

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.679 OF 2015

Mrs.Revanti Babubhai Mota)... Petitioner
V/s.
Mrs.Mangala Gokhale)... Respondent

Mr.Vishal Kanade i/by Mr.Sanjay Gawade for the petitioner.

Mr.Yuvraj P.Narvankar for the respondent..

CORAM: K.R.SHRIRAM, J.

DATED : 27.01.2015.

P.C. :

1 By consent of parties, rule made returnable forthwith and heard finally.

2 The petitioner is the defendant in the suit filed by the respondent for eviction on the ground of bonafide requirement. The defence taken by the defendant is that the plaintiff is not in bonafide requirement and in any case comparatively more hardship would be caused to the defendant if defendant is evicted from the suit premises.

3 The petitioner filed an application on 18.9.2014 in the trial court to appoint a Commissioner under Order-26 Rule 9 of Code of Civil Procedure 1908 for inspection of the premises in the occupation

of the petitioner and the premises in the occupation of the landlord viz. the respondent for considering the issue of hardship and alleged bonafide requirement. The respondent opposed the application. The petitioner gave written submissions and also relied upon the judgment of this court in the matter of ¹Dr.Chandrakant T.Chudgar Vs. M/s.Advertising Agencies Association of India. The respondent opposed the application on the ground that no such Commissioner is required to be appointed and in any case the petitioner has all documentary evidence available and Court cannot appoint Commissioner to collect evidence. The respondent relied upon two judgments of this court viz. ²Nalubai Narayan Shinde Vs. Gopinath Dagdu Shinde and in the matter of ³Syed Mushtaque Ahmad Syed Ismail Vs. Syed Ashque Ali Khan Haidar Ali.

4 In the impugned order, the trial court has referred to all the three judgments relied upon by the opposing party. It is the grievance of the petitioner that the judgment of Dr.Chandrakant (supra) squarely applies to their case but the trial court has not dealt with or analyzed the said judgment at all whereas the trial court has only considered the two judgments relied upon by the respondent. It is necessary to reproduce paragraphs-4, 5(1) & (2) and 6 of the impugned judgment.

4. Heard Ld. Counsel on behalf of defendant. He submitted written notes of argument. It is submitted

1 231 Bom. R.C. 1987

2 2011(3) Bom. C.R.167

3 2012(2) Bom.C.R.790

that plaintiff has so many residential properties in the suit building as well as Wadgaon Bdk. And this fact is suppressed by the plaintiff. Therefore, it is necessary to inspect suit building and premises occupied by plaintiff and his family members. It is also submitted that premises occupied by defendant is also required to be inspected through Court Commissioner so that issue regarding hardship and bona fide requirement will be easily disposed of. Ld.Counsel on behalf of defendant relied upon decision in case of : **Dr.Chandrakant T.Chudgar Vs. M/s.Advertising Agencies Association of India, Bom.C.R.231.** It is held that commission would have helped court and hardship issue would have become easy to decide.

5.

(1) **Nalubai Narayan Shinde Vs. Gopinath Dagdu Shinde, 2011(3) Bom. C.R. 167.**

It is held that Commissioner cannot be appointed to find out as to who is in possession of suit premises. Present case is neither of encroachment nor boundary dispute.

(2) **Syed. Mushtaque Ahmad Syed. Ismail Vs. Syed.Ashique Ali Khan Haider Ali, 2012(2) Bom.C.R.790.** Held that suit in question does not

contain any boundary dispute or any dispute as regards any encroachment wherein a report of Court Commissioner would facilitate civil court in arriving at a

decision. Court Commissioner cannot be appointed to collect evidence.

6. From the observations of above two rulings, it is made clear that commissioner cannot be appointed to collect the evidence. The commissioner cannot be appointed to find out as to who is in possession of the suit premises.”

The court has concluded that under Order-26 Rule-9 of CPC the court is empowered to issue court commissioner only to identify the property and not to collect evidence.

5 It is true that the trial court though it has referred in the impugned judgment the judgment in the matter of Dr.Chandrakant (supra) relied upon by the petitioner, the court has not considered the findings thereon in arriving at the conclusion at paragraph-7. At first I thought of remitting the matter back to the trial court to reconsider the issue but in my view, it would only amount to further delaying the proceedings in the trial court.

6 Rule-9 of Order 26 of CPC reads as under :-

“ **Commissions to make local investigations** – In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property or the amount of any *mesne profits* or

damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.”

7 The court therefore, is empowered, if the court feels a local investigation is required for the purpose of elucidating any matter in dispute to appoint a Commissioner to make such investigation and to report thereon to the court. In this suit the defence taken by the petitioner is that comparatively greater hardship will be caused to the defendant/petitioner if evicted. It is true that the defendant will have to establish her own requirements but for the court to consider the question of hardship no prejudice whatsoever would be caused if the commissioner is appointed to investigate the same and report to the court in writing. Such a report in my view, would help the court to reach the proper conclusion at the time of the trial. Therefore, I am inclined to grant the application of the petitioner to appoint Commissioner under Order 26 Rule 9 of CPC.

8 In the result, rule is made absolute in terms of prayer clauses-(a) and (b). The Registrar of the Small Causes Court, Pune to depute himself or such other officer as he may deem fit. For the purpose of carrying out these directions, the Registrar or the officer deputed by him should as far as possible go during the recess hours of the court or on Saturdays.

9 The Registrar upon receiving a copy of this order to forthwith fix up with the officer concerned and the parties, a date and time of the visit. Both the parties are directed to co-operate and not seek any adjournment or extension whatsoever on any grounds. The cost to be borne by the petitioner. The petitioner also to pay such amount as determined by the court to be payable as extra remuneration to the Registrar or the designated officer on the duty. The Registrar/officer concerned to make his report in writing and tender in a sealed envelope to the learned Judge hearing this case.

10 Till report is submitted, the trial court not to proceed with the matter.

11 It is directed that this exercise be completed within 30 days of submission of the authenticated copy by either the petitioner or the respondent.

12 All parties to act on authenticated copy of this order.

(K.R.SHRIRAM, J.)