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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 313 OF 2020**

Eknath Dattu Deokar & Ors. Petitioners
V/s
Vasant Siddhnath Deokar Respondent

Mr. Mahindra B. Deshmukh for the Petitioner.
Mr. Sachin S. Punde for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: FEBRUARY 16, 2021

P.C.:-

1] Respondent/Plaintiff's suit for removal of encroachment, declaration and also for permanent mandatory injunction and possession came to be dismissed. In appeal, Respondent-Plaintiff/Appellant moved an application below Exhibit-1 seeking appointment of Court Commissioner for carrying out measurement which is allowed by the order impugned dated 22/11/2019.

2] Submissions are, appointment of Court Commissioner is sought only to fill-in the lacuna, as appointment is purely with an intention to

collect evidence, particularly when already Court Commissioner was appointed during the trial and that being so, exercise of jurisdiction is without any basis.

3] The learned Counsel for the Respondent would support the order as according to him so as to decide the issue involved in the suit appropriately, Court has felt that report of the Court Commissioner i.e. City Survey Officer is necessary.

4] Considered submissions.

5] It is not in dispute that during pendency of suit, already there was appointment of Court Commissioner for measuring the property. Respondent/Plaintiff remained unsuccessful before the trial court and therefore fresh application is moved seeking appointment of the Court Commissioner under the pretext that dispute itself can be decided based on the same. It is for the Respondent/Plaintiff to establish his case about encroachment by leading independent evidence and not by seeking appointment of Court Commissioner so as to collect evidence in the matter. This is what has been exactly noticed in the case in

hand that Respondent/Plaintiff has invoked the provisions for appointment of Court Commissioner for collection of evidence. That being so, order impugned is liable to be quashed and set aside and the same is quashed and set aside. Application-Exhibit-1 for appointment of Court Commissioner stands rejected.

6] Petition is allowed in the aforesaid terms and disposed of.

(NITIN W. SAMBRE, J.)