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

915 WRIT PETITION NO.7475 OF 2018

HAYAT HASAN PATHAN
VERSUS
FAKIR MOHMAD PATHAN AND OTHERS

...

Advocate for Petitioner : Mr. S.S. Wagh
Advocate for Respondent Nos.1, 3 to 5 : Mr. Nangare
Prashant R.

...

**CORAM : P.R. BORA, J.
DATED : 11th JUNE, 2019.**

PER COURT:-

. By consent of the learned counsel for the parties,
the petition is heard finally.

2. The petitioner has filed R.C.S. No.362 of 2016 for measurement of his land ad-measuring 600 square meters out of gut no.650/1 and to fix the boundaries of the said land. It has been further prayed that since the plaintiff is intending to harvest the trees of Babhul standing in the land and make it clean for carrying out construction therein but the defendants-respondents are obstructing in carrying out the said work, an injunction be granted restraining the defendants from causing any such obstruction.

3. The defendants-respondents have filed the written statement and defendant nos.1, 3, 4 and 5 have also filed counter claim claiming the area wherein Babhul trees

are standing, to be in their occupation. In the circumstances, an application was filed by the petitioner-plaintiff for appointment of Court Commissioner for measurement of the suit land. The respondents submitted their say to the said application and endorse their no objection for carrying out such measurement with a rider that the said measurement shall be according to the old record pertaining to gut no.650. The learned Civil Judge has however rejected the application observing that the appointment of such commissioner is not necessary for decision of the dispute on merits. It is further observed that the suit itself has been filed by the plaintiff for the relief to fix the boundaries of his land and in the circumstances, appointment of Court Commissioner would amount to collect evidence for him.

4. Shri Wagh, the learned counsel appearing for the petitioner submitted that the learned Civil Judge has failed in appreciating the purport of filing an application for appointment of commissioner and has erred in rejecting the said application. The learned counsel submitted that in view of the written statement and the objections raised on behalf of the defendants and the counter claim filed by them, the appointment of Court Commissioner is a must in the present

matter and it may not amount to collecting of evidence. The learned counsel has relied upon the judgment of this Court in the case of "**Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade, 2004 (2) Mh.L.J. 722**". The learned counsel in the circumstances, has prayed for setting aside the impugned order and for allowing the petition.

5. Shri Nangare, the learned counsel appearing for respondents has opposed the contentions raised on behalf of the petitioner. Relying on the judgment of this Court in the case of "**Revji Namdeo Shinde and Another Vs. Sopan Manaji Shinde and Another**", in Writ Petition No.2864 of 2017 (Coram: Ravindra V. Ghuge, J.) on 30.07.2018, the learned counsel submitted that until the evidence of the petitioner-plaintiff is recorded, it may not be ascertained whether the appointment of Court Commissioner will be required or not. The learned counsel in the circumstances, has prayed for dismissal of the writ petition.

6. During the course of the argument, it was however agreed by the learned counsel appearing for the parties that, if the measurements are directed to be made of the suit land as well as the land claimed to be in possession of defendants, there may not be any objection for appointment of Court Commissioner.

7. Perused the impugned order and the other material placed on record. It is difficult to agree with the finding recorded by the learned Civil Judge in the impugned order that the appointment of commissioner in the present matter, as has been prayed by the plaintiff, would amount to collecting evidence for him. From the pleadings of the parties it appears that there had remain no alternative for the plaintiff except to apply for appointment of the Court Commissioner to measure the subject land and to get fix the boundaries. As noted here-in-above, now the defendants have also agreed for such measurement by appointing a commissioner provided the land which defendant nos. 1, 3, 4 and 5 claimed to be in their possession is also measured simultaneously. In the circumstances, the present writ petition is disposed of with the following order:

ORDER

- i) The learned Civil Judge shall pass appropriate order appointing the Court Commissioner for measurement of the suit land as well as the land claimed to be in possession of defendant nos.1, 3, 4 and 5.
- ii) The writ petition stands disposed of with the order as aforesaid.

(P.R. BORA, J.)