IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIRCUIT BENCH AT KOLHAPUR
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5706 OF 2026

Sumitra M. Nimbalkar
Since deceased through her L.rs.
Kisan Vitthal Gaikwad and others .. Petitioners

Versus

Smt. Sarubai Gopala Wagh and others .. Respondents

Shri Amarsinh Bhosale, Advocate i/by Shri Akshay Jagtap, Advocate for the Petitioners.
Shri Abhijit B. Kadam, Advocate a/w Shri Ashish A. Chavan, Shri R. Yadav and Shri Mayur Mohite, Advocate for the Respondent No. 2.

CORAM : SHAILESH P. BRAHME, J.
DATE : 29TH OCTOBER, 2026.

FINAL ORDER :

. Heard Mr. Bhosale, learned counsel for the petitioners and Mr. Kadam for the respondent No. 2, who is the contesting party.

2. Impugned order is passed below Exhibit 45, which was filed by the respondent No. 2 only. Other respondents are formal parties as they did not contest the said application.

3. The petitioners, who are original plaintiffs in R.C.S. No. 169 of 2017, are assailing order dated 08.10.2026 passed below Exhibit 45 appointing Commissioner by invoking powers under

Order XXVI Rule 9 of the Code of Civil Procedure (for short "C.P.C.").

4. Learned counsel for the petitioners submits that it is impermissible to invoke provisions of Order XXVI Rule 9 of the C. P. C. at pre-trial stage. Impugned order is perverse and unsustainable.

5. Learned counsel for the respondent No. 2 – caveator would submit that though application Exhibit 45 is decided in the year 2026, it was filed on 31.03.2021. The respondent No. 2 had already filed application Exhibit 32 for injunction. It is submitted that the respondents are occupying gut No. 292, which is wrongly claimed by the petitioners – plaintiffs. The topography of gut Nos. 292 and 293 and identification of the construction need to be brought on record to resolve the controversy. It is submitted that the Trial Court has taken appropriate view in appointing the Commissioner.

6. Undisputedly, recourse to Order XXVI Rule 9 of the C. P. C. is taken at pre-trial stage. The issues are even not settled. The recourse to said provision by either of the parties would amount to inference that attempt is for collection of the evidence and the party is not armed with evidence in support of the case. I have not been pointed out any extraordinary situation so as to invoke the provisions at pre-trial stage.

7. I propose to follow the consistent view being taken by this Court against appointing the Court Commissioner at pre-trial stage. A useful reference can be made to the judgments of this Court in the matters of **Sarjerao Nathu Bangar Vs. Namdev Keru Bangar in Writ Petition No. 13441 of 2019** and **Sitaram Suklal Patil and another Vs. Vasudev Suklal Patil in Writ Petition No. 9626 of 2016**.

8. It is made clear that parties are always having liberty to take recourse to Order XXVI Rule 9 of the C. P. C. at appropriate stage especially after recording of oral evidence. In that view of the matter the writ petition succeeds.

9. Impugned order dated 08.10.2026 passed below Exhibit 45 in R.C.S. No. 169 of 2017 is quashed and set aside. The parties shall be at liberty to take recourse to provisions of Order XXVI Rule 9 of the C. P. C. at appropriate stage.

[SHAILESH P. BRAHME J.]

bsb/Oct. 26