

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.**

WRIT PETITION NO. 12817 OF 2021

Om Ramling Appa Pune

...Petitioner

Versus

Nishant Kesharmal Parakh

...Respondent

.....

Shri. Mayur V. Salunke h/f Shri. V. D. Salunke, Advocate for the
petitioner

Shri. Z. Z. Hussaini, Advocate for respondent-sole

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CORAM : BHARATI H. DANGRE, J.

DATE : FEBRUARY 10TH, 2022

PER COURT : -

1. Heard the learned Counsel Shri. Mayur Salunke for the petitioner, who is impleaded as respondent in Reg. Civil Suit No. 199/2021 filed by the plaintiff (respondent herein) seeking perpetual injunction on the basis of a claim that he is owner and possessor of the suit property set out in paragraph no. 1 of the plaint. The said property is described as Plot no. 23 out of land Survey No. 30/1, having property no. A-7391 allotted by the Municipal Council, Ahmedpur.

. In the said suit, the defendant (petitioner before this Court) filed his written statement claiming his possession over the suit property since 2005 and it is specifically pleaded by the defendant

that he is running hotel/dhaba under the name and stile as 'Hotel Opera' over the suit property and he has constructed a shed with iron angles which is covered by the tin sheets and it house a kitchen, store room and sit out place for customers along with a cash counter. It is also pleaded that he has obtained an electricity connection in the year 2017.

2. In the suit so filed, an application for temporary injunction was moved vide Exh. 5 and the same came to be unconditionally withdrawn by the plaintiff to be decided along with the main suit.

3. It is in this background of facts, the defendant moved an application under Order XXXIX Rule 7 of the Code of Civil Procedure seeking appointment of Court Commissioner. The said relief is sought in the background of the statement contained in the application that the suit is in respect of a plot which is a house property and it is necessary to determine the nature of structure over the suit property which has been suppressed by the plaintiff and, therefore, it is pleaded that it is necessary to bring out the real structure on the suit property and for this purpose, the inspection of spot by submitting a report with map is prayed for. This application is opposed by the original plaintiff by stating that if the defendant has

pleaded his defence in the written statement, it is imperative for him to prove his case by adducing evidence and the evidence cannot be collected on this behalf by someone else.

. The learned Judge rightly appreciated the relief prayed in reference to the various authoritative pronouncements which has settled the law to the effect that the Court Commissioner cannot be appointed for collecting the evidence.

. Construing the factual as well as the legal position, it is recorded by the learned Judge that the appointment of the Court Commissioner as sought by the defendant is a premature request and by appointing a Court Commissioner, the defendant cannot be assisted in collecting the evidence regarding his possession over the suit plot and, therefore, the application has been rejected on 13.10.2021.

4. Upholding the impugned order dated 13.10.2021 below Exh.16 in RCS No. 199/2021 passed by IInd Jt. Civil Judge Junior Division, Ahmedpur, who has rightly appreciated the factual position and the legal scenario, the writ petition is dismissed.

[BHARATI H. DANGRE]
JUDGE