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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11597 OF 2019**

Salim Abdul Rehman Kachhi ... Petitioner

vs.

Dilip Sahebrao Umbarkar Deceased through ... Respondents
Lrs and Ors

Mr. Bhushan Walimbe a/w. Mr. Priyal Sarda, Mr. Mayank Tripathi,
Ms. Seema Dighe for Petitioner.

CORAM : GAURI GODSE, J.

DATED : 26th JUNE 2025

ORDER:

1. This petition is filed by the plaintiff challenging the rejection of his application for appointment of a court commissioner under Order XXVI, Rule 9 of the Civil Procedure Code, 1908('CPC'), in the application filed under Order XXXIX, Rule 2(a) of the CPC. The plaintiff's allegation is that the defendant has committed a breach of the order of temporary injunction. It is the plaintiff's contention that the construction and encroachment carried out by the defendant would amount to disturbing the plaintiff's possession. Thus, to find out whether there is any encroachment and disturbance to the plaintiff's possession, a court commissioner's report would be necessary. The Learned Judge has rejected the application. Hence, this petition by the plaintiff.

2. Learned counsel for the petitioner submits that the application for injunction was made on the allegation that the defendants are trying to encroach upon the plaintiff's possession by carrying out construction. He submits that the application for a temporary injunction was decided in favour of the plaintiff by restraining the defendants from disturbing the plaintiff's possession. He further submits that, considering the dispute regarding the respective possession of the parties and the allegations of encroachment, the learned Judge ought to have considered appointing a court commissioner as prayed. He submits that the learned Judge has rejected the application by erroneously holding that there is no case of encroachment or boundary dispute, and thus, the appointment of a court commissioner is not necessary. He thus submits that, considering the dispute regarding encroachment and respective possession of the parties, the only method to find out whether the defendants have encroached upon the plaintiff's property would be by way of the court commissioner's report. He therefore submits that the impugned order would require the interference of this court.

3. I have perused the papers of the petition. The plaintiff has filed a suit praying for partition and separate possession of City Survey No. 75/1B by dividing the property into shares for the parties. The plaintiff has further prayed for an injunction

restraining the defendants from obstructing the plaintiff's possession till the property is divided by metes and bounds. The plaintiff has also prayed for a decree of injunction restraining the defendants from carrying out any encroachment. Pending this suit, the plaintiff prayed for a temporary injunction restraining the defendants from disturbing the plaintiff's possession. This application is allowed, and the defendants are restrained from disturbing the plaintiff's possession in respect of the disputed property.

4. The plaintiff has filed a contempt application, alleging a breach of this interim injunction. The defendants have denied the allegations by filing a reply. Defendants claim that they are in possession of the property, and the description of the property in their possession is pleaded in paragraph no.4 of their reply. The defendants claim that in the year 1999, their house property was numbered as Grampanchayat House No. 276, and after obtaining permission for repair on 9th June 2015, they carried out repairs to their house property.

5. The plaintiff, thereafter, filed an application for the appointment of court commissioner for ascertaining the status of construction on the disputed property. This application is rejected by the trial court by holding that the proceedings are in the nature of contempt jurisdiction alleging breach of the order of injunction

and thus, limited issue to be decided is whether there is any breach of the order passed by the court. Since, there is no dispute in the contempt petition regarding any encroachment or boundary dispute, the learned Judge has refused to appoint the court commissioner as prayed by the plaintiff.

6. In the suit, the plaintiff has prayed for the removal of encroachment and made a substantial prayer for partition and separate possession. Hence, the issue regarding the respective possession of the parties is yet to be decided in the suit. The injunction is not for restraining the respondents from carrying out encroachment or restraining from carrying out construction. Thus, considering the nature of the main prayer in the suit and the nature of injunction, no fault can be found in the observations made by the learned Judge in refusing to appoint court commissioner. It is a well-settled legal principle that the court machinery cannot be used for collecting evidence. It is always open for the plaintiff to lead evidence in support of his allegation.

7. Learned counsel for the petitioner has relied upon the decision of this court in the case of *Rampyaribai wd/o Sukhdeo Daga and Ors Vs. Niladevi wd/o Narayanandas Jakhotiaya and Ors*¹ to support his submission that even in the proceedings in the nature of contempt jurisdiction, the court can appoint court

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commissioner for ascertaining the status of the property. Considering the nature of injunction granted in the present case and the allegation in the contempt application as discussed above, the legal principles in the decision relied upon by the learned counsel for the petitioner is of no assistance to the arguments made on behalf the petitioner.

8. This is not a case to exercise discretionary jurisdiction under Article 227 of the Constitution of India to interfere with the impugned order.

9. Writ Petition is therefore dismissed.

(GAURI GODSE, J.)