

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

928 WRIT PETITION NO.4955 OF 2016

SOPAN FUKA KALE DIED INDUBAI SOPAN KALE
DIED PRAKASH AND OTHERS

... Petitioners

VERSUS

SHALIGRAM RAMDAS KALE AND OTHERS

... Respondents

...

Advocate for Petitioners : Shri V.B. Patil

Advocate for Respondent Nos.1, 2 & 4: Shri H.F. Pawar h/f.

Shri S.B. Yawalkar

Respondent No.3 : Served.

...

CORAM : P.R. BORA, J.

Dated: July 30, 2019

PER COURT :-

1. Heard finally with consent of the learned counsel appearing for the parties. The order dated 05.03.2016 passed by 2nd Jt. Civil Judge, Senior Division, Jalgaon (hereinafter referred to as the 'Trial Court') below the application at Exh.163 in Special Civil Suit No.201 of 2013 is questioned in the present petition. The application at Exh.163 was filed by the present respondents, who are the plaintiffs in the said regular civil suit, seeking appointment of Court Commissioner. The said application has been allowed by the Trial Court. It is the contention of the petitioners that, earlier point of time also, the Court Commissioner was appointed under the order of the Court for the same reason and the said report is there on record. It is also the contention of the petitioners that, after the submission of

the report by the said Commissioner, the matter proceeded further and the evidence has also been recorded. It is also the contention of the petitioners that, since in the cross-examination certain admissions have been secured by the defendants, just to fill up the lacuna the subsequent application came to be made and the said has been erroneously allowed by the Trial Court. The learned counsel for the petitioners submitted that, the appointment of the Court Commissioner for second time can only be said to be for filling the lacuna in the case of the plaintiff and would also amount to collection of the evidence for the plaintiff. The learned counsel, in the circumstances, prayed for setting aside the aforesaid order and to allow the Writ Petition filed by the present petitioners.

2. The submissions so made are opposed by the learned counsel appearing for the respondents i.e. original plaintiffs. The learned counsel submitted that, to substantiate the facts brought on record by way of amendment and more particularly to bring on record the evidence in respect of the encroachment made on the suit properties allegedly by the defendants, there was no option for the plaintiffs except to file an application for appointment of Court Commissioner. The learned counsel submitted that, the Trial Court has, therefore, rightly allowed the said application. He,

therefore, prayed for dismissal of the writ petition.

3. I have given due consideration to the submissions made by the learned counsel appearing for the respective parties. I have perused the impugned order as well as the other material placed on record. Apparently it does not appear to me that, any patent error has been committed by the Trial Court in allowing the application and thereby appointing the Court Commissioner on the second occasion. The impugned order reveals that, in view of the amendment brought in the suit plaint and the further pleadings incorporated, more particularly as about the alleged encroachment, the request of the plaintiff was just and liable to be allowed so as to bring on record the evidence in that regard. It appears to me that, a possible view has been taken by the Trial Court and it does not appear that, that it is the arbitrary exercise of discretion by the Trial Court or the observations made are contrary to the evidence on record. In the circumstances, I do not find any reason to cause interference in the impugned order. The Writ Petition, therefore, fails and is accordingly dismissed.

(P.R. BORA, J.)