IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7066 OF 2015

Vithal Malshiddha Khatte **... Petitioner**

V/s.

Rashid Jahirbaig Aute & Ors. **... Respondents**

Mr. Samji Joseph a/w Jins Thomas a/w Kavita Nadar for the Petitioner.
Mr. Ravi Kadam, AGP for the Respondent Nos. 3 to 6.

CORAM : M.S.SONAK, J.
DATE : 15TH APRIL, 2019

P.C.:

1. Heard Mr. Samji Joseph for the Petitioner.

2. Challenge in this petition is to the portion of the impugned Order dated 21.05.2015 made by the District Judge, Solapur directing the learned Trial Judge to allow the appointment of Court Commissioner for visit and inspection of the disputed spot.

3. The Petitioner is original Defendant in Regular Civil Suit No. 388 of 2015. The application for interim relief taken out by the Plaintiff in the said suit came to be dismissed by order dated 27.04.2015 by the learned Trial Judge. By the impugned order, the Appeal Court has also dismissed the Appeal against the Order dated 27.04.2015. However, the Appeal Court, in its ultimate paragraph (paragraph 13) has ordered the following in relation to the appointment of the Court

Commissioner and that is, what is impugned by the Petitioner in the present petition.

> "*13. It appears that the appellant/plaintiff had filed an application (exh.23) before the lower court for appointment of Court Commissioner but the trial court vide order dated 27.04.2015 rejected the application. Considering the fact that there is no document to show the exact location of the Darga, disputed road and the disputed construction, it will be expedient in the interest of justice to bring factual location/situation of Darga/construction/road on record which will help the trial court in deciding the matter properly and effectively.* ***Therefore, I am of the opinion that the trial court should allow the appellant/plaintiff's application and should appoint Court Commissioner who will inspect and visit the disputed spot and shall submit his report/map of the factual position. The points are answered in negative accordingly and following order is passed****:"*

4. Mr. Samji Joseph, learned Counsel for the Petitioner submits that earlier, the Plaintiff vide application Exhibit 23 had applied for appointment of Court Commissioner and such application was dismissed by the Trial Judge by order dated 27.04.2015 which was not even challenged by the Plaintiff. However, he points out that there are no pleadings in the plaint justifying the appointment of the Court

Commissioner. He points out that as was observed by the Trial Judge in Order dated 27.04.2015, the Plaintiff, only wishes to collect evidence and the Court Commissioner cannot be appointed to enable the parties to collect evidence in the matter. Mr. Joseph also makes reference to Court another suit and points out that the appointment of Court Commissioner is to filling the lacuna which arise in the said suit as well as in the present suit. For all these reasons, he submits that the impugned portion of the impugned order deserves interference. He relies on ***Bacchaj Nahar v/s. Nilima Mandal & Anr.*** *in Civil Appeal Nos. 5798-5799 of 2008* decided by Hon'ble Supreme Court on 23.09.2008 in support of the proposition that without adequate pleadings, the Court Commissioner ought not to be appointed.

5. Having considered the aforesaid submissions and perused the record as well as impugned order, according to me, discretion has been exercised reasonably by the Appeal Court and there is no case made out for interference in the exercise of supervisory jurisdiction. The Appeal Court has expressed the opinion that appointment of Commissioner will really assist the Court in appreciating the factual situation. The earlier order made by the learned Trial Judge was of laconic in the sense that it was only observed that application of

appointment of Court Commissioner was to collect evidence for the parties. In this case, Appeal Court, has come to the conclusion that the appointment of Court Commissioner will in fact, assist the Court in appreciating the dispute between the parties. Normally, there is no necessity of pleadings in the plaint as regards the issue of appointment of Court Commissioner. An application, was admittedly taken out by the Plaintiff seeking appointment of Court Commissioner. This point was expressly urged before the Appeal Court. The Appeal Court, has in fact held against the Plaintiff on the issue of injunction. However, when it came to final disposal of the appeal, the Appeal Court has exercised discretion and directed appointment of Court Commissioner as noted earlier, there is unreasonableness in exercise of such discretion.

6. For all the aforesaid reasons, this petition is dismissed. There shall be no order as to costs.

(M.S.SONAK, J.)