IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.6772 OF 2023

Vinod Kantilal Vyas ...Petitioner.

V/s.

The State of Maharashtra & Others. ...Respondents.

Ms. Ratna Jaiswal i/b Ms. Urshita Jain for the Petitioner.
Mr. P. P. Pujari, AGP for the Respondent-State.
Mr. Atul Damle, Senior Advocate a/w. Mr. Rohan Mirpure, Mr. Viraj Jadhav, Mr. Chinmaya Acharaya i/b Mr. Kevin Pereira for Respondent Nos.2, 3 and 4.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 29th NOVEMBER, 2023.

P.C.:

1. The challenge in the petition is to the Order dated 22/12/2022 passed by the trial Court in an Application below Exhibit 93 taken out by the petitioner, who is defendant seeking appointment of Court Commissioner. The application seeks appointment of the Court Commissioner for the purpose of making a report in regard to the suit premises as well as toilet block which is alleged to be demolished by the developer.

2. The trial Court while rejecting the Application has observed that in the suit proceedings there is no burden cast upon the defendant to prove anything. The trial Court further held that appointment of Court Commissioner for collecting the evidence will cause serious prejudice to the plaintiff and as such there appears to be no necessity to appoint the Court Commissioner for collection of the evidence.

3. Heard Ms. Ratna Jaiswal for the petitioner, Mr. P. P. Pujari, AGP for the Respondent-State and Mr. Atul Damle, Senior Advocate for Respondent Nos.2, 3 and 4.

4. Ms. Jaiswal, learned counsel appearing for the petitioner submits that pursuant to Memorandum of Understanding, the entire plot of land has been owned by two owners and that the developer had demolished the WC in the petitioner's shop premises and subsequently WC is now on the open plot of land which belongs to the developer. She would further submit that the suit is filed for eviction on the ground of permanent addition and alteration and the MOU would demonstrate that in fact it was the developer who has demolished the WC in the suit premises and shifted the same to the open plot of land.

5. The Application is filed under Order 26 Rule 9 of CPC and settled position is that the appointment of Court Commissioner cannot be for the purpose of collection of evidence. In the present case, according to the petitioner the WC has been demolished by the developer and shifted to open plot. This is a matter which is required to be established by the petitioner by leading cogent evidence in that regard. The appointment of Court Commissioner was sought for the purpose of verifying the position of WC blocks lying in the open space. For that purpose it is not necessary that Commissioner be appointed and the said fact can be proved by placing on record necessary material. As regards reliance placed on MOU executed between the parties, the same definitely cannot be the reason for appointment of Court Commissioner. The trial Court has therefore rightly rejected the Application of the petitioner by observing that appointment of Court Commissioner cannot be for the purpose of collection of evidence.

6. In light of the above, I am not inclined to exercise the jurisdiction under the provisions of Article 227 of Constitution of India and interfere with the impugned order.

7. Petition fails and is dismissed.

(SHARMILA U. DESHMUKH, J.)