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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.13339 OF 2021

**RAJENDRA ARUN KADUS
VERSUS
SATISH KISAN BEDRE AND OTHERS**

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Mr U. U. Wagh, Advocate for petitioner;
Mr V. S. Bedre, Advocate for respondents

**CORAM : SMT. BHARATI DANGRE, J.
DATE : 16th February, 2022**

PER COURT:

1. Heard the learned Counsel for the petitioner and the learned Counsel for the respondents.

The petitioner is aggrieved by the two orders passed below Exh.56 and Exh.60, rejecting his both the applications for appointment of Commissioner.

2. The learned Counsel for the petitioner strenuously make an effort to argue by pointing out the record in the Regular Civil Suit filed by the plaintiff for eviction vide Regular Civil Suit No.217/2017, in which he is the defendant and he moved an application seeking appointment of Court Commissioner vide Exh.56. This application was moved on 17/03/2021 and immediately thereafter, i.e. on 21/09/2021, he filed Exh.60,

(2)

supplementing his application for appointment of Commissioner on the pretext of occurrence of certain subsequent events. The learned Counsel for the petitioner would argue that both these applications ought to have been decided together.

While bringing my attention to the record, his submission is that the arguments were heard on Exh.56 and Exh.60 and both the applications were listed for orders on 16/10/2021, however, since 16/10/2021 was declared as holiday by the High Court, an application was moved by the plaintiff for preponing the date. This application was moved on 13/10/2021. He also moved an application for taking the case on board and accordingly, the Roznama reflect that the matter was taken on board. It record that the plaintiff was present along with his Counsel. On the said date, the learned Judge pronounced his order on Exh.56 and Exh.60 as well as on Exh.65 and he rejected the Exh.56 and Exh.60 filed by the defendant and directed affidavit to be filed on Exh.65. The next date of the proceedings was scheduled on 26/10/2021.

3. When the annexures appended to the petition are perused, the order passed below Exh.56 is placed on record at page No.32 and the order passed by the Court on Exh.60 is placed on record at

(3)

page No.36-A. Both the orders are passed on the same day i.e. on 13/10/2021. On perusal of the order passed below Exh.56, it can be seen clearly that the application was argued by the Counsel for the plaintiff and Counsel for the defendant and the order clearly record the arguments advanced on behalf of Counsel for the defendant. The learned Judge proceeded to determine the application on merits and recorded that there is no dispute about the fact that the defendant is running a shop, namely, Arun Cycle Mart and the bone of contention of the dispute between the parties is whether the shop is situated in house No.666/A or not. It is further recorded that the defendant has already filed documents regarding his shop, and therefore, to ascertain whether his shop is located in the suit property or not, local inspection through the Commissioner is not warranted. In the wake of the settled proposition of law that the Court should decide the matter based on the material already brought on record by the evidence of both the parties and the Court Commissioner's appointment cannot be sought for, for collecting evidence on the part of the parties, the application came to be rejected.

Similarly, the application of the defendant for permitting photographs to be taken by the Court Commissioner, in view of

(4)

the subsequent development, which he has brought on record by Exh.60, also came to be rejected on the very same date by the learned Judge i.e. on 13/10/2021, by recording that by the said application, the defendant has specifically prayed for direction to the Court Commissioner to take photographs of the front door/shutter of his shop, since he apprehended that the number plate of the house is likely to be replaced. The learned Judge, by recording that the application for appointment of Court Commissioner is rejected today, and therefore, this application is also automatically rejected, even Exh.60 is also rejected. On perusal of the impugned order and the nature of the proceedings between the parties, where plaintiff has filed suit for eviction and seek eviction of the defendant, who is alleged to be his tenant located in the house property prescribed by the plaintiff as house No.667/A, whereas the defendant traversed the pleading by filing a written statement and he specifically pleaded that he is a tenant in house No.666/A and is running a cycle shop there. The plaintiff has concluded his evidence and has given a pursis for closing his evidence and now the defendant is in witness box. Depending upon the cross-examination of the plaintiff, he moved an application vide Exh.60 in attempt to controvert the stand of

(5)

the plaintiff, where he specifically denied the suggestion that the defendant is occupying house No.666/A and he apprehended that the number plate may be cunningly changed by the plaintiff and therefore, he moved Exh.60 and requested the Court Commissioner to take photographs of the front gate of the house, so that number of the house can be ascertained.

4. His both the applications came to be rejected in the impugned order and I concur with the reasoning of the learned Judge while rejecting both the application, in the wake of the settled position of law that the Court Commissioner cannot be appointed to collect the evidence for the parties and if the plaintiff make a particular pleading in the plaint, burden is upon him to make good the said pleading, on the basis of which, either plaintiff succeed or fail.

In the wake of the above, the learned Judge has rightly rejected both the applications, being without any merit and substance and the orders deserve to be upheld. The writ petition is, therefore, dismissed.

(SMT. BHARATI DANGRE, J.)

sjk