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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8614 OF 2019**

Sou Sushila Ganpat Jagtap

....Petitioner.

V/s

Shri Shantaram Shivram @ Shivaji Jagtap
and Ors.

.....Respondents

Mr. Sandeep S. Koregave for the Petitioner.

Mr. A.S. Rao for Respondent Nos. 1 to 3.

CORAM: NITIN W. SAMBRE, J.

DATE: MARCH 2, 2021

P.C.:-

1] RCS No.65 of 2008 was preferred by the present Petitioner for relief of perpetual injunction restraining the Respondents/Defendants from carrying out any obstruction to the peaceful possession of the property and mandatory injunction seeking removal of encroachment of the compound wall and western side wall.

2] The suit was dismissed on 5/1/2012 by Civil Judge, Junior Division, Malkapur-Shahuwadi. Appeal being Regular Civil Appeal No.38 of 2012 is pending consideration at the behest of the Petitioner/Appellant on the file of the learned District Judge, Kolhapur.

Application-Exhibit-39 for appointment of Court Commissioner pursuant to provisions of Order 26 Rule 9 of the CPC came to be moved which is rejected by the order impugned dated 1/3/2019. As such this Petition.

3] Submissions of the learned Counsel for the Petitioner are, at the time of recording of evidence in the aforesaid suit, application-Exhibit-47 came to be moved for appointment of Court Commissioner which was rejected vide order dated 11/7/2011. Further contentions are, in earlier suit being Suit No.92 of 2005 the Court Commissioner was appointed who has carried out measurement. However, the said suit was withdrawn as the present suit was initiated. The report of the Court Commissioner in the earlier suit was produced by Respondents/Defendants at Exhibit-64. However, Petitioner has no opportunity to prove the said report by examining TILR. He would further claim that even if the said report at Exhibit-64 was produced by the Respondents/Defendants, the Defendants have not examined TILR and as such, throughout proceedings evidence of Court Commissioner on the issue of encroachment was not placed on record. As such, court below in the absence whereof was unable to decide the true issue

involved in the suit.

4] Mr. Rao learned Counsel for the Respondents/Defendants would urge that the order impugned sufficiently speaks of opportunity of appointment of Court Commissioner being not availed at the relevant time by the Petitioner. According to him, if document at Exhibit-64 was available on record it was open for the Petitioner to summon the TILR and that being so, court below is justified in passing the order impugned dated 11/3/2019.

5] Considered rival submissions.

6] I am informed that earlier suit being Suit No.92 of 2005 was withdrawn on 24/11/2008 with permission to prosecute the present suit being RCS No.65 of 2008. The Court Commissioner was appointed and the said report was produced on record of the present suit being RCS No.65 of 2008 at Exhibit-64 by the Respondents/Defendants. The earlier suit i.e. RCS No.92 of 2005 was for simplicitor injunction wherein no prayer for removal of encroachment was made.

7] Once the said report at Exhibit-64 was produced on record by the Defendants, by the time evidence of Plaintiff was already over and that being so, he had no opportunity of summoning the witness i.e. TILR so as to prove his case of encroachment.

8] Apart from above, it appears that the Petitioner/Plaintiff moved an application Exhibit-47 in the present suit being RCS No.65 of 2008 seeking appointment of the Court Commissioner and the said prayer was rejected by order dated 11/7/2011 passed by the Trial Court. Rejection is based on completely erroneous ground i.e. earlier suit being RCS No.92 of 2005 was for injunction and removal of encroachment also, whereas the earlier suit was only for injunction and no mandatory claim was made for removal of encroachment. Apart from above, the appellate court below while passing the order impugned so also the Trial Court while rejecting the application-Exhibit-47 was not sensitive to the fact that earlier suit being RCS No.92 of 2005 was withdrawn and liberty was granted to prosecute the present suit. Just because the earlier suit was withdrawn that by itself will not come in the way of the Petitioner to seek relief of

appointment of the Court Commissioner. It is well settled that provisions of Order 26 Rule 9 of the CPC are available and remedy therein can be availed even at appellate stage. It appears that the Petitioner, to some extent, was diligent in pursuing his plea for appointment of the Court Commissioner during trial stage, as could be inferred from the order passed below Exhibit-47. All the aforesaid factual matrix has been lost sight of by the lower appellate Court while rejecting the application-Exhibit-39. After considering the claim put-forth in the suit which is for injunction and removal of encroachment, the least that was expected of the court below was to permit the parties to go for appointment of Court Commissioner by appointing TILR which evidence could have been ably assisted the Court to reach at appropriate conclusion. As such, in my opinion, case for indulgence is made out.

9] The order passed below Exhibit-39 in RCA No.38 of 2012 on 1/3/2019 is hereby quashed and set aside.

10] Application-Exhibit-39 stands allowed.

11] After the aforesaid report of the Court Commissioner is received, Petitioner is at liberty to take out the proceedings under the provisions of Order 41 Rule 27 for the purpose of leading additional evidence based on the report of the Court Commissioner. Needless to clarify that in case if lower appellate court allows such prayer of the Petitioner, it shall also be open to him to lead evidence in relation to earlier report of the Court Commissioner which is produced by the Respondents at Exhibit-64.

12] Petition stands allowed in the aforesaid terms. This Court expects the lower appellate court to complete the aforesaid exercise and decide the appeal expeditiously and in any case within a period of one year from today as the same is pending for more than nine years.

(NITIN W. SAMBRE, J.)