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

WRIT PETITION NO.232 OF 2015

Nanubai Vasant Nehe and others.

..Petitioners

-Versus-

Ravsaheb Nathu Pulate and others.

..Respondents

.....

Mr.S.S.Chapalgaonkar, Advocate for the Petitioners.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 19th January, 2015

Per Court:

1 The Petitioners are the original Defendants in RCS No.354/2014. The order below Exhibit-5 seeking temporary injunction was passed on 22.09.2014 and the injunction has been clamped upon the Petitioners/Defendants.

2 The Petitioners/ Defendants had preferred an application Exhibit-28 on 28.08.2014 prior to the decision on Exhibit-5. A request was made to the Trial Court to inspect the site personally so as to arrive at a conclusion as regards the nearest path that can be used as an access road so as to prevent any of the litigating parties from getting landlocked.

3 The said application is rejected by the impugned order dated

22.09.2014 merely on the ground that Exhibit-5 having been decided on merits, no orders need to be passed on Exhibit-28.

4 The learned counsel appearing for the Petitioners had alternatively suggested that the Trial Court could have appointed the Court Commissioner. Needless to state, the application Exhibit-28 was filed on 28.08.2014 i.e. prior to the decision on Exhibit-5.

5 This Court (Coram : S.S.Shinde, J.) has held in Writ Petition No.2749/2012 decided on 04.03.2013 that an application for appointment of Court Commissioner need not be filed at a pre-mature stage in trial. The relevant paragraph Nos.4 and 5 are reproduced hereinbelow :-

- “4. I have given careful consideration to the rival submissions. I find considerable force in the submissions of the learned counsel for the plaintiff that yet the issues are to be framed by the Trial Court and at the threshold of hearing of the suit, application filed by the defendants for appointment of the Court Commissioner is entertained by the Trial Court. The plaintiff's or defendants' case should stand or fall on the evidence lead by them. This Court in case of **Sanjay Namdeo Khandare Vs.Sahebrao Kachrau Khandare and others, reported in 2001(2) Mh.L.J. 959**, has taken a view that the Court Commissioner can not be appointed for collecting evidence.
5. In that view of the matter, in my opinion, the stage of the proceeding for appointment of the Court Commissioner is pre-mature. It is different matter if the

Court starts recording the evidence and finds it difficult to locate the correct position about the questions of controversy involved in the matter and at that stage, by invoking powers u/s. 26 Rule 9 of the C.P.C. appoints the Court Commissioner. Therefore, in my opinion, the impugned order can not sustain for the afore stated reasons. Therefore same is quashed and set aside. However, the parties will have liberty to file an application for appointment of the Court Commissioner at appropriate stage of the proceeding. Setting aside the impugned order will not come in the way of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit.”

6 This Court, while passing an order in Writ Petition No.8877/2013 (Coram : S.V. Gangapurwala, J.) dated 17.01.2014 has also echoed the same view in paragraph Nos.4, 5 and 6, which are reproduced hereinbelow :-

- “4. *There can not a dispute with the proposition that to appoint the court commissioner as per Section 75 of the Code of Civil Procedure is the discretion of the Court. The said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised as per the judicial norms.*
5. *The parties have not yet stepped into witness box. The Court commissioner could have been appointed if the Court finds it necessary for the just decision of the case. No doubt, in case of encroachment, dispute with regard to the identity of the property, the assistance of expert such as Cadestral Surveyor to measure the property can be considered by the Court. However, the stage is too premature. Even the application for temporary injunction is not decided. The report of the T.I.L.R. if disputed by either party, is not admissible in evidence unless the T.I.L.R. is examined.*
6. *At the stage of evidence, from the evidence on record i.e. documentary evidence if the Court finds that the*

appointment of court commissioner is necessary, then at that stage a party can file an application for appointment of T.I.L.R. as court commissioner, which application would be considered by the Court on its own merits.”

7 As such, since the recording of oral evidence has commenced now by the filing of the affidavit in lieu of examination-in-chief by the Plaintiffs, the learned counsel appearing for the Petitioners, on instructions, seeks leave to withdraw this Writ Petition with liberty to prefer a proper application for appointment of the Court Commissioner in the light of the view taken by this Court in the above two decisions.

8 As such, this Writ Petition is disposed of as withdrawn with liberty to the Petitioners to prefer a proper application for appointment of the Court Commissioner. In the event such an application is filed at an appropriate stage as observed by this Court in the above two decisions, the Trial Court shall consider the same in accordance with law after hearing the litigating parties and on its own merits.

9 No order as to costs.

(RAVINDRA V. GHUGE, J.)