

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9546 OF 2025**

Rajendra Kumar Mohatta & Ors. ...Petitioners

Versus

Nargis Majid Oomerbhoy & Ors. ...Respondents

Mr. P. K. Dhakephalkar, Senior Advocate (through Video Conferencing) a/w. Mr. Jaydeep Deo and Mr. Onkar Gawade, for the Petitioners.

Mr. P. J. Thorat a/w. Mr. Ganesh Ambulkar and Z. A. Jariwala i/b. Jariwala Associates, for the Respondent Nos.1 to 3.

CORAM:	MADHAV J. JAMDAR, J.
DATED :	8th DECEMBER 2025
UPLOADED ON:	17th DECEMBER 2025

JUDGMENT:-

1. Heard Mr. Dhakephalkar, learned Senior Counsel appearing for the Petitioners and Mr. Thorat, learned Counsel appearing for the Respondent Nos.1 to 3.

2. By the present Writ Petition filed under Article 227 of the Constitution of India, the challenge is to the legality and validity of the order dated 15th March 2025 passed by the learned Judge of the Small Causes Court, Mumbai below Exhibit-118 in R.A.E. Suit No.8/10 of 2012 as also order dated 9th June 2025 passed by the Division Bench of the Court of Small Causes in Revision Application No.87 of 2025.

3. Before setting out the contentions raised by both the parties and consideration of the same by this Court it is required to note the following aspects :-

- i. Learned Judge of the Small Causes Court, Mumbai by the impugned order dated 15th March 2025 passed below Exhibit-118 in R.A.E. Suit No.8/10 of 2012 allowed the said application seeking appointment of Court Commissioner to visit the suit building. The operative part of the said order reads as under:

“: ORDER :

1. The application is partly allowed in following terms :

2. Mr. Pradeep N. Kushawar, Architect and Valuer is appointed as court commissioner.

*3. The court commissioner is directed to visit the suit building, to take inspection of the suit building, to take note of actual and factual position of the suit building, total number of premises/units floor wise, their monthly rents/compensation/licence fees, **additions and alterations and encroachments in the common areas and compulsory open space of the suit building if any, as per sanctioned plan and to take photographs, if required.***

4. The Commissioner shall carry the sanction plan of the building with him and file his detailed report with

photographs, if required within 20 days from the date of issuance of commissioner's writ.

5. Plaintiffs shall deposit Rs.30,000/- (Rs. Thirty Thousand only) towards commission fees within 03 working days from today i.e. on or before 19/03/2025.

6. Plaintiffs shall obtain certified copy of the sanctioned plan of the suit building from BMC Office and file the same before this court on or before 21/03/2025 for commission work and same shall be given to commissioner alongwith writ.

7. After filing true copy of sanction plan and payment of fees, writ be issued to court commissioner (architect) for conducting inspection.

8. The commissioner shall give five days advance notice of the proposed date of commission to plaintiffs and defendant Nos. 8 to 12 and 61. 9. The commissioner shall file his final report within 20 days from the date of issuance of writ. 10. The commissioner is entitled for commission fees on his filing the commission report.”

(Emphasis added)

- ii. The impugned order dated 15th March 2025 of the learned Judge of the Small Causes Court is challenged by the present Petitioners by filing Revision Application No.87 of 2025 before the Division Bench of the Small Causes Court at Mumbai. However, the said Revision Application was dismissed by order dated 9th June 2025 on the ground that the said Revision is not maintainable.

iii. It appears that when the present Writ Petition No.9546 of 2025 has been filed, copy of order dated 9th June 2025 passed in Revision Application No.87 of 2025 was not available. A learned Single Judge by order dated 11th July 2025 has granted leave to amend the Petition to annex copy of the impugned order dated 9th June 2025 passed in said Revision Application No.87 of 2025 and raise additional grounds in the Writ Petition and continued stay granted by the Revisional Court upto 21st July 2025 i.e. adjourned date. By further order dated 21st July 2025 the hearing of the Writ Petition is adjourned to 15th September 2025 and the interim stay was extended till that day.

iv. In the meanwhile these orders granting stay by the learned Single Judge have been challenged before the Supreme Court and the Supreme Court by order dated 29th August 2025 stayed the said order dated 11th July 2025, 21st July 2025 and 22nd July 2025 passed by the learned Single Judge in Writ Petition No.9546 of 2025.

v. As the implementation of said order dated 11th July 2025 appointing Court Commissioner has been stayed by a learned Single Judge *inter alia* by said order dated 11th July 2025 as

also order dated 21st July 2025 and these orders are stayed by the Supreme Court, thus the said order appointing Court Commissioner continued to remain in operation and is being implemented.

