



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

WRIT PETITION NO. 6352 OF 2024

Dilip Bajirao Nalawade

Age 42 yrs, Occupation:- Agriculture,

R/o. Krushnapur, Tah. Umrkhed

District:- Yavatmal

.... PETITIONER

// VERSUS //

1. **Ashok Narayan Kadam,**
Age 46 years, Occ:- Agriculture,
R/o : Krushnapur, Tal :- Umarkhed,
District:- Yavatmal
2. **Subhash Narayan Kadam,**
Age 50 years, Occ:- Agriculture,
R/o: Krushnapur, Tah:- Umarkhed,
District:- Yavatmal
3. **Sharad Narayan Kadam,**
Age 43 years, Occ:- Agriculture,
R/o : Krushnapur, Tal :- Umarkhed,
District:- Yavatmal
4. **Ram Narayan Kadam,**
Age 40 years, Occ:- Agriculture,
R/o : Krushnapur, Tal :- Umarkhed,
District:- Yavatmal
5. **Vikas Namdev Harakate,**
Age 46 years, Occ:- Job Sarpanch
Grampanchayat, Krushnapur,
Tal :- Umarkhed,
District:- Yavatmal
6. **Secretary/Gramsevak,**
Grampanchayat, Krushnapur,
Tal:- Umarkhed,
District Yavatmal

.. RESPONDENTS

Mr. A.R. Fule, Advocate for the petitioner.

CORAM : SMT. M.S. JAWALKAR, J.

DATE : 05.05.2025

ORAL JUDGMENT :

1. Heard learned counsel for the petitioner.
2. In spite of service of notice, respondents chose to remain absent.
3. The facts in nutshell are as under:-

The petitioner is the original plaintiff. He has filed the suit for permanent injunction and removal of encroachment made by defendant numbers 1 to 4 on the suit way and further restrain defendant Nos.1 to 4 from obstructing the way of petitioner/plaintiff before the Civil Judge, Junior Division, Umarkhed District Yavatmal, bearing R.C.S. No.60/2022. He has also filed an application under Section 5 of Mamladar's Court Act, 1906. The Mamlatdar's Court directed defendant Nos.1 to 4 to remove encroachment. Trial Court, by its order dated 21.10.2022,

allowed the application filed below Exh.5 and further restrained the defendants from obstructing the way of the present petitioner/plaintiff towards the suit property.

4. Challenging the said order, defendants preferred the said appeal bearing No.39/2022 which is pending before District Judge-1, Pusad. However, there is no interim relief has been granted in favour of defendants.

5. As plaintiff submitted that defendants have not given access on the road the petitioner has preferred application under Order XXVI Rule 9 read with 151 of the Code of Civil Procedure, 1908, for appointment of a Court Commissioner to ascertain the actual position on the suit property. Learned trial Court rejected the application for appointment of Court Commissioner below Exh.33 by its order dated 07.03.2024. The plaintiff has also filed an application for a grant of police protection, as the defendants are influential persons and creating political pressure. If police protection is granted to the way of his field, obstruction on the way of his field will be removed. However, both these applications are

rejected by learned trial Court. The application for appointment of Court Commissioner is rejected on the ground that plaintiff wants to appoint a Court Commissioner for the purpose of collection of evidence. This ground is not at all sustainable in view of the fact that his application Exh. 5 came to be allowed on the basis of *prima-facie* case is made out which is based on the documents placed on record. Learned counsel for the petitioner relied on the judgment of ***Malappa Bhikappa Birajdar Vs. Aamsidha Bhikappa Birajdar and others*** reported in ***2022 DGLS (Bom.) 2440***, wherein this Court observed in paragraph nos. 8 and 10. It reads thus:-

“8. While dealing with such prayer, the Trial Court was sensitive to the fact that proceedings under Order XXVI Rule 9 of Code of Civil Procedure, 1908 for appointment of Court Commissioner cannot be used for collection of evidence, hence proceeded to analyse the pleadings, prayer in the Plaint, stage of the Suit and proceeded to order appointment of Court Commissioner. The Trial Court was of the view that appointment of Court Commissioner is necessary for deciding the issue brought before it by the rival parties. In such an eventuality, the Court below, in my opinion was justified in negating the contention of the Petitioner-Defendant that appointment of Court

Commissioner is with an intention to collect the evidence. The Trial Court while dealing with Suit claim is always armed with powers to facilitate itself to take out recourse to procedure, in accordance with law, for adjudication of the claim brought before it.

10. Needless to clarify that report of the Court Commissioner is always subject to scrutiny by the Civil Court as parties are at liberty to lead their evidence in accordance with law.”

6. So far as the application for police aid is concerned, the said application came be to rejected on the ground that the plaintiff claiming a grant of police aid for cultivating the land of the plaintiff. There is no error in the order passed by the learned 2nd Joint Civil Judge (Jr. Division), Umarkhed as the police aid is claimed for cultivating the land of the plaintiff. However, the court can pass order directing police aid for the petitioner to approach his field from the way passing through the field of defendant Nos.1 to 4. As such order dated 12.07.2024 passed by the learned 2nd Joint Civil Judge (Jr. Division), Umarkhed is hereby modified.

7. There is no prejudice is going to cause if court commissioner is appointed as defendants themselves said that there is no obstruction in any way of the petitioner from passing through their field.

8. There is no question of any collection of evidence in view of the fact that evidence is already placed on record from which the *prima facie* case is duly made out on the basis of documents in favour of the petitioner.

9. Application is partly allowed.

(i) Police aid is granted only to remove obstruction, if any, on the way to approach the field of plaintiff.

(ii) Defendants are hereby restrained from creating further obstruction on the way passes through the field of defendants.

(iii) Order passed below Exh.33 dated 07.03.2024 and order below Exh.36 dated 12.07.2024 in RCS No.60/2022 passed by 2nd Joint Civil Judge (Junior Division) are

hereby quashed and set aside.

(iv) The appointment of Commissioner is necessary to ascertain exact position on the site as such the learned 2nd Joint Civil Judge (Ju. Division), Umarkhed is hereby directed to appoint Court Commissioner to verify the facts.

(v) Petitioner's applications below Exh. Nos.33 and 36 are allowed in above terms.

10. The petition stands disposed of accordingly. Pending application, if any stands disposed of. No costs.

(SMT. M.S. JAWALKAR, J.)