

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****NOTICE OF MOTION NO. 1670 OF 2015****IN****SUIT NO. 372 OF 2007**

Mr.Sanjay Munshi

...Applicant /Orig.Deft.No.2

In the matter between

JalRustom Aria

....Plaintiff

and

The Municipal Corporation of
Greater Mumbai & Ors.

...Defendants

WITH**SUIT NO. 2 OF 2009**

Mr. Sanjay Munshi

...Plaintiff

vs.

Mr.Jal Rustom Aria & Ors.

....Defendants

Mr.Sharan Jagtiani with Ms.Ankita Singhania with Akshay Doctor i/b. Desai &
Diwanji for Plaintiff in S 372-2007 and for Defendant No.1 in S 2-2009

Mr.Ashwin Shete with Ms.Ketki Gadkari & Rahil Jhaveri i/b. Jaykar & Partners for
for Defendant No.2 in Suit 372-2007 and for Plaintiff in Suit 2-2009.

Mr.A.S. Kaningdhara i/b. S.V. Marne for Defendant No.2 in Suit 2-2009.

CORAM : S.C. GUPTE, J.**23 DECEMBER 2015****P.C. :**

After hearing the learned Counsel for the parties, the notice of
motion is disposed of by consent of parties and in the presence of the Plaintiff
and Defendant No.2 in Suit No.372 of 2007 (Applicant) by passing the following
order :

1. An architect on the panel of this court, M/s.H. Mehta & Associates, be appointed a Court Commissioner for the purposes indicated below. In the event the Commissioner is unavailable to execute the commission, liberty is granted to Respondent No.1 / Plaintiff in Suit No.372 of 2007 to approach the court to appoint another Commissioner.
2. The Commissioner shall visit the 3rd floor premises, examine the same and shall make a report of the work done including additions, alternations, repairs, renovations, interior work, structural changes, if any, etc., till date on the 3rd floor premises of the Sunama House Building by the Applicant / Sanjay Munshi, since the report of the last Commissioner, M/s.Nadkarni & Co. dated 7th March 2007. Such report along with photographs shall be filed by the Court Commissioner in this court within a period of four weeks from the date of this order.
3. The Commissioner shall be accompanied by a photographer to take the necessary photographs.
4. The Commissioner shall take the assistance of a Structural Engineer and such other professionals, if found necessary by the Commissioner.
5. The inspection will be carried out by the Commissioner in the presence of all parties concerned and after notice to the parties.

6. The Applicant and the Plaintiff may furnish material and information to the Commissioner with a view to assist the latter in his work. The Commissioner may also for facilitating his work call for such information and record from the parties as the Commissioner may deem fit.
7. As regards the list of 25 items of work, marked "X" for identification, the Commissioner shall, at the outset determine if the execution of the proposed work or any part thereof will cause any damage, harm or risk to the suit building or to the Plaintiff's premises. Subject to the Commissioner finding any proposed work or part thereof being likely to cause damage, harm or risk to the suit building or to the Plaintiff's premises, the Applicant shall be permitted to carry out the work in terms of 25 items of work contained in the list marked "X" for identification. Such work of repairs shall be carried out by the Applicant under the supervision of the Commissioner. It is clarified that whilst carrying out this supervision, the Commissioner shall merely ensure that the work to be carried out shall not entail any damage, harm or risk to the suit building or the Plaintiff's premises. The Applicant shall not commence the work without the Commissioner having inspected the premises, examined the same and noted the work for the purposes of preparation of a report in terms of clause 2 above. After such inspection, examination and noting, the Commissioner shall indicate his clearance to the work proposed to be carried out.
8. The Applicant shall carry out the repair work in terms of the list, marked "X"

for identification, within a period of six months from the date the Commissioner gives the clearance for the work to be carried out. The Applicant shall be at liberty to seek an appropriate extension of time, if necessary, but any such question of extension shall be determined by the Court after hearing all the parties and on merits.

9. The work shall be carried out by the Applicant from 10 am to 6 p.m between Mondays and Fridays and on Sundays.
10. The aforesaid work carried out on the 3rd floor premises shall be without prejudice to the Plaintiff's rights and contentions in the present suit (i.e. Suit No.372 of 2007) and especially the contentions in Notice of Motion No.4232 of 2009 filed under the provisions of Order XXXIX, Rule 2A of the Code of Civil Procedure, 1908 and his defences in Suit No.2 of 2009 and also the contention of the respective parties in proceedings pending before different courts, including this court, as well as any other proceedings.
11. The aforesaid work shall also be without prejudice to the Plaintiff's rights and contentions, as contained in the Indenture of Assignment dated 7th December 2001.
12. The fees of the Commissioner will be paid by Respondent No.1 / Plaintiff in Suit No. 372 of 2007 and the work, if any, will be done at the expense of the Applicant.

13. The Commissioner shall submit a final report after completion of the work with record, including photographic record, of all work done on the 3rd floor premises.

14. Liberty to the parties to apply in case of any difficulty.

2. Though the notice of motion is disposed of in terms of this order, it is made clear that the Court has not considered prayer clause (c) on merits and it will be open for the Applicant to apply for similar relief in any future proceedings. It is also clarified that insofar as prayer clause (d) is concerned, the prayer was not pressed in the notice of motion. However, the Applicant is at liberty to file suitable proceedings and take out appropriate applications for the relief sought in prayer clause (d), if so advised.

(S.C. Gupte, J.)