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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 324 OF 2018

ANIL GANPATI MALI & ANR. ..PETITIONERS

VS.

ANNASAHEB SHIVAPPA KULKARNI ..RESPONDENT

Mr. Padmanabh D. Pise for petitioners.

Mr. Sachin Keru Hande for respondent.

CORAM : M. S. KARNIK, J.

DATE : DECEMBER 9, 2021

P.C. :

Heard learned counsel for the petitioners.

2. The petitioners are the original defendants. The respondent – plaintiff filed a suit for perpetual injunction restraining the defendants from interfering with the plaintiff's peaceful possession in respect of the suit property in question.

3. The suit was filed on 15/3/2016. The application (Exhibit 21) was filed by the petitioner on 8/8/2016 for appointment of the Court Commissioner.

4. The said application was opposed by the defendants.

5. By the impugned order passed below Exhibit 21 the trial Court allowed the application. At paragraph 6 it is observed by the trial Court as under:-

"6. From perusal of written statement of defendant, it seems that they have challenged the area of suit property and possession as per above mentioned Final Decree. Thus the real dispute between the parties is about area and possession as per decree. It seem from the record that there are purchasers in the suit property which are not parties to previous litigation. Hence if real position and boundaries of the suit properties come on record it will helpful to decide the suit. Moreover, defendants will not be prejudiced by appointment of Court Commissioner. Hence to decide the real controversy between the parties and to bring on record real fact of the present position on record, it is necessary that commission should be issued to inspect the suit property. Hence, considering all above discussion and perusing record of the case, this application deserves to be allowed."

6. Learned counsel for the respondent – plaintiff submitted that no prejudice will be caused to the defendants if the Court Commissioner is appointed as appointment of the Court Commissioner help in deciding the real controversy between the parties and to bring on record the real facts of the present position on record.

7. Though the trial Court has stated in the order that if real position and the boundaries of the suit properties come on record, it will helpful to decide the suit. In my opinion, the same virtually amounts to allowing plaintiff to collect the evidence even before the parties lead their

evidence. It is well settled that the Court Commissioner cannot be appointed to collect the evidence.

8. In my opinion, it is always open for the plaintiff to apply for appointment of a Court Commissioner at an appropriate stage. Keeping the liberty of the respondent – plaintiff open to file an application for appointment of the Court Commissioner at the appropriate stage after hearing of the suit commences, this petition is allowed by setting aside the impugned order.

9. If a fresh application is made for appointment of the Court Commissioner at the appropriate stage, the same shall be decided by the trial Court without being influenced by any observations made by me in this order or that in the impugned order.

10. All contentions are kept open.

11. The writ petition is disposed of.

(M. S. KARNIK, J.)