4. At this stage only it is required to be noted that although the Division Bench of the Small Causes Court has held that the Revision is not maintainable, some observations are made by the Revisional Court regarding merits of the impugned order. However, in any case, the said Revision is dismissed on the ground that the same is not maintainable. It is required to be noted that Mr. Dhakephalkar, learned Senior Counsel appearing for the Petitioners has not raised any contention to the effect that the said Revision filed before the Division Bench of the Small Causes Court is maintainable.

5. Mr. Dhakephalkar, learned Senior Counsel submitted that the suit which has been filed by the Defendants i.e. the Respondent Nos.1 to 3 is on the ground of subletting, additions and alterations and also claimed future mesne profits. He submitted as vide document dated 27th July 1950, Mr. Rahim Karim Mistry assigned his right to construct the building to Shivratan Mohatta i.e. Defendant Nos.8 to 12, the said building was constructed by

Shivratan Mohatta and therefore, said Mohattas are the owners of the suit building since inception and have created tenancies/licenses in favour of the Defendant Nos.13 to 278 amongst other entities and they are also paying property taxes in respect of the suit building since inception till date. He submits that in any case the Court Commissioner has been appointed on the application filed by the Plaintiffs and same amounts to collection of evidence. He points out the discussion of the learned Trial Court from paragraph No.17 onwards and more particularly, paragraph No.24. He submits that the learned Trial Court has observed that object of appointment of Court Commissioner for local inspection is to obtain evidence and the said approach is totally illegal and contrary to the settled legal position as the Court Commissioner cannot be appointed to collect the evidence. He submitted that ground given by the Plaintiffs in application seeking appointment of the Court Commissioner is for the purpose of inquiry of mesne profits, however, the question of mesne profit inquiry arises if suit is decreed in favour of the Plaintiffs and in any case same is separate inquiry and therefore, the Court Commissioner cannot be appointed. Learned Senior Counsel therefore, submitted that the impugned order be quashed and set aside.

6. On the other hand, Mr. Throat, learned Counsel appearing for the Respondent Nos.1 to 3 i.e. original Plaintiffs pointed out the order dated 3rd February 2025 passed by the Supreme Court in Special Leave to Appeal (C) No(s).2257 of 2025 by which both the parties are granted liberty to file an application for appointment of Local Commissioner. He submits that pursuant to liberty granted by the Supreme Court, application bearing Exhibit.118 is filed in RAE Suit No.8/10 of 2012. He pointed out the contentions raised in paragraph Nos.6 to 8 and paragraph 9 to 12 of the application seeking appointment of Court Commissioner. He submits that by exercising power under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (CPC) and by exercising discretion as envisaged under the said provision, the learned Trial Court appointed the Court Commissioner and to inspect the suit premises and therefore, no interference in the writ jurisdiction of this Court is warranted. He pointed out the reasoning of the learned Trial Court as recorded in paragraph Nos.24, 29, 33 and 42 and supported the impugned order. He also relied on the decision of this Court in the case of *Kirti Purshottam Kapadia since deceased through Legal heirs & Ors. vs. Rajendra Bhagwandas Choudhary & Ors.*¹

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7. Perusal of the record shows that the Respondent Nos.1 to 3 are the original Plaintiffs and *inter alia* sought the following reliefs in RAE Suit No.8/10 of 2012 :

“(a) The Defendant Nos.1 to 7 its representatives, employees, agents and/or any person claiming through or under it be ordered and decreed to vacate and hand over quite, vacant and peaceful possession of the “Suit Property/Premises” i.e. the entire land and structures erected thereon located at Plot No.12, 13 and 14 admeasuring 1843.89 sq.yds. of the Queens Palton Road Estate of government of India Mumbai 400001 as more particularly described in the schedule hereto annexed and marked as Exhibit “A” which is bounded as follows i.e. on or towards North by Musafirkhana Road, on the South partly by Sabu Siddik Road and partly by on the West by the Palton Road and on the East by plot bearing old Nos.XIV and XV of the said Palton Road Estate.

