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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.8561 OF 2014

Asadyar Khan s/o Jameelyar Khan,
Age : 42 years, Occu. Business,
R/o Mill Corner, Kotwalpur,
Aurangabad

..PETITIONER
(Org. Defendant)

VERSUS

Subhashchand s/o Surajmal Bothra,
Age : 65 years, Occ. Business,
R/o Row House No.67, Blue Bell
Housing Society, N-1, CIDCO,
Aurangabad

..RESPONDENT
(Org. Plaintiff)

Mr A.D. Kasliwal, Advocate for petitioner;
Mr S.M. Sangle, Advocate holding for Mr G.K. Naik Thigle, Advocate for
respondent

CORAM : N.W. SAMBRE, J.

DATE : 23rd November, 2015

ORAL ORDER :

Special Civil Suit No.176 of 2013 is filed against the present petitioner – defendant for possession of open land out of C.T.S. No.2596, situated at Mill Corner, Aurangabad. The suit has reached at the stage of recording of evidence and as such, respondent-plaintiff filed an application Exh.19 for appointment of Court Commissioner, which came to be granted by 3rd Joint Civil Judge Senior Division, Aurangabad, by an order dated 16th August, 2014. Thus, the present petition at the behest of original defendant.

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2. Mr Kasliwal, learned Counsel appearing on behalf of the petitioner, would urge that the order impugned is not sustainable, in view of the fact that the same is passed before the stage of recording of evidence. By relying upon the judgment of this Court in the matter of **Kalyan Santram Kawade & ors. vs. Khanderao alias Khandu Ganpati Kawade & ors.**, reported in **2015 (4) Mh.L.J. 429**, would urge that the powers of appointment of Court Commissioner are required to be exercised sparingly. According to him, only in case if grave injustice is noticed, then appointment of Court Commissioner cannot be ordered and sought to place reliance on the observations of this Court that such an appointment , normally does not precede recording of evidence.

3. According to the learned Counsel, in the plaint, the petitioner has come out with the case that on two occasions he has carried out measurement of the suit property; (i) through a Cadestral Surveyor on 7th November 2012 and (ii) by a retired City Survey Officer. In view of above, according to him, there was no necessary to appoint the Court Commissioner.

4. Learned Counsel appearing on behalf of respondent – plaintiff would urge that the order impugned speaks of the fact that the application for appointment of Court Commissioner was moved at an appropriate stage, i.e the stage at which recording of evidence has commenced. According to him, the Court below, in the detailed order has taken note of lacunae/shortfalls noticed in the two measurements as are reflected in

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paragraphs 6, 7 and 8 of the plaint. He would then urge that having regard to the nature of the claim made in the plaint, particularly in the matter of possession of the portion of plot No.7 out of C.T.S. No.2596, the appointment of Court Commissioner is very much justified and sought dismissal of petition.

5. After considering the submissions made by the respective parties, it is required to be noted that the learned trial Court whose order is impugned herein, has considered entire gamut of the matter, including the law dealing with appointment of Court Commissioner. In the present case, the learned trial Court was of the firm view that appointment of City Survey Officer as a Court Commissioner is necessary in view of the fact that the Cadestral Surveyor, about whom pleadings are raised in paragraphs 6 and 7 has measured only the property of the plaintiff and noticed that the same holding was found to be less by around 29 and odd meters than the one to which he was having title. The trial Court then also considered the law that was cited before it for appointment of Cadestral Surveyor as Court Commissioner. The fact remains that the application as is moved for appointment of Court Commissioner appears to be after commencement of recording of the evidence in the matter.

6. The submission of Mr Kasliwal that the powers for appointment of Court Commencement are required to be used sparingly by relying upon the judgment in the matter of Kalyan Santram Kawade and ors. (cited supra), if applied to the facts of the present case, in my opinion, the earlier

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measurement has rightly prompted the trial Court to order appointment of Court Commissioner, particularly having regard to the prayer in the plaint.

7. In the light of above, no illegality is noticed in the impugned order. The impugned order appears to be in tune with requirement of Order XXVI, Rule 9 of the Code of Civil Procedure. Thus, the petition fails and stands rejected with no order as to costs.

(N.W. SAMBRE, J.)

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