

1. Heard Mr. Prasad Kulkarni, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants', have challenged the Judgment and order dated 22.4.2015 passed by the learned Civil Judge, Jr. Dn., Manmad, below Exh.35 in Regular Civil Suit No.50 of 2014. By that order, the learned trial Judge rejected the application filed by the defendants under Order 26, Rule 9 of C.P.C for appointment of Court Commissioner.
3. In support of this petition, Mr. Kulkarni submitted that the respondent, hereinafter referred to as plaintiffs, instituted suit for perpetual injunction restraining the defendants from keeping plastic tank or any other movable articles in City Survey No.911/B and also restraining the defendants from causing any obstructions to the plaintiffs while carrying out construction as

also from committing encroachment.

4. Mr. Kulkarni submitted that the defendants filed Written Statement as also counter claim. During the pendency of the suit, the defendants filed application Exh.35 under Order 26 Rule 9 for appointment of Court Commissioner. He has taken me through paragraph 5 of the application and submitted that in order to bring on record the factual position, it is absolutely necessary to appoint Court Commissioner. The Court Commissioner can bring on record who is in possession of the property in dispute. The Court Commissioner can be examined and cross examined by parties. He, therefore submitted that it is absolutely necessary to appoint Court Commissioner. By the impugned order, the learned trial Judge, however, rejected the application.

5. I have considered the submissions of Mr. Kulkarni. I have perused the material on record. In paragraph 4, the learned trial Judge considered the decision of this Court in the case of Nalubai Narayan Shinde Vs. Gopinath Shinde, 2011(3) Bom.C.R. 167 and observed that Court Commissioner cannot be appointed for finding out as to who is in possession of land. The Court Commissioner also cannot be appointed for finding out person who is using the property and keeping the articles. By appointing the Court Commissioner for finding out these things impliedly amounts to finding out who is in possession of particular

property. By the present application, the defendants want to collect evidence. The suit is not in respect of boundary dispute and, therefore, he rejected the application. I do not find that the learned trial Judge committed any error in rejecting the application. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)