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

WRIT PETITION NO.13081 OF 2016

M/s. Digvijay Vaidya Builders & Developers	..Petitioner.
V/s.	
Jayprakash Jagannath Ingle & Ors.	..Respondents.

Mr.Vaibhav R.Gaikwad for the petitioner.

Mr.Hemant Ghadigaonkar with Sachin Padya for respondent No.1.

Mr.Shailesh Chavan for respondent Nos.2, 4, 5, 6a to 6e.

CORAM : M.S.SONAK, J.

DATE : APRIL 26, 2019

P.C.:-

Heard Mr.Gaikwad, learned counsel for the petitioner, Mr. Ghadigaonkar, learned counsel for respondent No.1 and Mr.Chavan, learned counsel for respondent Nos.2, 4, 5, 6a to 6e.

2. Challenge in this petition is to the order dated October 26, 2016 by which learned trial Judge was pleased to appoint Court Commissioner.

3. Mr.Gaikwad, learned counsel for the petitioner submits that the impugned order was made at the behest of respondent No.1, who is one of the defendants in the suit. He submits that in terms of the

development agreement, this defendant is required to be allotted only two premises admeasuring 810 sq. ft. and 236 sq. ft. He, therefore, submits that at the behest of the said defendant, the impugned order could not have been made.

4. He submits that as a developer, the petitioner is entitled to make certain deviations and thereafter seek sanction in respect of the said deviation. He submits that the impugned order is actually to collect evidence on behalf of the defendant. For all these reasons, he submits that the impugned order warrants interference.

5. Mr.Ghadigaonkar, learned counsel for respondent No.1 defends the impugned order on the reasoning reflected therein. He submits that the development agreement contemplates mere allotment of premises in favour of respondent No.1 but further development agreement makes it clear fifty per cent of the property is to be retained with the owners and there are also other obligations. He submits that the issue of deviation will be evident once the commission is executed. He submits that there is absolutely no jurisdictional error in the order and this petition may be dismissed.

6. The record indicates that the trial Judge has exercised his discretion. Cogent reasons have been given in the impugned order as to why the appointment of Court Commissioner is necessary and as to how such an appointment will assist the Court itself in appreciating the real

issues which arise in the suit.

7. There is no bar to the defendant to a suit seeking appointment of Court Commissioner. Therefore, merely because, the application seeking appointment has been made by one of the defendants to a suit, it cannot be said that the same was not maintainable.

8. Mr.Gaikwad also submitted that the injunction is already granted by the learned trial Judge against the defendants. The grant of such injunction also has no nexus to the issue of appointment of Court Commissioner. The injunction is possibly restraining the defendants from interfering with the petitioner undertaking development of the suit property. However, that does not mean that the development can be contrary to the sanctioned plan.

9. No doubt, Mr.Gaikwad points out that changes can be made for technical purposes and thereafter sanction can be obtained. At this stage, it is not necessary to go into this issue. However, in order to appreciate whether such deviation has indeed taken place, the appointment of Court Commissioner is absolutely necessary. Since it is the case of the petitioner that there no deviations, it is not understood as to why the petitioner is opposing the appointment of a Court Commissioner. In fact, in a situation of this nature, it is only appropriate that Court commissioner visits the construction site

confirms whether the construction / development which is undertaken is in accordance with the sanctioned plan or not. Even assuming that the construction is not in accordance with the sanctioned plan or in the nature of technical deviations, the Court Commissioner will only take note and place his report before the Court.

10. Besides, the agreement on which Mr.Gaikwad places his reliance, *prima facie* indicates that fifty per cent of the property is to be retained by the owner, therefore, this is not merely a case where only two premises were to be allotted in favour of respondent No.1 and thereafter, nothing further was required to be done under the development agreement.

11. For all the aforesaid reasons, there is no case made out to interfere with the impugned order. The petitioner is liable to be dismissed and is hereby dismissed. There shall be no order as to costs.

12. At this stage, learned counsel for the petitioner seeks a stay on the order now made. According to me, since the Court Commissioner is only required to submit his report and further since it is the case of the petitioner himself that the construction is in accordance with law or at the highest there are now some technical deviations, I see no good reason as to why the petitioner should resist the execution of the commission. Therefore, the prayer for stay cannot be acceded to.

13. All concerned to act on the basis of an authenticated copy of this order.

(M.S.SONAK, J.)