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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4853 OF 2023

Kishor Sakahari Kawade

PETITIONER

VERSUS

Pandit Laxman Kawade and Others

RESPONDENTS

.....

Mrs. Suvarna M. Zaware, Advocate for the petitioner

Mr. Satyajit S. Bora, Advocate for respondent No.1

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 20th JUNE, 2023

ORDER :

1. The petitioner is aggrieved by order dated 7th January, 2023 passed by learned Civil Judge, Junior Division, Shrirampur below Exhibit-44 in Regular Civil Suit No. 73 of 2018.

2. Respondent No.1 filed the suit for injunction that the defendants should not carry out construction in the suit property. The defendants resisted the suit, by filing written statement and denied the contention of the plaintiff. They claimed that the construction is being carried out in their own land and not in 15 Are land, which is in joint possession of the plaintiff and the defendants.

3. The plaintiff examined himself as PW-1 and after closure of

his evidence, the plaintiff filed application at Exhibit-44 seeking appointment of Court Commissioner for bringing before the Court the stage of the construction and the area where the actual construction is being carried out by appointing Taluka Inspector of Land Records, Shrirampur as Court Commissioner for measurement of the suit land and to submit a report, as to whether the construction of the defendants is in the suit land or is adjacent to the suit land. The application was opposed by the defendants on the ground that the plaintiff is trying to collect evidence by appointment of Court Commissioner. The Trial Court allowed the application. Hence, the present writ petition.

4. Heard learned advocate for the petitioner and learned advocate for respondent No.1. Perused the memo of writ petition, the documents annexed along with the same and the impugned order.

5. Learned advocate for the petitioner submits that the plaintiff has given admissions in favour of the defendants and with a view to fill up the lacuna, he has filed the application for appointment of Court Commissioner. The plaintiff is trying to collect evidence by appointment of the Court Commissioner. Further submission is, the Court Commissioner is appointed at a premature stage. In support of this submission, learned

advocate for the petitioner has placed reliance on the decision of this Court in Writ Petition No. 4889 of 2022 (*Shivaji Natha Vaidya and Others V/s Shankar Natha Vaidya and Others*).

6. Learned advocate for respondent No., on the other hand, supported the impugned order. He submits that the report of the Commissioner would enable the Trial Court to arrive at a just decision.

7. Perusal of the record indicates that there is dispute about the exact location where the construction is being carried out by the defendants. The plaintiff has sought injunction that the defendants should not carry out construction in the suit property. It is a specific case of the defendants that they are carrying out the construction in their own land and they are not constructing on the suit property. Admittedly, the 15 Are land is in joint possession of the plaintiff and the respondents. Considering these aspects, this Court is of the considered view that the Trial Court is justified in appointing the Court Commissioner. The Court Commissioner would place before the Trial Court his report along with a map, which would clarify the exact situation on the site and would also enable the Trial Court to arrive at a just decision that whether the construction of the defendants is in the suit property or adjacent to the suit property. Report of the

Commissioner since would enable the Trial Court to effectively decide the dispute between the parties, no fault can be found with the impugned order passed by the Trial Court.

8. In Writ Petition No. 8489 of 2022, in the facts of that case, this Court held that appointment of the Court Commissioner at a premature stage cannot be allowed. In that case, recording of evidence in the suit was to commence and hence the order impugned in that petition was set aside with liberty to the plaintiffs therein to move application for appointment of Court Commissioner, after the parties lead their evidence. Such are not the facts of the present case. Since recording of the evidence has already commenced in the present case, this judgment would not help the petitioner.

9. There is no illegality or perversity in the order impugned in the present petition. No case is made out by the petitioner to warrant exercise of extraordinary writ jurisdiction. Writ petition being devoid of merits, is dismissed.

[NITIN B. SURYAWANSHI]
JUDGE