

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 627 OF 2021**

Asif Hasan @ Ahmed Hasan Sayyed .. Petitioner

v/s.

Dattaram Dhondu Bhanage & Anr. ..Respondents

Mr. Shreekant Gavand for the Petitioner.
Mr. Ashutosh Gole for the Respondent .

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 30th MARCH, 2021.**

P.C. :

1. Heard finally with consent of learned Counsel for the respective parties.
2. The Petitioner herein has challenged the Order dated 11th February, 2020 whereby the learned Civil Judge, Junior Division, Roha, has allowed the application for appointment of Court Commissioner.
3. Heard learned Counsel for the respective parties. I have perused the records. The Petitioner herein was the Plaintiff and the Respondents were Defendants in the suit. They shall be hereinafter referred to as Plaintiff and Defendants respectively.
4. It is the case of the Plaintiff that by agreement dated 3rd March, 1992, the Defendant had agreed to sell to him land bearing Gut No. 84 which is adjacent to his property. The Plaintiff has claimed that the entire sale consideration was paid and that he was put in possession of the suit land. Since the Defendant had failed to execute the sale deed, the Plaintiff has filed a suit for specific performance of the said

agreement.

5. By application dated 16.2.2017, which was filed even before filing of the written statement, the Defendant had sought for appointment of Commissioner. The Id. Judge dismissed the said application by order dated 27th March, 2017 holding that the Defendant had not disclosed any ground for appointing the Court Commissioner. The learned Judge held that the suit is for specific performance and does not involve issue of encroachment. Hence it is not necessary to take measurement of the land and or prepare measurement map. Subsequently, the Defendant filed written statement and filed second application for appointment of Commissioner alleging that the land of the Plaintiff has been acquired for widening of National Highway. The Defendant has sought to appoint the Commissioner to ascertain whether the Plaintiff has any land adjoining to the suit property.

6. The trial Court has held that though the Plaintiff has not raised a boundary dispute, the Defendant no.1 has averred that the Plaintiff is trying to encroach in the suit property. The trial Court has further observed that the Defendant has denied that the Plaintiff is in possession of the suit property and that the appointment of the Commissioner is necessary to decide the controversy.

7. It is pertinent to note that the Plaintiff having filed suit for specific performance of an agreement, is required to prove execution of agreement, payment of consideration, issue of possession and breach of agreement. The question whether the adjoining land of the Plaintiff

has been acquired for road widening is totally irrelevant to decide the issue involved in the suit. Furthermore, the object of local investigation under Order 26 Rule 9 of CPC is not to collect evidence to prove the possession of the suit property but for the purpose of elucidating any matter in dispute. The Trial Court has thus grossly erred in appointing the Commissioner to ascertain the factum of possession and acquisition of the land. The impugned order which suffers from material infirmity and illegality cannot be sustained. Hence the Petition is allowed. The impugned order is quashed and set aside.

(ANUJA PRABHUDESSAI, J.)