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

WRIT PETITION NO. 1817 OF 2024

Arun Rajaram Ingale and Ors.

.. Petitioners

Versus

Krushna Shivappa Ingale and Ors.

.. Respondents

-
- Mr. Prajakt Arjunwadkar, Advocate for Petitioners.
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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 12, 2024.

P.C.:

1. Heard Mr. Arjunwadkar, learned Advocate for Petitioners.

2. This Writ Petition takes exception to the order dated 29.08.2023 which is at Exhibit “M” - page No.115 of the Writ Petition. This is an Application filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short “**CPC**”) seeking appointment of Court Commissioner in the Suit proceedings. Stage of making this Application is crucial.

3. Regular Civil Suit No.7 of 2021 is instituted by Plaintiffs. Application under Exhibit “5” stands allowed in favour of Plaintiffs and the learned Appellate Court confirm the Exhibit “5” order and dismisses the Misc. Civil Application. Thereafter Application below Exhibit “92” is filed wherein the impugned order is passed.

4. Considering the fact that Application below Exhibit “5” and Misc. Civil Application holding in favour of Plaintiffs, the impugned order allowing appointment of Court Commissioner to conduct measurement of the Suit property at a pre-trial stage cannot be permitted. Suit has been filed by Plaintiffs for simplicitor injunction on the basis of a registered sale deed dated 19.06.1995. It shall be the prerogative and right of Defendants to lead evidence in rebuttal. Such evidence cannot be allowed to be created by appointing Court Commissioner at this stage.

5. I have perused the finding returned in paragraph No.5 of the impugned order. The learned Trial Court has opined that the real dispute between the parties regarding location of construction carried out by Defendants in the Suit property in respect of which injunction has been sought needs to be identified. The finding returned in paragraph No.5 is that allowing such a commission to execute the order of the Court will not amount to collection of evidence, rather that it will elucidate the matter. Be that as it may, then in every Suit a party will seek appointment of Court Commissioner at a pre-trial stage for elucidation of the dispute.

6. As observed by this Court, the question would therefore be at which stage of trial Court Commissioner can allowed to be appointed by the Court. In this case, Exhibit “5” has been allowed and upheld

and this is an important circumstance.

7. An arguable case has been made out by Mr. Arjunwadkar for issuance of notice and stay of the impugned order. The impugned order dated 29.08.2023 is expressly stayed till the present Writ Petition is heard finally at the stage of admission on the next date.

8. Issue notice to the Respondents. Humdast permitted.

9. In addition to Court notice, Petitioners are permitted to serve a copy of the Petition and this order on the Respondents and inform them about the next date of hearing by any permissible mode of service and file appropriate Affidavit of service with tangible proof thereof on or before the next date.

10. Respondents are directed to remain present in Court on the next adjourned date either by themselves or through Advocates.

11. Respondents are directed to take cognizance of this order and file their Affidavit-in-Reply on or before the next date, if so desired.

12. It is clarified that, this Writ Petition shall be disposed of on the next adjourned date at the stage of admission itself.

13. The Court Commissioner is also directed to stay its commission until the present Writ Petition is determined at the stage of admission itself.

14. Stand over to **04th March, 2024.**

[MILIND N. JADHAV, J.]

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