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

WRIT PETITION NO.245 OF 2016

Suryakant s/o Bhimrao Patil,
Age: 55 years, Occu: Business,
R/o. Venketesh Nagar, Ahmedpur,
Tq. Ahmedpur, Dist. Latur

..PETITIONER
(Orig.Deft.)

VERSUS

Gokuldas s/o Madanlal Bhutada,
Age: 73 years, Occu: Agri. & Business,
R/o. Chavanda Galli Ahmedpur,
Tq. Ahmedpur, Dist. Latur

..RESPONDENT
(Orig.Plaintiff)

Mr J. R. Patil, Advocate for petitioner;
Mr A. N. Sabnis, Advocate holding for Mr V. D. Gunale, Advocate for
respondent

CORAM : NITIN W. SAMBRE, J.

DATE : 12th September, 2017

ORAL ORDER

The respondent-plaintiff filed Special Civil Suit No.8 of 2012 in the Court of Civil Judge Senior Division, Ahmedpur, for recovery of possession of encroached portion of suit plot, perpetual injunction, etc.

2. The petitioner-defendant resisted the suit by filing written statement and the Trial Court framed issues at Exh.79 on 10th November, 2014.

3. The respondent-plaintiff on 5th January, 2013, i.e. before framing of issues, moved application Exh.18 under Order XXVI, Rule 9 of the Code of Civil Procedure, seeking appointment of Court Commissioner. The said

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application was allowed by the Trial Court by order dated 10th January, 2013, appointing Advocate Mr Jagdish Paul as Court Commissioner, with directions to him to visit the suit property, note down situation on the suit property and prepare map showing relevant situation.

4. The Court Commissioner submitted a report at Exh.37, subsequent to which issues were framed.

5. The respondent-plaintiff thereafter pressed application Exh.5 for injunction, which was allowed in his favour.

6. Application Exh.97 was moved by the respondent-plaintiff again for appointment of Court Commissioner viz. Cadestral Surveyor from the office of Deputy Superintendent of Land Records, Ahmedpur, for visit to the site i.e. Plot No.1, inspection of the same, and also of the construction made by the defendant and accordingly draw a map showing lands of the plaintiff and the defendant.

7. The said application was resisted by the petitioner-defendant. However, the Trial Court vide impugned order dated 26th October, 2015, allowed the application for appointment of Court Commissioner, *inter alia* directing him that he shall demarcate survey numbers 89/1 and 88/1/1 of the respective parties to the suit, measure the same, as also the construction on each of the survey numbers, find out the encroachment, if any, on survey numbers, whether there is any violation in the construction carried out exceeding the plot boundaries.

8. The aforesaid order dated 26th October, 2015, is questioned in the present petition on the ground that the stage at which the said application was moved for appointment of Court Commissioner was premature, particularly when it was the plaintiff, who was required to make homework before filing the suit, alleging encroachment by the petitioner-defendant. According to the petitioner, the said act on the part of respondent-plaintiff amounts to collection of evidence and the application is not tenable before commencement of recording of evidence in the suit. So as to substantiate his contention, learned Counsel appearing on behalf of the petitioner would draw support from the order dated 31st July, 2017, passed by this Court in Writ Petition No.9626 of 2016.

9. While countering the aforesaid submissions, Mr Sabnis, learned Counsel appearing on behalf of the respondent would draw support from the judgment of this Court in the matter of **Habibkhan s/o Inauttalakhan & ors. vs. Waman s/o Govind Rathod & ors.**, reported in **2012 (2) Mh. L.J. 541**, so as to justify the impugned order, as according to him, looking to the nature of dispute raised in the plaint, the appointment of Court Commissioner was for the purpose of rendering assistance to the Trial Court to arrive at a proper conclusion. He would also rely upon the judgment of this Court in the matter of **Ajay Ramesh Bhoir vs. Avinash Shantaram Jadia Shiravane**, reported in **2004 (2) Mh. L.J. 725**, so as to submit that the appointment of Court Commissioner is must for ascertaining the dimensions of the disputed property.

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10. Considered the rival submissions.

11. The claim made in the suit by the respondent-plaintiff appears to be for the purpose of removal of encroachment and vacant possession of the property. It was expected of the petitioner-defendant to make appropriate homework, prepare himself and then file the suit by ascertaining exact dimensions of encroachment made by respondent-plaintiff as alleged in the plaint. What is apparent from the conduct of the respondent-plaintiff is that he initially moved an application for appointment of Court Commissioner and as such, an Advocate was appointed to visit the site and ascertain the situation on the suit property, based on which temporary injunction was granted in favour of respondent and against the petitioner.

12. After the issues were framed and before commencement of recording of evidence, another application Exh.97 came to be moved by the respondent-plaintiff for appointment of Court Commissioner. The relief claimed in the said application is an attempt on the part of the plaintiff to collect the evidence to prove his claim as sought to be espoused in the plaint and grant thereof by the Trial Court, despite resistance to the same by the petitioner, amounts to approving the same.

13. Needless to say that it is for the plaintiff to prove his claim of encroachment and possession. He cannot utilize the court proceedings for collection of evidence so as to prove his claim as is put-forth in the plaint.

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This is what exactly is permitted by the Trial Court by passing the impugned order, that too, in my opinion, at a premature stage. The recording of evidence in the matter is yet to commence and the burden is on the plaintiff to establish that there is an encroachment and it is upon satisfaction to that effect, the Trial Court may consider the prayer of respondent-plaintiff for appointment of Court Commissioner. Without considering the aforesaid principle as is laid down by this Court in the matter of **Sitaram Suklal Patil & anr. vs. Vasudeo Suklal Patil**, in Writ Petition No.9626 of 2016, decided on 31st July, 2017, the learned Trial Court has proceeded to allow the application, which in my opinion, is not sustainable in view of the aforesaid observations. There is no dispute about proposition laid down by this Court, in the matters of Habibkhan s/o Inauttalakhan and Ajay Ramesh Bhoir (supra). However, it is required to be noted that the Court Commissioner cannot be permitted to be used by the respondent-plaintiff for collection of evidence, that too without he being entered into witness box so as to substantiate his claim of encroachment initially.

14. Though a plea that the matter has been rendered infructuous is raised by the respondent-plaintiff by stating that the impugned order is already executed by carrying out amendment to the plaint, still in view of above observations, in my opinion, the clock can be set in right direction as the order impugned, though acted upon, is already held to be illegal and not permissible.

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15. In view of aforesaid, writ petition stands allowed in terms of prayer clause (B) and is disposed of.

It is made clear that this will not preclude the plaintiff from moving an application, if such occasion arises, for appointment of Court Commissioner, at an appropriate stage after commencement of recording of evidence.

(NITIN W. SAMBRE, J.)

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