(b) The Defendant Nos.8 to 283 his/her/their/its representatives, employees, agents and/or any person claiming through or under it be ordered and decreed to vacate and hand over vacant and peaceful possession of the “Suit Premises” i.e. the premises in possession of the respective defendant/s as shown in the cause title of the suit/plaint in the suit property.

(c) That the Defendants be Order and Decreed to pay mense profit from the date of the filing of the Suit till possession is handed over to the Plaintiffs.

(d) Pending the hearing and final disposal of the suit, this Hon’ble Court be pleased to appoint a Court Commissioner and be pleased to order and direct the Court Commissioner and/or the Plaintiffs their representatives, their architect, photographs to take inspection of the “Suit Property/Premises” and take

measurements thereof and/or to take photographs in order to ascertain the present state and condition of the "Suit Property/Premises" to take photos and to take measurements and to draw up plans.

(e) Pending the hearing and final disposal of the suit, the Hon'ble Court be pleased to direct the concern police station and/or the police authority to provide necessary Assistant/protections for the purpose of taking inspection etc. as prayed in prayer clause (d) above;

(f) Pending the hearing and final disposal of the suit the Defendants, their servants, agents and representatives, members and/or any person claiming through or under them be restrained by an order and injunction of this Hon'ble Court from further subletting, transferring, assigning the suit premises and/or from parting with the possession of the suit premises/property and/or to create any third party rights or from any inducting third party in the suit premises/property or in any part thereof and from carrying out any additions and alteration of permanent nature and/or committing breaches of the terms mentioned in the agreement of head lease dated 24th September 1948 and 27th July 1950."

8. It is the claim of the Respondent Nos.1 to 3 i.e. Plaintiffs that they are landlords of the suit property bearing Plot Nos.12, 13 and 14 admeasuring 1843.89 sq.yards of Queen's Palton Road Estate of Government of India and all structures standing on the aforesaid plots of land in view of registered Lease dated 10th February 1976 executed on behalf of the President of India in their favour. It is the claim of the Plaintiffs that the Respondent Nos.4 to 10 i.e. the original Defendant Nos.1 to 7 are the legal heirs of the original

licensee/tenant late Rahim Karim Mistry and the Petitioners i.e. the Defendant Nos.8 to 12 are unlawful occupants of the suit property, who claim to be the assignees of late Rahim Karim Mistry as per the agreement dated 24th September 1978. It is the claim of the Respondent Nos.1 to 3 i.e. the original Plaintiffs that the Respondent Nos.11 to 277 are illegally inducted in various parts and portions of the tenements in the said building. The Petitioners claim to be responsible for inducting Respondent Nos.11 to 277.

9. It is the claim of the Petitioners i.e. Defendant Nos.8 to 12 that the said Rahim Karim Mistry vide document dated 27th July 1950 assigned his right to construct the building to Defendants- Shivratan Mohatta. Said Mohatta constructed the suit building after execution of the said agreement and therefore, Mohattas i.e. Defendant Nos.8 to 12 are the owners of the suit building since inception and have created tenancies/liences in favour of the Defendant Nos.13 to 278 amongst other entities.

10. After filing of the written statement issues were framed on 15th January 2016. Thereafter, the said issues were recasted by the learned Trial Judge of the Small Causes Court by order dated 28th February 2025 passed below Exhibit 109 in R.A.E. Suit No.8/10 of 2012.

Thereafter again additional 3 issues were framed by the learned Trial Court by order dated 28th April 2025 passed below Exhibit 177 in R.A.E. Suit No.8/10 of 2012. Thus, the following issues are framed:

Issues recasted by order dated 28th February 2025

“ISSUES

- 1. Do plaintiffs prove that there is relationship between them or their predecessor and defendant Nos. 1 to 7 or their predecessor as landlord and tenant ?*
- 2. Do plaintiffs further prove that defendant Nos. 8 to 283 are illegal occupants of the suit premises / suit property ?*
- 3. Do defendant Nos. 8 to 12 prove that they have been lawfully inducted in the suit premises with the consent and knowledge of the plaintiff ?*
- 4. Do plaintiffs prove that defendants have carried out additions and alterations of permanent nature in the suit premises illegally and unauthorizedly without the consent of the plaintiff ?*
- 5. Are plaintiffs entitled for decree of eviction on the ground of denial of their title to the suit property by defendant Nos. 8 to 12 ?*
- 6. Whether this Court has jurisdiction to try and entertain the present suit?*
- 7. Whether the suit is bad for misjoinder of parties?*

