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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5430 OF 2017**

A. V. Corporation through its PartnersPetitioners
V/s.

Ganpat Haribhau Jadhav and anotherRespondents

**WITH
CIVIL APPLICATION NO. 2837 OF 2017
IN
WRIT PETITION NO. 5430 OF 2017**

Ganpat Haribhau Jadhav and anotherApplicants
V/s.

A. V. Corporation through its PartnersRespondents

Mr. Y. S. Jahagirdar, Senior counsel i/b Mr. Shailendra S. Kanetkar
for the Petitioner
Mr. Saurabh S. Dongre for respondent nos. 1 & 2 and for applicant in
Civil Application

**CORAM : NITIN W. SAMBRE, J.
DATE : JANUARY 27, 2020.**

P.C.

This petition is by original defendant in R.C.S. No. 285 of 2016 questioning the order dated 29/03/2017 passed by 3rd Civil Judge Junior Division Pimpri whereby application Exhibit 24 moved under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 ('C.P.C.' for

short) by the respondent-plaintiff came to be allowed.

2] Respondent-plaintiff initiated a suit for injunction and possession. In the said suit, it is claimed that petitioner has encroached to the extent of 25R land. Specific pleadings are raised that land of the petitioner and respondent needs to be measured before the claim as is put forth in the plaint is adjudicated.

3] In the aforesaid background, respondent-plaintiff moved an application for appointment of Court Commissioner which is allowed by impugned order dated 29/03/2017.

4] While questioning the order impugned, learned senior counsel for the petitioner-defendant, Shri. Jahagirdar would urge that Court needs to appreciate the very object of the Bombay amendment to Order VII Rule 3 of the C.P.C. According to him, respondent-plaintiff has not placed on record plaint map and that being so, there is major defect in the suit which is initiated by the respondent. A further submission is, Order XXVI Rule 9 of the Code of Civil Procedure, 1908 cannot be taken recourse to by respondent-plaintiff with an intention

to collect evidence. He would invite attention of this Court to the measurements carried out by petitioner and respondent independently in 2015. He would further urge that under scheme of Order XXVI Rule 9 of C.P.C. it is always open for the Court, if occasion so arise or court is satisfied to appoint Court Commissioner on its own, He would urge that such provision cannot be taken recourse to, at the behest of the party like plaintiff for collection of evidence.

5] Learned counsel for the respondent-plaintiff supports the order impugned.

6] I have perused provisions of Order VII Rule 3 of C.P.C. particularly Bombay amendment in the backdrop of submission of the petitioner of failure of plaintiff to annex plaint map.

7] At this stage, this Court need not to go into the said issue as it is open for the Trial Court to deal with the same at an appropriate stage of the suit.

8] As far as invoking provisions of Order XXVI Rule 9 of the C.P.C.

for appointment of Court Commissioner at the behest of respondent-plaintiff is concerned, this Court need to take notice basic pleadings in the plaint in support of such claim. In the suit it is claimed by the respondent-plaintiff that petitioner-defendant has encroached on his property and has specifically spelt out the nature of encroachment. He has also claimed that for proper adjudication of the claim of the plaintiff, it is necessary to carry out measurement of the property existing on the spot in the possession of the plaintiff and defendant.

9] Power to appoint Court Commissioner is within the discretion of the learned Trial Court and such discretion is required to be exercised in the interest of the parties. The Trial Court is required to appreciate that the best evidence can be gathered with the help of Court Commissioner. The Trial Court appears to be of the opinion that the report of the Court Commissioner is very much necessary particularly having regard to its peculiar nature of being collected from visiting the spot will aptly help the Trial Court in deciding the claim. As such, discretion is rightly exercised. Considering nature of relief claimed in the plaint in the backdrop of pleadings, in my opinion, the Court was

very much justified in passing the order impugned in the matter of appointment of Court Commissioner. Just because injunction as was prayed by the respondent-plaintiff was rejected, that by itself will not act as an embargo on the right of the respondent-plaintiff to claim appointment of Court Commissioner.

10] Measurement of the land in 2015 i.e. before initiation of the suit will be of hardly any assistance particularly when respondent-plaintiff has come out with a specific case that the Court while entertaining the suit needs to exercise powers under Order XXVI Rule 9 of the C.P.C. No illegality could be noticed in the order which warrants interference in extraordinary jurisdiction.

11] Petition fails, same stands dismissed.

12] In view of dismissal of petition, Civil Application also stands disposed of.

[NITIN W. SAMBRE, J.]