

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.6219 OF 2014

Raghunath Pandurang Kale

...Petitioner

vs.

Sou. Alka Sunil Malvade

...Respondent

Mr. Pratap Patil for the Petitioner.

Mr. Vikas M. Mali for the Respondent.

CORAM : R. M. SAVANT, J.

DATE : 23RD FEBRUARY, 2015.

P.C. :-

Rule.

2] With the consent of the learned counsel for the parties, made returnable forthwith and heard.

3] The writ jurisdiction of this Court is invoked against the order dated 24th April, 2014 passed by the learned Civil Judge, Senior Division, Islampur, by which order the application Exhibit 49 filed by the Plaintiff for examining the Court Commissioner who was appointed by the Trial Court came to be rejected. The impugned order discloses that the said application has been rejected as the Plaintiff has closed his evidence. The Trial Court has further observed that what the Plaintiff wants to prove by this application is neither part of his pleading nor it is relevant.

4] Having regard to the fact that the Court Commissioner was

appointed by the Trial Court, in my view, the Trial Court has erred in making the observation as mentioned hereinabove. It is well settled that the Court Commissioner can be appointed by having recourse to order 26 Rule 9 of the Code of Civil Procedure for elucidating the matter in controversy. It is in the said context that the application Exhibit 49 was required to be considered. Since, by order dated 16th November, 2011, the Court Commissioner was appointed by the Trial Court at the behest of the Plaintiff, the plaintiff was required to be given an opportunity to formally lead the evidence of the Court Commissioner to prove the report submitted by him. The defendant can obviously cross examine the Court Commissioner if the evidence which comes on record is adverse to the defendant. If the Court Commissioner is not allowed to be examined, the exercise of appointing the Court Commissioner would be turned futile.

5] In that view of the matter, the impugned order dated 24th April, 2014 is required to be quashed and set aside and is accordingly quashed and set aside. The application Exhibit 49 stands allowed. Since the Defendant has filed his affidavit of examination -in- chief, it is before the cross examination of the defendant that the Trial Court would permit the Plaintiff to examine the Court Commissioner and the cross examination of the Court Commissioner would also be conducted immediately thereafter. The Writ Petition is allowed to the aforesaid

extent. Rule is accordingly made absolute with parties to bear their respective costs.

(R. M. SAVANT, J.)

wadhwa