



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

WRIT PETITION NO. 3531 OF 2025

Bhiva Ratan Bhagwat, Since Deceased (09.10.2023) Thr. L.R's

- a. Rahul Bhiva Bhagwat, Aged 47 years, Occ: Judicial Officer, R/o MIG 3/10, Housing Board Colony, Vaishali Nagar, Nagpur.
- b. Aniruddha Bhiva Bhagwat, Aged 45 years, Occ. Government Servant, R/o Flat No.605, Gulmohar Apartments, Building-2, Block-A, Talpuri International Colony, Bhilai Chhattisgarh – 490009.
- c. Mangesh Bhiva Bhagwat, Aged 42 years, Occ: Service, R/o MIG 3/10, Housing Board Colony, Vaishali Nagar, Nagpur.

PETITIONERS

VERSUS

1. Rajesh Baburao Thool, Aged : 39 years, Occ. Unknown.
2. Anusubai Baburao Thool, Aged 70 years, Occ: Household.

Both R/o Panchmadhi Muhalla, New Colony, Nagpur.

RESPONDENTS

Shri R.D. Dharmadhikari, counsel for the petitioners.
Shri P.V. Ghare, counsel for the respondents.

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE : JANUARY 16, 2026

ORAL JUDGMENT

RULE. Rule is made returnable forthwith and heard finally with consent of the learned counsel for the parties.

2. By this petition, the order dated 25.11.2024 passed by the appellate Court rejecting the application at Exhibit 16 for appointment of the Court Commissioner at the appellate stage, is subjected to challenge.

3. The petitioners are the original plaintiffs in Regular Civil Suit No.611 of 2005 which was filed for seeking declaration and injunction.

The suit was dismissed by the judgment and decree dated 13.09.2012. The plaintiffs thereafter filed Regular Civil Appeal No.354 of 2013 in which they filed an application for appointment of Court Commissioner to get the suit land measured. The application was resisted by the respondents and the same was rejected by the order dated 25.11.2024 which is subjected to challenge by way of instant petition.

4. The primary contention of the counsel for the petitioner is that in the wake of the controversy about encroachment upon the suit property, there was necessity to appoint the Court Commissioner to take measurement of the disputed land so that the controversy is decided in its entirety. He submitted that although the application was filed by invoking the provisions of Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short, 'the Code'), the Appellate Court has considered the parameters with respect to the provisions of Order XLI Rule 27 of the Code and has erroneously rejected the application. In support of his submissions, he placed reliance on several judgments of this Court laying down the proposition that in the suit related to encroachment, the appointment of Court Commissioner has to be directed. Reliance is placed on the judgments in *Rawanbapu Bhimrao Deshmukh & Others Versus Bapurao Rangrao Deshmukh & Others* [(2024) 2 Mah LJ 552], *Vijay Shrawan Shende & Others Versus State of Maharashtra & Others* [2009(5) Mh.L.J. 279] and *Dhondiram & Others Versus Gopal Through L.Rs. Raosasaheb & Others* [2025 SCC OnLine Bom 2632].

5. Opposing the petition, the learned counsel for the respondents submitted that the petitioners/plaintiffs have never applied for appointment of the Court Commissioner during pendency of the civil suit and therefore the application at the appellate stage deserved to be rejected and therefore justified the impugned order.

6. While considering the controversy involved, it has to be seen that the application for appointment of Court Commissioner is filed only at the stage of consideration of the appeal. Pertinent to note, no issue was framed by the trial Court with respect to removal of encroachment. Neither the plaintiffs have ever applied for appointment of Court Commissioner to measure the suit land during pendency of suit. The suit is finally decided and the judgment and decree is now challenged before the Appellate Court. In view of this, the application for appointment of Court Commissioner is definitely an attempt to collect evidence in order to fill up the lacunae. As such, there is no perversity on the part of the Appellate Court in considering the parameters of the provisions of Order XLI Rule 27 of the Code related to additional evidence. Even during course of arguments, the counsel for the petitioners was unable to submit any plausible explanation as to why any application for appointment of Court Commissioner was not filed before the trial Court during pendency of the civil suit. As such, the application filed at the appellate stage clearly amounted to an attempt to collect evidence and there is no perversity on the part of the Appellate Court in rejecting the application.

7. The impugned order passed by the Appellate Court is well reasoned and needs no interference on any count. Having regard to the factual and legal aspects, no indulgence is warranted under Article 227 of the Constitution of India. The writ petition is accordingly dismissed with no order as to costs. Rule stands discharged.

(PRAFULLA S. KHUBALKAR, J.)

APTE