



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13636 OF 2022

Kalpesh R. Patel.

...Petitioner.

Versus

Shree Thane Halai Lohana Mahajan
Trust Thane.

..Respondent.

*Mr. R. S. Datar i/b Ms. Druti Datar for the petitioner.
Mr. Vivek Joshi for the respondents.*

Coram : Sharmila U. Deshmukh, J.

Date : December 4, 2023.

P. C. :

1. Heard.
2. Challenge in the petition is to the order dated 2nd September 2022 rejecting the petitioner's application for appointment of Court Commissioner under Order XXVI Rule 9 of the CPC.
3. Learned counsel appearing for the petitioner submits that the petitioner-tenant was in occupation of certain area and subsequent to the demolition of portion of building by the Thane Municipal Corporation, area in his possession has reduced. He would further submit that the appointment of Court Commissioner is necessitated to verify the area which is in possession of the petitioner and also to

ascertain that for approaching the mezzanine floor, there is only one access and there is no partition.

4. The trial Court has rejected the application by observing that the area in possession is a disputed issue. The trial Court has held that the plaintiff's case is that he is possessing area more than mentioned in the assessment sheet and, as such, he needs to prove the area he occupies during trial by leading required evidence. The trial Court has further observed that unless and until plaintiff explains the inconsistency of area he occupies in the assessment sheets, the appointment of Court commissioner cannot be permitted.

5. It appears that there is discrepancy between the area which is mentioned in the assessment sheet and the area which petitioner claims to be in possession. It will be therefore necessary for the petitioner to first lead evidence to show the area in respect of which he claims to be in possession and explain the inconsistency between the area in his possession and the area mentioned in the assessment sheet. It cannot be disputed that appointment of Court commissioner cannot be for the purpose of collection of evidence. However, after the petitioner has led necessary evidence, it will be open for the petitioner to renew the request for appointment of Court commissioner which the trial Court will consider after considering the evidence brought on record by the petitioner. If the petitioner is

permitted to renew the request for appointment of Court commissioner after he has led sufficient evidence in that respect, it cannot be said that the appointment of Court commissioner is for the purpose of collection of evidence.

6. In that view of the matter, writ petition is disposed of with liberty to the petitioner to lead evidence and thereafter to renew the request for appointment of Court Commissioner, which the Court will consider on its own merits. Needless to clarify that observations made in this order are for the purpose of deciding the validity of impugned order and the trial Court to decide the application, if any made subsequently for appointment of Court commissioner, on its own merits.

[Sharmila U. Deshmukh, J.]