8. Whether the suit is within limitation?

9. Whether an enquiry into future mesne profit warrants ?

10. Whether the plaintiffs are entitled for eviction and possession of the suit premises as claimed ?

11. What Order and Decree?”

(Emphasis added)

**Additional Issues framed by order dated
28th April 2025**

“O R D E R:

1. The application is partly allowed and following additional issues are framed.

I. Do Plaintiffs prove that late Rahim Karim Mistry has constructed the suit building as per the terms of agreement dated 24.09.1948?

II. Do defendant nos.8 to 12 prove that late Shivratan Mohata has constructed the suit building?

III. Whether the suit is hit by the principle of waiver, acquiescence and estoppel?”

11. Mr. Thorat, learned Counsel appearing for the Respondents to support the order of the learned Trial Court has relied on the decision of the learned Single Judge in the case of Kirti Purshottam

Kapadia (supra) and more particularly, on paragraph Nos.7 and 8 of the same which reads as under:

“7. I have considered the submissions canvassed by the learned counsel appearing for parties. This is a suit filed for recovery of possession under the provisions of Maharashtra Rent Control Act, 1999 (MRC Act). Therefore, the usual principle which is made applicable to typical disputes relating to encroachment of lands or about possession of lands may not be attracted in the suit filed by landlord for recovery of possession from tenant on the grounds such as erection of unauthorized construction, change of user, non-user, etc. The Court can receive necessary assistance by ascertaining the factual position existing at the suit premises. Thus, appointment of Court Commissioner actually assists the Court in arriving at the correct factual position. This actually is the purpose behind empowering a Court to issue commission under provisions of Order XXVI Rule 9 of the Code of Civil Procedure. Rule 9 of Order 26 provides thus:

Commissions for local investigations

9. Commissions to make local investigations.—

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

8. Thus, the objective behind empowering the Court to issue commission is to essentially elucidating the

matter in dispute. True it is that in a case involving dispute about encroachment of land or for seeking recovery of possession of land, Plaintiff needs to first elucidate his case by leading evidence and if the Court finds that the commission is necessary for better resolution of the factual controversy, it can direct appointment of commissioner even in those suits. In Rent Act Suits, particularly involving the allegation of unauthorised additions or alterations in the suit premises thereby causing injury or destruction thereto or erection of permanent structure, etc issuance of court commission many times becomes eminent to ascertain the ground reality. Similarly in a case involving change of user, sometimes ascertainment of nature of activity carried out at the suit premises may provide necessary assistance to the Court in deciding the factual controversy. Therefore, in every case appointment of Court Commissioner cannot be rejected on a broad principle that Plaintiff cannot collect, gather or create evidence through Court Commissioner. In many cases like the present one, appointment of Court Commissioner for ascertainment of the factual position is actually aimed at providing the necessary assistance to the Court for determining the real question in controversy between the parties. In my view, therefore, the report of the Court Commissioner, which is already on record, cannot be completely discarded under a specious plea of collection of evidence.”

(Emphasis added)

12. The above observations in the case of Kirti Purshottam Kapadia (supra) are squarely applicable to the present case. Although it is the submission of Mr. Dhakephalkar, learned Senior Counsel that said judgment is passed in the facts of that case, however, reading of said paragraph Nos.7 and 8 shows that the

learned Judge has specifically recorded that usual principle which is made applicable to typical disputes relating to encroachment of lands or about possession of lands may not be attracted in the suit filed by landlord for recovery of possession from tenant on the grounds such as erection of unauthorized construction, change of user, non-user, etc. The Court can receive necessary assistance by ascertaining the factual position existing at the suit premises. It has been further observed that thus, the appointment of the Court Commissioner actually assists the Court in arriving at the correct factual position.

13. The above observations in Kirti Purshottam Kapadia (supra) are squarely applicable to the present case as one of the issue is concerning whether Plaintiffs prove that the Defendants have carried out additions and alterations of permanent nature in the suit premises illegally and unauthorizedly without the consent of the Plaintiffs.

