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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12923 OF 2019**

Assen Private Limited

...Petitioner

V/s

Deepam Bhikubhai Thanawala & Ors

....Respondents

Mr. H.L. Tiku, Senior Advocate a/w Ms. Gauri Mestha i/b L.J. Law for the Petitioner.

Mr. Kishor Malpathak for Respondent Nos. 1 to 4.

Mr. Mandar Limaye for Respondent No.5.

CORAM: NITIN W. SAMBRE, J.

DATE: MARCH 4, 2021

P.C.:-

1] Heard Mr. Tiku, learned Senior Counsel appearing for the Petitioner/original Defendant, Mr. Malpathak, learned Counsel appearing for Respondent Nos. 1 to 4/original Plaintiffs and Mr. Limaye, learned Counsel appearing for Respondent No.5-Thane Municipal Corporation.

2] Impugned in the Petition is an order passed by the Court of 2nd Joint Civil Judge, Senior Division, Thane in Special Civil Suit No. 389 of 2011 whereby Application-Exhibit-89 moved by the

Respondents/Plaintiffs for appointment of Court Commissioner under the provisions of Order 26 Rule 9 of the CPC i.e. Survey Officer/TILR came to be allowed.

3] According to the learned Senior Counsel appearing for the Petitioner, title of the suit property came to be vested in the Petitioner vide conveyance dated 20/8/1960. The Suit No.75 of 1968 was preferred by one Chunilal Thanawal against M/s Surendra Industries (Bombay) Private Limited which is owned by the Petitioner. In the said suit, a Deed of Exchange was executed resulting in unconditional withdrawal of the Suit No.75 of 1968 on 3/12/1969. Respondent No.1 to 4 who are Plaintiffs, initiated present Suit i.e. Special Civil Suit No.389 of 2011 for specific performance, mesne profit and injunction. Petitioner resisted the claim in the said suit in which issues were framed on 22/06/2016.

4] Respondent Nos. 1 to 4 on 28/09/2016 moved an application for issuing witness summons to Respondent No.5 for production of documents which was rejected on 01/04/2017.

5] The application under Order 26 Rule 9 of the CPC was moved on 31/08/2019 and the said application came to be allowed on 20/11/2019. As such, this Petition.

6] The learned Senior Counsel for the Peitioner, while questioning the order impugned, would urge that the earlier suit being RCS No. 75 of 1968 was withdrawn on 03/12/1969 in view of Exchange Deed and Deed of Right of Way. In the said backdrop, contentions are, fresh suit i.e. RCS No. 389 of 2011 is not maintainable. It is further claimed that earlier application for appointment of the Court Commissioner was already rejected vide order below Exhibit-27 and that being so, second application for the very same prayer on same allegation will operate as *res judicata*. It is claimed that issues were framed way back and till this date, Respondent Nos. 1 to 4 have not filed affidavit of evidence. As such, intention of Respondent Nos. 1 to 4 is to delay the suit proceedings.

7] By inviting attention of this court to the prayer in the Plaint, learned Senior Counsel for the Petitioner would urge that appointment of the Court Commissioner was not warranted. It is also alleged that

vide impugned order, Respondents/Plaintiffs are trying to collect the evidence.

8] While countering the aforesaid submissions, learned Counsel for Respondent Nos. 1 to 4 would support the impugned order, as according to him, appointment of Court Commissioner is warranted in a suit for specific performance in view of change of boundaries of the property. He would lay emphasis on Development Plan Road constructed by the Planning Authority subsequent to filing of the suit and that being so appointment of Court Commissioner was justified. As such, he has sought dismissal of the Petition.

9] Considered rival submissions.

10] No doubt, suit in the present proceedings is for specific performance. Application-Exhibit-89 for appointment of Court Commissioner specifically speaks that the suit is for enforcement of contract for exchange of suit property based on Settlement Deed dated 03/12/1969 of which specific performance is sought. Alternative prayer of the Respondents/Plaintiffs for restoration of possession of

the suit property could also be noticed. It is required to be noted that Application-Exhibit-27 for appointment of the Court Commissioner was with an intention to ascertain the exact area of the suit property No.2. The said application was rejected on 09/012/2014 with a finding that specific area of 7902 sq. meters is already known and admitted in the Plaint by the Plaintiffs. As such, survey was not warranted.

11] The present application-Exhibit-89 is based on the construction of road through suit property No.1 and suit property No.2 which is identified as Pokharan Road which has width of about 30 meters in the Development Plan. Respondent Nos. 1 to 4 issued notice dated 7/4/2018 to the Thane Municipal Corporation for production of survey plan and the area statement of the D.P. Road. However, said documents could not be produced as the survey was not finalized by Respondent No.5 – Thane Municipal Corporation. As such, it can be inferred from the record that present application-Exhibit-89 is based on the subsequent development i.e. construction of D.P. Road by the Planning Authority. Though the suit in question is for specific performance, however, if the boundaries of the suit property are not

certain, in my opinion, even in such a suit, it is always open for the Plaintiffs i.e. Respondent Nos. 1 to 4 to move a prayer for appointment of Court Commissioner so as to ascertain the boundaries and the area. If the said issue is not addressed at the present stage of the proceedings, it can be noticed that execution of decree either way will have some adverse repercussions. The fact that passing of D.P. Road through the suit property, as has been claimed by the Respondents/Plaintiffs, is not disputed by the Petitioner/Defendant. In that view of the matter, it cannot be inferred that Respondent Nos. 1 to 4 are trying to collect the evidence by taking out the present application. The reliefs claimed in the earlier Suit i.e. Suit No.75 of 1968 and in the present Special Civil Suit No.389 of 2011 cannot be said to be similar. Rather, present suit appears to be for execution of agreement as was reached in the earlier suit. Apart from above, application-Exhibit-27 was moved by the Petitioner at the relevant time for appointment of the Court Commissioner. The same was rejected for the reasons furnished in the order of rejection. However, here is a case where application-Exhibit-89 is based on development as has occurred during pendency of the suit.

12] In the aforesaid backdrop, claim that appointment of Court Commissioner ought not to have been ordered which is sought to be canvassed by the learned Senior Counsel for the Petitioner relying on the judgments of this Court in the matter of *Syed. Mushtatque Ahmad Syed. Ismail and Ors vs. Syed Ashique Ali Khan Haidar Ali* reported in **2012 (2) BomCR 790** and in the matter of *Dhondiram Nivrutti Pawar and Ors. vs. Laxman Khashaba Pawar and Ors.* reported in **2018(2) MhLJ 255** cannot be accepted.

13] For the reasons stated above, Petition, in my opinion, lacks merits and as such stands dismissed.

(NITIN W. SAMBRE, J.)