the plaintiffs' claim.

13. In the aforesaid backdrop, the justifiability of the order for appointment of TILR as a Court Commissioner to have a joint measurement of the suit property and Gat No. 882 is required to be appreciated.

14. A Court Commissioner can be justifiably appointed to elucidate the matter in controversy. Where there is a boundary dispute or question of demarcation of the properties, a joint measurement of the lands would be necessary to ascertain the extent of encroachment, if any, and to elucidate the matter in controversy. However, where the appointment of the Court Commissioner is sought to gather evidentiary facts, the Court Commissioner cannot be appointed as that would amount to collection of evidence.

15. In the case of **Sanjay Namdeo (Supra)** on which reliance was placed by Mr. Pansare, like the case at hand, the Court Commissioner was appointed to visit and inspect the spot and submit a report regarding actual possession of the suit field, this Court held that the said exercise would amount to appointment of the Court Commissioner for collection of evidence regarding possession and it is well-settled that Court Commissioner cannot be appointed for collection evidence.

16. In the case of **Nalubai Shinde (Supra)** also, a learned Single Judge of this Court following the decision in the case of **Sanjay Namdeo (Supra)** reiterated that a Court Commissioner cannot be appointed to find out as to who is in possession of the suit premises.

17. It would be superfluous to multiply the authorities. The principle is too well-settled to need support of authoritative precedents. The Court Commissioner cannot be appointed to ascertain as to who is in actual possession of the disputed property.

18. This principle assumes more salience in a case where the suit is for recovery of possession based on previous possession. In such a case proof of dispossession is a jurisdictional fact. It is for the party who is dispossessed to establish the factum of previous possession by cogent evidence and not for the Court to lend its assistance by appointing a Court Commissioner.

19. The endeavour of Mr. Kalpesh Patil to salvage the position by canvassing a submission that though in the body of the order the Trial Court has referred to the factum of ascertaining of possession, yet, in the operative part of the impugned order the learned Judge was cautious enough to simply direct that a joint measurement be carried out and a report be submitted to the Court, does not merit countenance.

20. The specific observation of the learned Civil Judge that the cadastral surveyor was an expert to ascertain the possession of the

defendant over the particular property, betrays the prime reason which weighed with the learned Civil Judge in appointing the TILR as a Court Commissioner.

21. Thus, the impugned order cannot be sustained.

22. The conspectus of the aforesaid consideration is that, the Petition deserves to be allowed.

23. Hence the following order:

O R D E R

- (i) Petition stands allowed
- (ii) The impugned order stands quashed and set aside.
- (iii) The application for appointment of Court Commissioner stands rejected.
- (iv) Rule made absolute in the aforesaid terms.
- (v) No costs.

[N. J. JAMADAR, J.]