

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 17727 OF 2025

Sairama Realities Pvt Ltd & Anr

..Petitioners

Versus

Arun Khandu Patil

...Respondent

Dr Uday Warunjikar, with Yash K. Jagdale, i/b Sakshi S Inamdar, for
the Petitioner.

CORAM: N. J. JAMADAR, J.

DATE : 5th JANUARY 2026

ORDER:

1. Heard Dr Warunjikar, the learned Counsel for the Petitioners.
2. The challenge in this Petition is to an order dated 2nd December 2025, passed by the learned Civil Judge, Junior Division, Khalapur, District Raigad-Alibag, whereby an Application preferred by the Plaintiff for appointment of the Court Commissioner under the provision of Order 26 Rule 9 of the Code of Civil Procedure, 1908 (“the Code”), came to be allowed and Taluka Inspector of Land Records (“TILR”), Khalapur, has been appointed as a Court Commissioner to measure the Suit property and submit a report along with a map, including the encroachment, if any.

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3. The Respondent-Plaintiff has instituted a Suit with the assertion that the property of the Defendants bearing Survey Nos. 25/2 and 25/3 is situated on the North West side of the Plaintiff's property bearing Survey No. 25/6, Mouje Sangadewadi, Taluka Khalapur, District Raigad ("the suit property"). The Defendants have carried out development of their property by committing encroachment over the suit property to the extent of 2000 sq ft.

4. In the wake of the dispute the Plaintiff had got the suit property measured by the TILR vide MR No. 398 of 2024. At that time the cadastral surveyor has indicated that the then proposed construction of the hotel may encroach over 2000 sq ft of the Plaintiff's property. The Defendants had assured not to encroach over the Plaintiff's property and, yet, erected the structures by committing encroachment over the suit property. Hence the Suit for removal of encroachment and consequential relief of injunction.

5. In the said Suit, the Respondent took out an Application for appointment of the Court Commissioner and also an Application for temporary injunction. By orders of even date, the learned Civil Judge was persuaded to allow the both the Applications. The Defendants were restrained from carrying out further construction and causing obstruction to the access of the Plaintiff to the Suit property.

6. By the impugned order, the learned Civil Judge was persuaded to appoint the Court Commissioner, as in the view of the learned Civil Judge, the Suit regarding removal of the encroachment cannot be adjudicated unless and until the suit properties were measured.

7. Being aggrieved the Petitioners have invoked the writ jurisdiction.

8. Mr. Warunjikar would urge that the learned Civil Judge committed an error in exercising the discretion to appoint the Court Commissioner at a nascent stage of the proceeding. The learned Civil Judge lost sight of the well-recognized principle that a Court Commissioner cannot be appointed to collect evidence. The onus lay upon the Plaintiff to establish the factum of encroachment. It was submitted that this Court in a series of judgments, has held that the appointment of the Court Commissioner at the initial stage would be premature and the Court would be justified in appointing the Court Commissioner after the parties led evidence to elucidate the controversy.

9. Reliance was placed on the judgments of this Court in the cases of **Shantaram Dattatray Kekan and Ors Vs Bhausahab Karbhari Kekan & Anr¹** and **Surel Milk & Food Processor Pvt Ltd and Ors Vs Bhagwan Krishna Pawar and Ors.²**

1 2023(2) MhLJ 77.

2 2024 SCC OnLine Bom 2810.

10. I find it difficult to accede to the submissions of Dr Warunjikar. Indeed, this Court in the cases of **Surel Milk & Food Processor Pvt Ltd (Supra)** and **Shantaram Dattatray Kekan (supra)**, has recorded that, in those cases, the application for appointment of the Court commissioner was filed at premature stage. However, those judgments are required to be considered in the backdrop of the peculiar facts of those cases.

11. From the text of Section 75 and Order XXVI Rule 9 of the CPC, restraint on the power of the Court to appoint the Court Commissioner qua a particular stage of the proceeding cannot be discerned. It cannot be laid down as an immutable rule of law that the Court commissioner cannot be appointed before the parties have started to adduce evidence. The provisions contained in Order XXVI Rule 9 of the Court indicate that the Court is empowered to appoint the court Commissioner to elucidate the matter in controversy. The term ‘elucidation of the matter in controversy’ cannot be equated to “elucidation of the evidence adduced by the parties”. To lay down a cast iron rule that the Court commissioner cannot be appointed before the parties have adduced evidence would be, in effect, disabling the Court from getting assistance it requires for the determination of the controversy between the parties.

12. In the instant case, the core dispute between the parties is over the alleged encroachment committed by the Defendants on adjoining suit property. The principal prayer in the Suit is a decree for removal of

alleged encroachment. It is not a case where the Plaintiff has approached the Court with bald assertion of alleged encroachment.

13. The Plaintiff had, in fact, got the suit property measured by TILR, to which a specific reference is made in the Plaint. As the suit property and the property of the Defendant are incontrovertibly located adjacent to each other, the issue of encroachment can only be resolved by measurement of those properties by cadastral surveyor. In a suit of the present nature, in my considered view, the exercise of the appointment of the Court Commissioner cannot be questioned on the ground that it is actuated by a design to collect evidence.

14. A useful reference in this context can be made to the decision of the Supreme Court in the case of **Haryana Waqf Board Vs Shanti Sarup and Ors**,³ wherein it was enunciated that where the question is of removal of encroachment and demarcation of boundaries, it is necessary to have a joint measurement of the adjoining lands.

15. For the forgoing reasons, in exercise of supervisory jurisdiction, this Court does not find any infirmity in the impugned order.

16. Resultantly, the Petition stands dismissed.

[N. J. JAMADAR, J.]

3 (2008) 8 SCC 671.