

**Order below Exh.136 in Spl. Civil Suit No.71/2023****CNR No.MHST180002402023**

This application is filed by the plaintiffs for appointment of Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure,1908.

02. It is contended that plaintiffs have filed an application on Exh.5 seeking temporary injunction against the defendants No.1, 12, 15, 19 and 23, to restrain them from alienation, transfer or creating any third-party rights, alteration in the nature of the suit properties. One of the suit properties situated at village Mhaswad, Tal. Man, Dist. Satara bearing Gat No.1236/5 is in the possession of the plaintiffs and given to the plaintiffs in the oral as well as written partition between plaintiffs and defendants. Defendant No.15 entered on that suit properties and disturbed the peaceful possession of the plaintiffs. Defendant No.15 is trying to make illegal construction on the same. Plaintiffs have filed an application at Exh.85 against the said defendant and prayed for status-quo order. Accordingly, the Court has passed the order directing the defendant No.15 to maintain the status-quo over the above mentioned suit property. It is further contended that for the proper adjudication at Exh.5 and the suit, it is necessary that the factual position of said suit property should come before the Hon'ble Court through the third-person like Court Commissioner. Hence, before deciding an application on Exh.5, it is essential to appoint the Court Commissioner to ascertain and report the Hon'ble Court about factual position regarding the nature and extent of alleged interference, the nature of alteration, modification and construction over the suit property, the possession and use of the

property by the parties and the material changes made by the defendants. The plaintiffs are ready to bear the costs and expenses of the Court Commissioner. Hence, this application is filed to appoint a proper person as a Court Commissioner to visit the disputed site, to make the local inquiry and to submit the report.

03. Defendants No.12 to 22 have filed their say to this application at Exh.138 and contended that the application is false and liable to be rejected. The suit property Gat No.1236/5 was never given to plaintiffs in any partition. The construction of defendant No.15 is not illegal. In the suit of the plaintiffs which is filed for partition, there is no contention about the earlier partition between plaintiffs and defendants. It is also nowhere mentioned by the plaintiffs in the plaint that Gat No.1236/5 was given to the share and possession of the plaintiffs. It is also not so mentioned in the temporary injunction application. However, this application is filed by the plaintiffs beyond their pleadings, which is not tenable in the eyes of law. The application filed by the plaintiffs on Exh.5 is pending for decision. It is binding on the plaintiffs to establish his case on their own. This application is moved to collect the evidence by appointing a Court Commissioner. The application is premature. Plaintiffs cannot take the help of court to collect the evidence. Hence, defendants have prayed for rejection of this application.

04. Heard learned advocate on both the sides at length.

05. Perused the documents filed on record by both the sides. The affidavits of witnesses filed by the plaintiffs in support of this application namely Raviraj Sarate, Vikas Lokhande, Anand Sartape and photographs filed on record.

06. The plaintiffs have relied upon the case laws as under:

1. **Chand Fabricators (P) Ltd, Vs. Geeta Food Products, (1996) AIHC 2892**, facts of the case law and of case in hand are not similar. Case law is in respect of infringement of trade mark right of plaintiff. Hence, this case law is not helpful to the plaintiffs.

07. On the other hands, defendants No.12 to 22 have relied upon the case laws as under:

1. **Gangaram Baban Tagad & Ors Vs. Sarubai Yashwant Tagad & Ors, Writ Petition No.6700 of 2011, decided on 12.06.2013**, wherein, it is held by the Hon'ble Bombay High Court that "it would be premature to consider the application under Order XXVI of Rule 9 of the C.P.C prior to decision on Exh.5." This case law is helpful to the defendants.

2. **Syed Mushtaque Ahmad & Ors Vs. Syed Ashique Ali Khan, 2012 (1) AIR Bom R 114.**

3. **Dhondiram Nivrutti Pawar & Ors Vs. Laxman Khashaba Pawar & Ors, 2018(2) Mh.L.J 255.**

4. **Vij Kamagar Sahakari Patsanstha Ltd., Ambejogai Vs. Ramkrushna Dhondiram Thorat & Ors, 2009(3) AIR Bom R 737,**

The common ratio laid down in all the above case laws is that plaintiffs should prove his case on his own. By way of appointment of Court commissioner plaintiffs cannot collect the evidence of possession when there is no issue of encroachment, there is no need to appoint the Court Commissioner.

08. Defendant No.1 relied upon the judgment of the Hon'ble

Bombay High Court in a case of **Mrs. Fatima Gomes Furtado & Ors, Vs. Smt. Indirabai Vinayak Lotlikar & Ors, 2016(2) ALL MR 142**, wherein, it has been held by the Hon'ble Bombay High Court that "where both the appellants and respondent are claiming to be owners of disputed property based on same sale deed and when there is dispute of encroachment Court Commissioner has to be appointed." Facts of the case law and of the case in hand are not similar, hence, it is not applicable to this suit.

09. This is a suit for partition, separate possession and perpetual injunction. Plaintiffs are claiming the suit properties as their ancestral and joint family properties which are yet not divided by way of partition. On the contrary, it is the contention of the defendants that some of the suit properties are their self acquired properties with which plaintiffs have no concern. Admittedly, both plaintiffs and defendants have to prove their case on their own by filing such oral and documentary evidence. By filing this application, plaintiffs have specifically alleging that defendant No.15 has made a construction over the Gat No.1236/5, which was in their actual possession by entering upon said Gat number illegally. It is further mentioned in the said application that already there was oral and written partition between plaintiffs and defendants and the said Gat No.1236/5 was given to the share of plaintiffs. It has to be mentioned here that plaintiffs are taking two contrary stands by way of their plaint and said application. It is stated in the plaint that, there is still no such partition of the suit properties, but in the application for appointment of Court Commissioner plaintiffs are stating that there was such oral and written partition. Plaintiffs cannot blow hot and cold at the same time. Further, from the photographs filed on record

by both the sides, it can easily be inferred that the construction standing on the said gat number is of a temporary nature, made with the help of iron angles, tin sheets and shutters. There is no such dispute of encroachment. No such pleading of encroachment are mentioned in plaint. Under such circumstances, the appointment of the Court Commissioner is not required. Rather, by appointing the Court Commissioner, the Court cannot help the plaintiffs to collect an evidence regarding their possession over the suit properties. This has to be done by the concerned parties on their own, hence, the application lacks of merit. Accordingly, I pass following order:

**ORDER**

Application at Exh.136 stands rejected.

Date: 31.01.2026.  
Vaduj.

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