

MHPU180013342017



R.C.S./237/2017
Dattatray Baburao Phadke Vs. Devaibai Yashwant Yede

ORDER BELOW EXH.20.

(Passed On 10/08/2026)

The present application has been filed by plaintiffs under Order XXVI Rule 9 of the Code of Civil Procedure, seeking the appointment of a Court Commissioner to measure the suit properties. Defendant Nos. 1 to 9 have strongly opposed the application by filing their say at Exh.30.

2. It is the contention of the plaintiffs that the suit property bears Survey No. 582. The plaintiffs have already get the suit property measured through a private surveyor. However, the defendants have obstructed the measurement of the suit property. Therefore, the present suit has been filed for removal of the encroachment from the suit property. In order to ascertain the actual position and status of the suit property on the field, it is necessary to appoint a Court Commissioner to measure the suit property. The plaintiffs are ready and willing to bear the expenses of the Court Commissioner and has therefore requested that the TILR be appointed as the Court Commissioner for carrying out the measurement.

3. Per contra, the defendants have opposed the present application and submitted that the plaintiffs have not approached the Court with clean hands. The plaintiffs have suppressed material facts from the Court. It is further submitted that, by filing the present application before the commencement of the trial, the plaintiffs are attempting to collect evidence through the Court machinery, which is

not permissible in law. Therefore, the defendants have prayed for rejection of the present application.

4. Heard both sides. This Court has also gone through the written argument filed by Defendant Nos. 1 to 9. In support of their contentions, Defendant Nos. 1 to 9 have relied upon the judgments of the Hon'ble Bombay High Court in ***Dhondiram Nivrutti Pawar Vs. Laxman Khashaba Pawar***, reported in 2018 (3) All MR 696, and ***Arjun Rambhau Dhankude Vs. Nirmala Patilbua Pawar***, Writ Petition No. 4078 of 2018. Perused the record, the present application, say and the documents placed on record.

5. This Court has gone through the provisions of Order XXVI Rule 9 and Section 75 of the CPC. Under the said provisions, where clarification of a matter in dispute between the parties is necessary, the Court may appoint a Court Commissioner for the measurement and local inspection of the suit property.

6. In the present case, admittedly, the suit has been filed for removal of encroachment. It is a settled principle of law that, in cases involving a dispute regarding boundaries or encroachment, appointment of a Court Commissioner for joint measurement of the suit property is an appropriate remedy for ascertaining the actual position on the spot and elucidating the dispute between the parties. However, the Ld. Advocate for the defendants has argued that the plaintiffs are attempting to collect evidence by using the machinery of the Court before commencement of the trial. No doubt, in the case of ***Shantaram Datta Kekan and ors. Vs. Bhausaheb Karbhari Kekan***, Writ Petition No. 14046 of 2021, the Hon'ble Bombay High Court observed as under:

“8. After having considered the provisions of Code under which Civil Court is empowered to appoint Court Commissioner as well various decisions of this Court on the subject it is clear that, there is no hard and fast Rule that Court Commissioner can be appointed only at a particular stage. This Court in few decisions has permitted appointment of Court Commissioners even before commencement of trial and in some cases appointment of Court Commissioners before commencement of trial is held to be erroneous. In my view, the decisions are rendered in facts of each case. However, common thread that runs through all the above decisions is as regards the principle that a Court Commissioner can never be appointed in order to enable parties to collect evidence. It is on account of this principle that in most of the cases this Court has held that even before a party adduces his evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court's power to appoint Court Commissioner at any stage does not appear to be circumscribed. It all depends upon facts and circumstances of each case.”

7. It is clear that the appointment of a Court Commissioner cannot be said to be impermissible at every stage of the proceedings. However, it has also been observed that a Court Commissioner cannot be appointed merely for the purpose of collecting evidence on behalf of a party. In the present case, some defendants have not yet appeared in the suit as the suit summons are not served on them, against whom the plaintiffs have claimed relief in respect of the boundary dispute and removal of encroachment. The plaintiffs are seeking measurement of the suit properties before commencement of the trial and even before service of summons upon all the defendants. The conduct of the plaintiffs indicates that they are attempting to collect evidence for the purpose of the trial by using the machinery of the Court. Such a course is not permissible in law. Therefore, at this stage of the proceedings, the

present application is not sustainable and is liable to be rejected on the ground that the appointment of a Court Commissioner would amount to collection of evidence before commencement of the trial. However, the plaintiffs may be granted liberty to file a fresh application for appointment of a Court Commissioner at any further appropriate stage of the proceedings.

8. This Court has also gone through the case-law in *Dhondiram (Supra)*, however the respondents therein had not raised any dispute regarding the boundaries. The facts of the said case are distinguishable from the facts of the present case, as the issue of encroachment is directly involved in the present proceedings. This Court has also considered the case-law in *Arjun (Supra)*. However, the facts and circumstances of the said case are different from those of the present case. Therefore, the said judgment is not helpful to the defendants in the present matter.

9. In view of the above observations, this Court is of the opinion that the present application is not sustainable at this stage and is liable to be rejected. Thus, I pass the following order.

ORDER

1. The application below Exh.20 is hereby rejected, with liberty to the plaintiffs to file a fresh application at further appropriate stage of the proceedings.
2. Both parties shall take note of this order.

Daund.
Dt.10/08/2026.

(A. S. Shaikh)
4th Jt. Civil Judge (Jr.Dn.),
Daund, Dist. Pune.

CERTIFICATE

I affirm that the contents of this P.D.F file, Order are same, word to word, as per the original order.

Name of the Steno	:- Deepak A. Merukar, Grade-3
Court / Panel	:- A. S. Shaikh 4 th Jt. C.J.J.D. & Judicial Magistrate First Class (Court No. 4) Daund.
Order / Judgment date	:- 10/08/2026.
Order / Judgment singed by	:- 10/08/2026.
the Presiding Officer on	
Order/ Judgment uploaded on :-	10/08/2026.