

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

WRIT PETITION NO. 7692 OF 2016

Maharu s/o Hari Wani
Age 63 years, occup. Business,
R/o CTS No.2669, Amalner, .. Petitioner/
Tq. Amalner, Dist. Jalgaon Orig. Plaintiff

versus

Mahendra Nandlal Kothari,
Age : 62 years, occup. Business,
R/o Shop No. 1 & 2, Agriculture
Produce Market Committee, .. Respondent/
Amalner, Tq. Amalner, Orig. Defendant
District Jalgaon

Mr. Kishor C. Sant, Advocate for petitioner
Mr. Yatish G. Gujarathi, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 25th July, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for the parties finally by consent.

2. Petitioner who is before this court is a landlord and has instituted regular civil suit no. 12 of 1999 in the court of Civil Judge, Junior Division, Amalner, against present respondent-

tenant seeking his eviction, *inter alia*, on the grounds of reasonable and *bonafide* requirement and non-user of the premises by the tenant.

3. Said suit had terminated into its dismissal under the judgment and order dated 09-12-2011. It appears that the matter since then has been resting with appellate court under regular civil appeal no. 5 of 2012.

4. After hearing learned counsel, there does not appear to be much dispute on factual position that a portion of tenanted premises had collapsed and come down in 2013. It further appears that there has been some correspondence in this respect, including one criminal prosecution at the instance of tenant against the landlord and his son.

5. In regular civil appeal no. 5 of 2012, an application (Exhibit-19) came to be moved at the instance of appellant in April, 2016 purportedly pursuant to Order XXVI, rule 9 of the Code of Civil Procedure, 1908 for a report in respect of the condition of the roof of the tenanted premises.

6. Exhibit-19 was opposed to by the tenant-respondent, referring to that appointment of court commissioner in the

present case may not be called for, since the report would seldom have any bearing on the grounds being taken up for eviction.

7. After hearing parties, the appellate court by impugned order passed on 10-06-2016 rejected the application Exhibit-19 and as such the appellant is before this court.

8. Learned counsel Mr. Kishor Sant appearing for petitioner vehemently submits that looking at the factual position, the situation can be resolved to a large extent and damage to tenanted premises can be assessed by appointment of court commissioner. He submits, the landlord may not be in a position to go to tenanted premises and assess the damage, the tenant being claiming to be in possession of the property. He, therefore, urges this court to give indulgence to the request being made under Exhibit-19.

9. On the other hand, learned counsel Mr. Yatish Gujrathi appearing on behalf of sole respondent, takes a diagonally opposite stand, vehemently equally submitting that the appellate court has taken stock of the situation including the scope of dispute pending between the parties and has considered that the application Exhibit-19 is unrelated to the

dispute. He submits that when primarily dispute is with regard to *bonafide* requirement of landlord and allegation of non-user of suit premises for six months preceding the suit, the roof collapse has hardly to do anything with said grounds. As a matter of fact, it is an ingenuous attempt by the landlord to collect evidence in disguise which is estimated by the landlord which would sub-serve his cause. Learned counsel submits, in none of the grounds taken in the suit for eviction, the event of collapse of roof is appearing. He particularly emphasizes the reasons in paragraph no. 6 of the impugned order, which have weighed while passing the impugned order.

10. Upon aforesaid, it appears that as far as dispute pending in regular civil appeal n. 5 of 2012 is concerned, admittedly roof collapse appears to be in 2013 and the application Exhibit-19 had been moved only in April, 2016 taking up a plea of examining roof condition. It appears that the grounds which have been taken up by the landlord for eviction of the tenant have their primary thrust on *bonafide* requirement of the petitioner-landlord and non-user by the respondent-tenant of the premises. In the circumstances, as observed by trial court and submitted by learned counsel for respondent, appointment of court commissioner would not be

able to serve any purpose underlying regular civil appeal no. 5 of 2012 filed by present petitioner.

11. The observations as are occurring under paragraph no. 6 of the impugned order are being reproduced hereinbelow for ready reference.

" 6. As to Point No. 1 :- I have gone through the judgment of the learned lower Court by which the suit was dismissed. On perusal of the judgment, it reveals that Issue No. 5 relates to the requirement of the defendant and Issue No.10 relates to non-user of the suit property. Learned advocate for the defendant Mr. M. J. Bagul has rightly submitted that the non-user for the period of six months preceding date of filing of the suit is the requirement for obtaining decree on the ground of non-user. Therefore, the present situation of the suit property is not required to be brought on record, in order to decide the controversy between the parties. It appears that by filing present application the plaintiff wants to bring on record subsequent event. Ultimately it can be said that by appointing the Court Commissioner the plaintiff wants to collect evidence, which is not permissible. Looking to the facts and circumstances of the case and fact that so called act of demolition had taken place during the pendency of the appeal, in my view, it is not necessary at all to appoint Court Commissioner. Hence, I answered Point No. 1 in the negative. "

12. Having regard to the reasons and observation quoted hereinabove which have weighed with the appellate court, the reasons given for rejection of Exhibit-19 would not be

liable to be faulted with and as such, writ petition does not deserve any consideration for giving indulgence to the petitioner.

13. Writ petition as such is dismissed. Rule stands discharged.

SUNIL P. DESHMUKH,
JUDGE

pnd