

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

WRIT PETITION NO. 3040 OF 2015

Rajendrakumar Bhausahab Landage
and another .. Petitioners

Versus

Nathu Santu Kumutkar and others .. Respondents

Shri Niteen V. Gaware, Advocate for Petitioners.
Mrs. C. S. Deshmukh, Advocate for the Respondent No. 1.
The Respondent Nos. 2 to 4 are served.

**CORAM : S. V. GANGAPURWALA, J.
DATE : 22ND MARCH, 2016.**

PER COURT :

. The application for appointment of Court Commissioner is allowed, aggrieved thereby the present petition.

2. Mr. Gaware, the learned counsel for petitioners submits that, the petitioners had in fact filed an application for appointment of Court Commissioner in the Trial Court. The same is pending. In a miscellaneous appeal filed against the order passed by Trial Court below Exh. 5, the petitioners filed an application for appointment of Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure (for short "C.P.C."). However, the Court allowed the said application under Order 39

Rule 7 of the C. P. C. The learned counsel submits that the application was filed by the present respondents in fact to fix the boundaries with a prayer to appoint T. I. L. R. as a Court Commissioner. However, the Court on its own appointed an Advocate as Court Commissioner. No purpose would be served. According to the learned counsel the boundaries of entire gut number can only be ascertain by T. I. L. R. The Court has enlarged the scope of order 39 Rule 7 of the C. P. C.

3. Mrs. Deshmukh, the learned counsel for the respondent No. 1 submits that the Court can always grant lesser relief. The respondent has invoked provisions of Order 26 Rule 9 of the C.P.C., however, the Court instead of allowing the application granted lesser relief by appointing Court Commissioner for local inspection under Order 39 Rule 7 of the C.P.C., as the application for injunction is pending. The learned counsel submits that, the Court has taken care and has prohibited the Court Commissioner from giving the opinion on the aspect of possession of either party. The appellant in fact has admitted the possession of the present respondent. The inspection of the suit property is necessary for effective adjudication of the suit.

4. The Court can appoint Commissioner invoking powers under Section 75 read with Order 29 Rule 6 of the C. P. C., so also can appoint Commissioner in deserving cases by invoking

the powers under Order 39 Rule 7 of the C. P. C. However, the appointment of Court Commissioner for inspection U/O 39 Rule 7 of the C. P. C. is for limited purpose. The application for injunction is already decided by the Trial Court. The suit is filed in the year 2013. The purpose for which the Commissioner is appointed would certainly not come within the purview of Order 39 Rule 7 of the C. P. C. Be that as it may even otherwise the application for injunction has to be decided on the basis of prima facie proof, the parties have to prove prima facie the aspect of possession based on the documents. The Court certainly ought not to have invoked its powers under Order 39 Rule 7 of the C. P. C.

5. In light of the above, the impugned order is quashed and set aside. The application Exh. 38 is rejected.

6. The observations of this Court are limited to the application Exh. 36 and shall not in any way be construed of giving any finding on the appointment of Court Commissioner.

[S. V. GANGAPURWALA, J.]