

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5104 OF 2015

Iftekar Khadebhai Choudhary	..	Petitioner
VS.		
Smt. Chandrabaga H. Javalkar	..	Respondent

Mr. I. M. Khairdi for Petitioner.
Mr. Milind Deshpande for Respondent.

CORAM : M. S. SONAK, J.
DATE : 10 AUGUST 2015

P.C. :-

1] Rule. By consent and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

2] Challenge in this case is to the order dated 18 March 2015, by which the trial Court has appointed a Commissioner to carry out repairs to the suit premises.

3] The impugned order dated 18 March 2015 is in fact, in continuation of the order dated 5 February 2015. In paragraph 7 of the order dated 5 February 2015, the trial Court has observed thus :

“7. The applicant and opponent filed on record the report submitted by Civil engineer. The applicant filed on record the report submitted by Sadguru Associates dt. 01/04/2011 which shows that the suit property is in a well condition and

in which ground floor is well and some repairing work is necessary on the first floor. While the opponent filed on record the report of Architect and structural designer Shailesh Karwa and Associates dt. 22/08/2013 which shows that the suit property is 80 years old. The construction is in mud. The first floor is about to collapse. The walls of upper floor have a big holes and huge cracks. In future if the upper floor of the building and staircase leading to upper floor collapsed, then there will be possibility of human loss or injury. All the walls of the structure are in dilapidated condition and as per the report building has lost all its strength and beyond repairs. Therefore, two contradictory reports of expert engineers are on record. Therefore to bring on record the factual position and situation of suit property, in my opinion, the appointment of Court Commissioner is necessary.”

4] There is no necessity to interfere with the reasoning of the trial Court as recorded in paragraph 7 of the order dated 5 February 2015. In fact, the trial Court is right that a Court Commissioner is required to be appointed to bring on record the factual position in order to decide which of the two reports submitted by the engineer / architect of the rival parties deserves greater credence. As noted earlier, the issue is whether the suit property is in such a state as can be redeemed by repairs or whether the situation of the suit property is such that no amount of repairs will salvage the same.

5] The impugned order dated 18 March 2015 however directly requires the Commissioner to effect repairs to the suit premises. This is not proper. To begin with, the Court Commissioner, consistent with the observations in paragraph 7 of the order dated 5 February 2015 should have been directed to place on record the factual position and the situation of the suit premises. The Court Commissioner can also furnish his opinion on the two aspects as aforesaid. Thereafter, it was for the trial Court to take into consideration the material before it including the reports submitted by the rival parties and the report of the Commissioner and come to some conclusion with regard to the status of the suit premises. Only thereafter, some order could have been made in the context of repairs to the suit property.

6] Accordingly, the impugned order dated 18 March 2015, to the extent it directly requires the Commissioner to carry out repairs is set aside. However, the appointment of the Commissioner is sustained. The Commissioner to visit the site and to furnish report in the context of observations in paragraph 7 of the order dated 5 February 2015 to the trial Court as early as possible and in any case within a period of fifteen days from today. The trial Court, within a period of fifteen days from the receipt of such report to decide the matter in the context of contentions of rival parties and

the material before it, including the report of the Court Commissioner.

7] Rule is made absolute to the aforesaid extent only. There shall be no order as to costs.

8] It is made clear that this Court has not gone into the merits of the matter and therefore, all contentions of all parties in this regard are kept open.

9] All concerned to act on basis of authenticated copy of this Order.

(M. S. SONAK, J.)

Chandka