

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2803 OF 2014

Rameshwar s/o Pandurangrao Pawar,
Age 50 years, Occ. Business,
R/o. Flat No. B-301, Gurumishri Archid,
Near Mahaveer Bhavan
Kumbharwada, Aurangabad

...Petitioner

versus

Sanjay s/o Pandurang Pund,
Age 46 years, Occ. Business,
R/o. Pundwada, Nagarkhana Galli,
near Supari Hanuman Mandir,
Gulmandi, Aurangabad

...Respondent

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Mr. P.N. Sonpethakar, advocate for the petitioner
Mr. S.D. Joshi, advocate for respondent

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CORAM : V. K. JADHAV, J.

DATED : 4th JANUARY, 2016

ORAL JUDGMENT:-

1. Rule. Rule returnable forthwith. By consent of parties, matter is heard finally at admission stage.
2. The petitioner/original plaintiff has instituted a suit for decree of perpetual injunction claiming therein that he is tenant over the suit property house No. 4-5-10 situated at Gulmandi, Aurangabad.

According to the petitioner/plaintiff, during the course of widening of road, the Municipal Corporation had demolished part of the house to the extent of 22.5 sq. mtrs. and out of that shop, an area to the extent of 9"x12" remained in possession of the petitioner/plaintiff. The petitioner/plaintiff is doing business in the said premises. Since the respondent/defendant is disturbing the possession of the petitioner/plaintiff over the said portion of the house, the petitioner/plaintiff is constrained to institute the suit for decree of perpetual injunction.

3. During pendency of suit, possession of the petitioner/plaintiff was protected by the court by issuing order of temporary injunction. However, respondent/defendant has filed an application Exh. 43 for appointment of Court Commissioner. The learned Judge of the trial court, by the impugned order dated 24.02.2014, has allowed the said application. Hence this writ petition.

4. Learned counsel for the petitioner submits that the petitioner has already placed on record the panchnama drawn by the Municipal Corporation and the measurement carried out in respect of demolition. Furthermore, the court below has protected the possession of petitioner by issuing order of temporary injunction till disposal of the suit. The learned counsel further submits that

respondent/defendant, by way of his pleadings, contends that the entire property which was earlier in possession of the petitioner/plaintiff, has been acquired by Aurangabad Municipal Corporation and as such, the petitioner/plaintiff is not in possession of any property. The learned counsel further submits that by filing application Exh.43. Respondent/defendant was intending to create evidence. Learned counsel further submits that learned Judge of the trial court has committed grave error of law in allowing said application Exh. 43.

5. Learned counsel for respondent/defendant submits that the Corporation has acquired the entire suit property at the time of widening of road. Learned counsel further submits that in order to fix boundary of the suit property vis-a-vis the center of the road, appointment of City Survey Officer as a Court Commissioner is necessary. Learned counsel further submits that the petitioner/plaintiff has not filed a single document on record to demonstrate the exact measurement, extent, location and the situation of suit property. Learned counsel, thus, submits that learned Judge of the Trial Court has rightly allowed application Exh. 43 and appointed a City Survey Officer, Aurangabad, as a Court Commissioner. Learned Judge of the trial court has directed the City Survey Officer to measure the distance of the suit property from the

center of the road, fix the boundaries and submit report alongwith the map within a specified date. Learned counsel further submits that writ petition is without any substance and thus liable to be dismissed.

6. The petitioner/plaintiff has already placed on record the panchnama drawn by Municipal Corporation and the measurement carried out thereof in respect of demolition. So far as carrying out the work of widening of road is concerned, center point of main road is always the base. It is well settled that the object of local inspection is not to collect evidence which can be taken in court, but to obtain evidence for elucidating matters which due to its peculiar nature, are local in character and only be had at the spot. Order 26 Rule 8 of the Code of Civil Procedure does not authorize the Court to delegate to Commissioner, the trial of any material issue which the court itself is bound to try. In the case in hand, it appears that the respondent/defendant is trying to create evidence by filing application Exh.43. The learned Judge of trial court should have rejected the said application. On the basis documents placed on record and on the basis of oral evidence adduced by the parties to the suit, the court can arrive at a certain conclusion. It cannot be ignored that respondent/defendant is a landlord whose remaining portion of the house is situated beyond the said road and the portion of the shop

alleged to have been possessed by the petitioner/plaintiff. In view of this, I am inclined to allow this writ petition. Hence the following order:

O R D E R

- I. The writ petition is hereby allowed.
- II. The order dated 24.02.2014, passed below Exh.43, in Regular Civil Suit No.117/2012 by 2nd Joint Civil Judge Junior Division, Aurangabad, is hereby quashed and set aside. The application below Exh.43 is hereby rejected
- III. In the circumstances, there shall be no order as to costs.
- IV. Rule made absolute in the above terms. Writ petition is disposed of.

(V. K. JADHAV, J.)

rlj/