



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 6887/2024

(MADAN CHINTAMAN RATHI **VERSUS** MUJAFFARKHA MURTUZAKHA PATHAN)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Shri R.S. Kurekar, counsel for the petitioner.
Shri V.K. Paliwal, counsel for the respondent.

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE : NOVEMBER 13, 2025

Heard the learned counsels for the parties.

2. The petitioner's challenge is to the order dated 10.09.2024 passed by the trial Court rejecting the application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short, 'the Code') for appointment of Court Commissioner.

3. The petitioner is the original plaintiff who has filed a suit for permanent injunction to restrain the defendant from obstructing the peaceful possession and enjoyment of the suit property. The plaintiff also filed an application for temporary injunction in the suit and during pendency of the said application filed separate application under Order XXVI Rule 9 of the Code for appointment of Court Commissioner. The plaintiff alleged that the defendant was causing obstruction to his construction and appointment of Court Commissioner was necessary to ascertain the factual position. The application was opposed by the defendant and it came to be rejected by order dated 10.09.2024. Feeling aggrieved by this order, the petitioner has filed the instant writ petition.

4. The learned counsel for the petitioner submitted that the appointment of Court Commissioner is necessary to ascertain the factual position as regards the respective possessions of the parties which will enable the Court to decide the controversy effectively. It is also submitted that the appointment of Court Commissioner will be benefited to both the parties and will not cause any prejudice to the other side.

5. The learned counsel for the respondent opposed the petition and submitted that the appointment of Court Commissioner is sought at the stage of arguments on temporary injunction application and it is apparently an attempt to collect evidence and therefore the same is rightly rejected. He submitted that the petitioner has failed to demonstrate any illegality much less perversity in the impugned order and the petition deserves to be rejected.

6. While considering the rival contentions, it has to be seen that the application for appointment of Court Commissioner is filed at the stage of arguments on temporary injunction in the suit. A perusal of the application shows that the Commissioner is sought to be appointed only for ascertaining the factual position. It is crucial to note that the suit is only for permanent injunction. There is no question of allegations of encroachment or any relief for removal of encroachment from any of the lands belonging to the parties. As such, considering the nature of controversy involved in the suit, the application for appointment of Court Commissioner at this stage is clearly for collecting evidence, which is not permissible. Needless

to state, after the evidence is adduced in case situation arises, parties are entitled to seek appointment of Court Commissioner.

7. A perusal of the impugned order shows that the trial Court has given due consideration to all the relevant aspects and the impugned order does not appear to be perverse. Reliance is aptly placed by the learned trial Court on the judgment of the Coordinate Bench of this Court in *Shantaram Dattatraya Kekan & Others Versus Bhausahab Karbhari Kekan & Another* [Writ Petition No.14046 of 2021] reiterating the settled position of law that the Commissioner cannot be appointed to collect evidence.

8. Considering the overall factual and legal aspects, no indulgence is warranted under Article 227 of the Constitution of India with the impugned order. The writ petition is accordingly dismissed with no order as to costs.

(PRAFULLA S. KHUBALKAR, J.)