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

WRIT PETITION NO.14023 OF 2017

Vasantrao S Medhe and ors ... Petitioners

V/s.

Vimal Bandu alias Vishwas Mohite
and ors ... Respondents

Mr. Yuvraj P. Narvankar, for the
Petitioners.

Mr. Amit B. Borkar, for the Respondent Nos.
1 to 4.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 20th FEBRUARY, 2018.

P.C. :

1] Heard learned counsel for the petitioners and learned
counsel for the respondents.

2] Rule.

3] Rule is made returnable forthwith with the consent of
learned counsel for both the parties and the petition is taken up for
final hearing.

4] By this petition filed under Article 227 of the Constitution
of India, the petitioners are challenging the order dated 30th January,
2017, passed below Exh.218 and subsequent order dated 29th July,

2017, passed below Exh.219 in, R.C.S.No.744 of 2003, by 2nd Joint Civil Judge Senior Division, Kolhapur.

5] The earlier application Exh.218 was filed for leading additional evidence. However, as the said application was vague and did not specify which additional evidence the petitioners want to lead, trial Court has rejected the said application. Hence the petitioners filed second application at Exh.219 seeking issuance of witness summons to the T.I.L.R., who was appointed as Court Commissioner. and who has measured the suit land. The said application was also rejected by the trial Court, holding that it is barred by principles of *resjudicata* as while rejecting first application, it was observed that, “at this stage, even if the petitioner wants to examine Court Commissioner, he can be called, but for that purpose an opportunity of leading additional evidence to plaintiff is required to be given, which at this stage of the proceeding may not be possible”.

6] Both these orders of the trial Court are subject matter of this writ petition. As admittedly, the suit is simplicitor for declaration and injunction, according to learned counsel for respondents in a suit for injunction, appointment of Court commissioner is not necessary for the purpose of collecting evidence and hence his examination as a witness is also not necessary.

Learned counsel for the petitioners, however, points that

though the suit is for declaration and injunction, there are clear averments made in the plaint that the respondents have already made plotting in the suit land and have tried to make encroachment on the land in possession of the petitioners.

7] In my considered opinion, at this stage, it may not be necessary to enter into question whether the appointment of Court Commissioner was essential or not because already the Court Commissioner's report is on record. The petitioners have accepted the report. However, respondents have raised objection. Hence, another T.I.L.R., was appointed as Court Commissioner, namely Mr. H.R. Dixit. He has also carried out measurement and filed his report. This report is also accepted by the petitioners, but respondents have raised objection thereto. Therefore, as once the Court Commissioner is appointed and his reports are on record, then the contention of respondents that the Court Commissioner cannot be appointed, for the purpose of collecting evidence, in a suit for injunction, holds no merit. This Court has to decide this writ petition, on the basis of two reports of Commissioners are already on record and which are accepted by the petitioners; whereas objected by the respondents.

8] It is a matter of record that the affidavit in-lieu-of-examination-in-chief of plaintiff was filed in the year 2005 and thereafter appointment of T.I.L.R., as Court Commissioner has taken

place. It can be seen from the record that the defendants-respondents have also filed affidavit in-lieu of examination-in-chief on 1st May, 2008 and additional affidavit on 13.8.2008. Now if the Court Commissioners are appointed subsequent to the recording of evidence of petitioners was complete and the affidavit in lieu of examination-in-chief of respondent was filed, then it becomes necessary that as regards subsequent event that is appointment of Court Commissioner and the map prepared by him, the petitioners should be given an opportunity to lead additional evidence.

9] It is pertinent to note that the earlier application Exh.218 filed by the petitioners for leading additional evidence was rejected mainly on the ground that it was a vague application. It may be true that while passing order thereon, trial Court has also observed that at this stage it would not be necessary and proper to again put the suit for recording of evidence, but that is additional reason given by the trial Court. The main reason given by the trial Court was that the said application was very vague. Hence, the petitioners have given another application Exh.219, giving the particulars of the witness to be called and the documents which are required to be produced on record. His evidence appears to be essential in order to decide the dispute between the parties finally and completely and also for bringing on record subsequent event, after recording of evidence of

petitioners was complete. Hence, the interest of justice requires that this application Exh.219 needs to be allowed for recording of evidence of the Court Commissioner. The cross examination of respondent can be conducted only after recording the evidence of Court Commissioner T.I.L.R., is over so that no prejudice can be caused to respondents also.

10] In view thereof, writ petition is allowed.

11] The impugned order passed by the trial Court below Exh. 219 is set aside and the application at Exh.219 for issuance witness summons to Court Commissioner is allowed with observations made hereinabove.

12] Rule made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]