

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

**WRIT PETITION NO. 5715 OF 2014**

Tekchand s/o Rijumal Khubani,  
Age: 73 years, Occupation: Business,  
R/o Near Savarkar Garden,  
Dharangaon, Tq. Kopargaon,  
District Ahmednagar.

...Petitioner

versus

1. The State of Maharashtra,  
through the District Collector,  
Ahmednagar.
2. The Deputy Director Town Planning  
and Valuation, Ahmednagar,  
District Ahmednagar.
3. Nagar Parishad, Kopargaon,  
through the Chief Officer.
4. Vardhaman s/o Dipchand Gangawal,  
Age: 66 years, Occupation : Business,  
R/o Near Savarkar Garden,  
Dharangaon Road, Kopargaon,  
District Ahmednagar.
5. Lata w/o Vardhaman Gangawal,  
Age: 52 years, Occupation: Household,  
R/o Near Savarkar Garden,  
Dharangaon Road, Kopargaon,  
District Ahmednagar.

...Respondents

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Mr. Milind Patil, Advocate for petitioner.

Mr. N. R. Bhavar, Advocate for respondent No. 3.

Mr. A. P. Bhandari, Advocate for respondent No. 5.

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**CORAM : N.W. SAMBRE, J.**

**Reserved on : 15<sup>th</sup> April, 2015**

**Pronounced on : 23<sup>rd</sup> April, 2015**

**ORDER :**

Heard respective parties. With the consent of the parties, the petition is taken up for final disposal at admission stage.

2. The petition is by the plaintiff questioning the order dated 10/09/2012 passed below Exhibit-34 an application under Order 26 Rule 9 of the Code of Civil Procedure for appointment of Court Commissioner, order dated 23/04/2013 passed below Exhibit-52 an application under Order 12 Rule 8 for issuance of directions for production of documents, order dated 13/01/2014 passed below Exhibit-90 an application seeking issuance of witness summons.

3. The brief facts as are necessary for deciding the claim in question raised before this Court are as under :

The petitioner-plaintiff filed a suit for mandatory injunction for demolition of illegal structure of the defendant. The petitioner claims to be owner of the property in question and sought decree from the Court as regards declaration that the construction carried out by defendant Nos. 5 and 6 as mentioned in the plaint paragraph-1 is without any sanction from the local planning authority and further claimed easementary right, in addition to demolition of

illegal construction.

4. In the said suit, the planning authorities were also impleaded as defendants, who have filed their written statement and the trial Court has framed following issues.

- (1) Does plaintiff prove that defendant defendant No. 5 and 6 are obstructing his right of air and light?
- (2) Does he further prove that they are causing nuisance to him?
- (3) Whether plaintiff has locus standi to file suit about alleged violation of construction bye laws by the defendant?
- (4) Whether plaintiff is entitled for the relief of mandatory injunction?
- (5) What order and decree and costs.?

4. In the back ground facts of the case, the petitioner moved an application under Order 26 Rule 2, 9 and 10(a) of the Code of Civil Procedure seeking appointment of Court Commissioner either Architect or Engineer. The said application came to be rejected by an order dated 10/09/2012 on the ground that the appointment of Court Commissioner amounts to collection of evidence.

5. The above referred reasons given by learned trial Court while rejecting the application for appointment of Court Commissioner if analyzed, in the light of plaint, the petitioner has in specific terms has made prayer for demolition of illegal construction. Such prayer, in the back ground of pleadings in the plaint if perused, it is required to be noted that it is well settled that provisions of Order 26 Rule 9 of Code of Civil Procedure i.e. appointment of Court Commissioner cannot be utilized for the purpose of collection of evidence. It was expected of the petitioner-plaintiff before filing suit to file on record the measurement map/plaint map demonstrating the illegal construction and location of properties.

6. In my opinion, learned trial Court has rightly made observations while rejecting the application for appointment of Court Commissioner.

7. So far as the second order which is questioned in the present petition i.e. the rejection of prayer for issuance of directions for production of documents is concerned, it is required to be noted that learned trial Court has recorded sufficient reasons for not granting of the said application. The trial Court has rather given finding that in case the notice for production of document is not honoured, learned trial Court has every right to draw adverse

inference in such a matter at an appropriate stage. Learned trial Court has also observed that it is open for the present petitioner to apply for adducing secondary evidence in the matter. The reasons cited therein appear to be germane to the cause and do not call for any interference.

8. So far as next order dated 13/01/2014 is concerned, learned Counsel for the petitioner though has placed reliance upon the provisions of Section 30 of Code of Civil Procedure so as to canvass that in the back ground of role of municipal council and other respondents as is reflected in the written statement, the said application was rightly partly allowed by learned trial Court, having regard to position in law i.e. to say, it is not open for the present petitioner-plaintiff to summon the defendant, as his witness. An appropriate support can be drawn from the judgment of this Court in the matter of **Suresh Sahebrao Tawale vs. Uttam Shankar Ghadge and others** reported in **2012(5) Bom. C.R.495**.

9. The contention of the petitioner that provision of Section 30 of Code of Civil Procedure, which is enabling provision, in support of contention for discovery is concerned, the trial Court has already taken the view as regards the production of document as is sought by the petitioner, as according to the trial Court, in case of

failure to produce documents upon notice to that effect sought by the petitioner would result in drawing adverse inference by the Court below against the concerned party at an appropriate stage.

10. In view of above, in my opinion, no case for interference is made out. The writ petition lacks merit, stand dismissed.

**[ N.W. SAMBRE, J. ]**

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