

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2500 OF 2023

Bipin Dattatray Mhatre	...	Petitioner
<i><u>Versus</u></i>		
Tejashree Ranjan Mhatre and Ors.	...	Respondents

— —
Mr. C.P. Deogirikar for the Petitioner.
— —

CORAM : SHARMILA U. DESHMUKH, J.

DATE : June 20, 2023.

P. C. :

1. Heard.

2. The Petitioner questions the decision dated 31st October, 2022 of the City Civil Court in Notice of Motion No.3262 of 2021 rejecting the petitioner's application under Order XXVI Rule 9 of the Code of Civil Procedure. Learned counsel appearing for the Petitioner submits that the Petitioner who is the original defendant no.3 in SC Suit No.163 of 2014 was in possession of room No.2 of the building situated at 64/F, 1st Floor, Saikrupa, Parel Village, Mumbai and the Respondent Nos.1 and 2 were in possession of the room no. 3 of the

same building. He further submits that during the absence of the Petitioner on account of his hospitalization, the Respondent Nos.3 and 4 trespassed in both room nos.2 and 3. To secure the possession of the room of which he has been disposed, the Petitioner instituted case before the Small Cause Court, as the Petitioner claims to be tenant of the said room No.2.

3. He further submits that as the Respondent Nos.1 and 2 filed proceedings in the City Civil Court under Section 6 of the Specific Relief Act, the Petitioner filed the counter claim in the said proceedings, in which an application for appointment of Court Commissioner came to be filed for the reason that during the pendency of the proceedings it came to be notice of the Petitioner that there has been some alteration in the rooms and as such, the room nos.2 and 3 have been amalgamated. He would further submit that the appointment of the Court Commissioner is necessary to place on record the factual position of the rooms in question and, as he is now been dispossessed. It is not possible for him to enter in the premises and ascertain the position prevailing as on today.

4. Learned counsel for the Petitioner relies upon the

decisions of the Apex Court in the case of *Dalhousie Properties Ltd. vs. Surajmull Nagarmull*, [(1977) 1 SCC 367]; and in the case of *Amrish Kilachand and Another Vs. Indian Commercial Co. and Others*, [(1997) 10 SCC 95]. The decisions which have been relied by the learned counsel for the Petitioner have been rendered in completely differently factual position and are not applicable to the facts of the present case.

5. Learned counsel for the Respondent Nos. 1 and 2 disputes the position that the Petitioner was in possession of the room no.2 and in fact questions the maintainability of the counter claim filed by the Petitioner. Be that as it may. Today, the issue before this Court is the appointment of the Court Commissioner as sought by the notice of motion No.163 of 2014.

6. City Civil Court has rejected the application in view of the well settled principle of law that the appointment of Court Commissioner cannot be for the purpose of collecting evidence. The possession of room no.2 has been sought by the Petitioner claiming that he was a tenant in the premises from 1973 to the date of his dispossession on 16th July, 2013 and on the ground of previous

possession, the counter claim seeking possession has been filed.

7. This position is being disputed by the Respondent Nos. 1 and 2, who states that the Respondent has nothing to do with room no.2 and has no right, title and interest in the suit premises. Considering the pleadings which have come on record, it is necessary for the Petitioner to establish that he was in possession of room no.2 before an application for appointment of Court Commissioner can be made. It is well settled law that the Court Commissioner cannot be appointed for the purpose of collecting evidence and usually in cases of boundary disputes, the appointment of Court Commissioner is permitted. Although, it has been held that the stage at which the appointment of the Court Commissioner is sought is not relevant and the common thread that runs through all the decisions, is that irrespective of the stage, it has to be seen that the application is not filed for the purpose of collection of evidence.

8. Considering the facts of the present case when the dispute which has been raised as regards the initial possession of the Petitioner in respect of room no.2 of the building in question, in my opinion, it will be necessary for the Petitioner to lead evidence to

establish the possession of his room and thereafter, if so advised to file an application for appointment of Court Commissioner. Before any evidence is being led as regards the possession, the appointment of Court Commissioner at this stage will amount to collection of evidence which is prohibited.

9. In view of the above, there is no merit in the petition. The writ petition stands dismissed.

(Sharmila U. Deshmukh, J.)