

ORDER BELOW EXH. 49 IN RCS NO.85/2025.

CNR No.MHST180001252025

01. This application is filed by plaintiffs under Order 26 Rule 9 of the Code of Civil Procedure,1908 for appointment of an advocate as a Court Commissioner.

02. It is the contended by the plaintiffs that they have filed this suit for declaration, perpetual injunction and other consequential reliefs, against the order of Sub-Divisional Officer, Dahiwadi, dated 04.02.2025. Suit properties are Gat No.47 and Gat No.885 totally admeasuring 0H-61R and 0H-66R respectively, situated at village Hingane, Tal. Khatav, Dist. Satara, in which a way running in between both the gat numbers which is allegedly obstructed by the plaintiffs is the subject matter of the suit. It is contended by the plaintiffs that they are owners of the suit properties. Defendants have appeared in this suit and denied the contents of the plaint. In order to decide the real controversy between both the parties it is necessary to bring on record the factual position on the spot, to find out whether there is really any such way existing or not. Hence, by filing this application, plaintiffs are praying for appointment of an Advocate as Court Commissioner to visit the suit properties and the property of defendant, its boundaries, embankments, trees etc. and whether any such way is running in between the suit properties or not.

03. Defendants No.1 to 5 have filed their say to this application at Exh.51. It is contended that the application filed by the plaintiffs is false and liable to rejected. Plaintiffs have suppressed material facts

from the Court. Defendant No.6, who is Tahsildar in Rasta Case No.18/2024 passed a judgment dated 04.09.2024 and the said judgment is confirmed by the Sub-Divisional Officer, Dahiwadi dated 04.02.2025. But plaintiffs are praying that both the judgments are illegal and liable to be set-aside by way of the relief of declaration. Plaintiffs are also praying the relief of permanent injunction to restrain defendants from implementing the order of Tahsildar in Rasta Case and from creating any new way on the basis of that order.

04. It is further contended by defendants that on the eastern side of Gat No.47 and 885, there is Hingane-Tadawale main road running in south-north direction. On the western side of both the gat numbers of plaintiffs, there are Gat No.46, 77, 121, 122, 124, 147 and 125 of defendants and lands of other agriculturists. There is 10ft wide way east-west running through the Survey number Bandh of Gat No.47 and Gat No.885, which is very old. The said way is obstructed by the plaintiffs illegally by ploughings and putting stone on it. Hence, defendants have approached Tahsildar for removing obstruction of way under Section 5 of the Mamlatdar Courts Act, in Rasta Case No.18/2024. In that rasta case, Mamlatdar after hearing both the parties and after conducting the panchnama of the spot, directed plaintiffs to make open the obstructed way. Plaintiffs filed in Rasta Revision appeal bearing No.332/2024 before Sub-Divisional Officer, Dahiwadi, who rejected the revision appeal of plaintiffs and confirmed the order of the Tahsildar. By filing this suit, plaintiffs filed an application below Exh.5 to restrain defendants from implementing the order of Tahsildar. But this Hon'ble Court also rejected the Exh.5 application of plaintiffs. Against the said order, plaintiffs filed Civil Misc. Appeal No.25/2025 before the Hon'ble

District Court, Vaduj, but the appeal filed by plaintiffs is also rejected. Already in Rasta case proceeding, the Tahsildar has visited the spot and bring on record the actual position of the spot by way of panchnama. Hence, again the appointment of Court Commissioner on the same issue is not necessary. Plaintiffs are trying to collect the evidence, which is not permissible. Hence, defendants have prayed for rejection of this application.

05. Heard arguments of both the sides at length.

06. The plaintiffs have relied upon the judgment of the Hon'ble Bombay High Court Bench Aurangabad in a case of ***Karbhari Raibhan Thete & Ors, Vs. The Additional Collector and Ors in Writ Petition No.2780 of 2022, decided on 24th June, 2022***, wherein, it has been observed that “*during the enquiry of application under Section 5(2) of the Mamlatdar Courts Act, the Mamlatdar has to deal with it as a suit and has powers which are clearly analogous to the powers conferred upon the Civil Court under the Code of Civil Procedure.*” Whether the Mamlatdar in Rasta case proceeding has adopted the prescribed procedure or not, it is not the stage to decide this issue. Hence, this case law is not helpful at this juncture to the plaintiffs.

07. On the contrary, the defendants have relied upon case law i.e. ***Sanjay Namdeo Khandare Vs Sahebrao Kachru Khandare & Ors, 2001(2) Mh.L.J, 959***, wherein, it has been observed that “*the court commissioner cannot be appointed for collecting the evidence.*” The facts of the case law and of the case in hand are not identical, hence, this case law is not helpful to defendants.

08. Plaintiffs have filed this suit for declaration that the order passed by the Tahsildar in Rasta case No.18/2024 and the order

passed by Sub-Divisional Officer, Dahiwadi in Revision Appeal No.332/2024, confirming the order of Tahsildar is *vide-ab-initio* and liable to be set aside. The further relief of perpetual injunction to restrain defendants from implementing the order of defendant No.6-Tahsildar is also prayed. It is an admitted position that the application for temporary injunction below Exh.5 filed by the plaintiffs is rejected by this Court on the ground that prima-facie the panchnama carried out by Tahsildar During the Rasta case proceeding appears to be correct. It has to be mentioned here that on this only ground that, there is a panchnama of Tahsildar, it cannot be held that the application for appointment of Court Commissioner is not maintainable. It needs a mention here that plaintiffs are challenging the said order of Tahsildar and Sub-Divisional Officer in Rasta case proceeding. Plaintiffs have come with a specific case that there is no such revenue record in respect of the said way. It is true that under Section 5 of the Mamlatdar Courts Act, the Mamlatdar has the power to make open the already existed and obstructed way in order to facilitate the ingress and egress to the agriculturists, through the survey number bandh. Plaintiffs are challenging the order of Tahsildar and Sub-Divisional Officer. They are contending that the order is arbitrary. Defendants are coming with a case of the said way running through the suit properties since long back. It means, they are claiming the way as a customary way. Defendants are bound to establish the existence of said way. Plaintiffs are also bound to show that there is no such way is in existence as prayed by defendants. Under such circumstances, the appointment of Court commissioner is going to fulfill the purpose of both the parties. However, the appointment of an advocate as a Court Commissioner will not serve the purpose as he is not an expert in that field. The appointment of

T.I.L.R would serve the said purpose. Accordingly, the application filed by plaintiffs for appointment of advocate as a Court Commissioner is not maintainable. Hence, I pass following order:-

ORDER

Application below Exh.49 is rejected, with the observations made above in the order.

Vaduj.
Dt.18.08.2025

(F. B. Baig)
Jt. Civil Judge Sr.Div. Vaduj.