



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

WRIT PETITION NO. 6609/2024

BABURAO SAMBESHIV CHAUDHARI (DEAD) THR.LR's RATNA BABURAO CHAUDHARI & OTHERS
VERSUS SMT. NIRMALA MORESHWAR SURKAR

Office Memoranda Appearances, directions and Registrar's orders	Notes, of Court's orders or Registrar's orders	Office Coram, Court's orders or Registrar's orders
--	---	---

Court's or Judge's orders

Mr. S.S.Deshpande, Advocate for Petitioners.
Mr. A.M.Chandekar, Advocate for Respondent.

CORAM: RAJ D. WAKODE, J.

DATED : 16th MARCH, 2026

1. Heard the learned counsel for the parties.

2. The petitioners' challenge is to the order dated 25.11.2021 passed by the trial Court rejecting the application for appointment of Court Commissioner.

3. The petitioners are the legal representatives of Baburao, who was the original plaintiff in the suit for declaration and recovery of the encroached portion of land out of suit property bearing Survey no.397. During the course of evidence, the plaintiff filed an application for appointment of Taluka Inspector of Land Records as Court Commissioner and the application came to be rejected by primarily observing that there is no material on record to indicate the details of the suit properties. The trial Court has also observed that the said application is an attempt to collect evidence through the Court machinery and thus rejected the application. This order is subjected to challenge by way of instant petition.

4. The learned counsel for the petitioners submitted that in view of nature of the suit being suit for removal of encroachment, appointment of an independent person viz. Taluka Inspector of Land Records as Court Commissioner is imperative. He submitted that there is no dispute that the land bearing Survey no.397 is re-numbered as Survey no.397/3A and as such, the reasons recorded by the trial Court for rejecting the application are without any basis. He submitted that the appointment of the Court Commissioner is necessary for complete and effective adjudication of the controversy involved in the suit. In support of his submissions, he placed reliance on the judgment of the Co-ordinate Bench of this Court in ***Kashinath Chindhuji Shastri Versus Haribhau Nathuji Bawanthade*** [2004(2) Mh.L.J. 724] and the judgment of this Court in ***Vijay Shrawan Shende Versus State of Maharashtra & Others*** [2009(5) Mh.L.J. 279].

5. As against this, Shri A.M. Chandekar, learned counsel for the respondents submitted that the application for appointment of Court Commissioner is an attempt to collect evidence and the same is rightly rejected by the trial Court. He submitted that the plaintiffs are bound to prove their case on the basis of pleadings and evidence and thus justified the impugned order.

6. Pertinent to note, the petitioners are the owners of various individual plots as mentioned in their respective complaints. The petitioners are the original plaintiffs who have filed suit for declaration and possession of the encroached portion of the land situated in the layout carved out on land bearing Survey no.397. At the stage of evidence, after examination of the third witness,

the plaintiffs filed an application under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 seeking appointment of the Court Commissioner. Pertinently, the plaintiffs have sought for appointment of the Taluka Inspector of Land Records as Court Commissioner to measure the land bearing Survey no.397 (Re-numbered as Survey no.397/3A) and in view of the controversy involved, the measurement of land by the Government official will assist the Court in ascertaining actual controversy. The reason recorded by the trial Court in the impugned order that there is no material on record to show that the suit property bearing Survey no.397 is converted into Survey no.397/3A does not appear to be convincing for rejecting the application. Rather, measurement of the property will clarify the position about existence of the plot of the plaintiffs over the suit properties. The position of law is settled that in the suit relating to disputes about encroachment or dimensions of the suit property, it is essential to appoint the Court Commissioner. The reliance placed by the counsel for the petitioner on the judgments cited, appears to be appropriate. Further, in the instant case the plaintiffs have themselves sought for appointment of a Government official as Court Commissioner and therefore directing the appointment of the Court Commissioner at the cost of the plaintiffs will not cause any prejudice to the defendant.

7. Having regard to the controversy involved in the suit and considering the contentions of the plaintiffs as mentioned

in the application under Order XXVI Rule 9 of the Code, I find it necessary that the Taluka Inspector of Land Records be appointed as Court Commissioner. The plaintiffs will have to bear the costs of the Court Commissioner. The impugned order rejecting the appointment of the Court Commissioner appears to be passed only for the reason of lack of clarity about Survey number of the suit property, does not stand to the scrutiny of law. In my considered opinion, the direction to appoint the Court Commissioner in the peculiar facts of this case will not amount to collection of evidence and therefore the impugned order deserves to be quashed and set aside.

8. In view of the above mentioned factual and legal aspects, the writ petition is allowed. The order dated 25.11.2021 passed by the trial Court on application at Exhibit 48 is quashed and set aside. The application filed by the petitioners-plaintiffs seeking appointment of the Court Commissioner under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 is allowed. The plaintiffs are directed to bear the costs of the Court Commissioner. The writ petition is allowed in aforesaid terms and disposed of. No order as to costs.

(RAJ D. WAKODE, J.)