14. It is also significant that Order XXVI, Rule 9 of the CPC is concerning Commissions to make local investigations which specifically provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any

property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon. Thus, it is for the Court to determine whether local investigation is required. In this particular case, the learned Judge of the Small Causes Court, Mumbai has exercised the said discretion by passing the impugned order dated 15th March 2025 below Exhibit-118 in R.A.E. Suit No.8/10 of 2012. The learned trial Court has *inter alia* observed as under:

i. *The object of appointment of Court Commissioner for local inspection is to obtain evidence, which from its peculiar nature, can best be had from the spot. It will assist the Court to properly appreciate the evidence and decide the controversy between the parties in the right directions. (Para 24)*

ii. *If local inspection of the suit premises is carried out by an independent architect, no prejudice or grave injustice would be caused to the Defendants. On the contrary, it will assist the Court in elucidating the matter is in dispute between the parties. (Para 26)*

iii. *The facts of the present case are such that in order to decide the real controversy between the parties, the factual and actual position of the suit premises is required to be brought on record. It will help the Court to elucidate the matter in dispute between the parties. Hence, in my considered opinion the ratio laid down in the above cited authority is squarely applicable to the case at hand. (Para 44)*

Thus, the learned Trial Court by exercising the power under Order XXVI Rule 9 has appointed the Court Commissioner for local investigation. The discretion as provided under Order XXVI Rule 9 has been exercised by the learned Trial Court by giving cogent reasons.

15. Mr. Dhakephalkar, learned Senior Counsel although has not raised any contention regarding maintainability of the Revision filed before the Revisional Court, however, relied on discussion of the Revisional Court by which the Revisional Court has specifically held that the learned Trial Court should not have appointed the Court Commissioner. The observations of the learned Revisional Court in this regard are to be found in paragraph Nos.26 and 27, which reads as under:

“26. To reiterate, the suit is for recovery of possession of the suit premises. Plaintiffs sought the decree of eviction in respect of the suit premises consisting of the land and the building thereupon. To be precise, plaintiffs have sought decree of possession of total area of 1843.89 sq. yards, which is necessarily including the area of the suit building. Therefore, bifurcation of division of area of each tenement/unit will not be necessary. Accordingly, name of each tenant, mode of creation of each tenancy, amount of paid rent/compensation, amount of arrears of such rent/compensation will not be necessary for decision in the suit.

27. In view of Order XXVI Rule 9 of Civil Code, a commission can be issued for ascertaining amount of mesne profits. So, if at all plaintiffs taste success in this suit and their entitlement as well as period of mesne profit is crystallized, it will be of haste to call for such details through the commission issued by virtue of the impugned order. In fact, it will be uncalled for, so far as decision in the suit is considered.”

16. However, it is required to be noted that the Revisional Court has completely overlooked that one of the issue framed is that whether Plaintiffs’ prove that the Defendants have carried out additions and alterations of permanent nature in the suit premises illegally and unauthorizedly without the consent of the Plaintiffs. As noted herein above, in the decision of Kirti Purshottam Kapadia (supra) it has been specifically held that the usual principle which is made applicable to typical disputes relating to encroachment of lands or about possession of lands may not be attracted in the suit filed by landlord for recovery of possession from tenant on the grounds such as erection of unauthorized construction, change of user, non-user, etc. The Court can receive necessary assistance by ascertaining the factual position existing at the suit premises. Thus, appointment of Court Commissioner actually assists the Court in arriving at the correct factual position. The said observations are squarely applicable to the present case.

17. Perusal of the impugned order shows that a possible view of the matter has been taken. This is a Writ Petition filed under Article 227 of the Constitution of India. As per the settled legal position, not every order which has been erroneous or even illegal can be set aside by the Court exercising jurisdiction under Article 227 of the Constitution of India. It is settled legal position that the Court exercising power under Article 227 of the Constitution of India is not Appellate Court or Revisional Court. Thus, in the facts and circumstances and in view of the law laid down concerning jurisdiction under Article 227 of the Constitution of India, no interference in the impugned order is warranted, more particularly when the learned Trial Court by giving cogent reasons has appointed the Court Commissioner. If the Trial Court has recorded that the local investigation is necessary for the Court to determine the dispute then, the said discretionary order need not to be interfered by this Court under jurisdiction of this Court under Article 227 of the Constitution of India.

18. Accordingly, the Writ Petition is dismissed, however, with no order as to costs.

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[MADHAV J. JAMDAR, J.]