

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 7666 OF 2016**

1. Shardaben shantilal Shaha ..Petitioner.

Vs

1. Nashik Gymkhana and Ors. .. Respondents

Mr. Tushar N. Sonawane, Advocate for Petitioner.

**CORAM : R.G.KETKAR,J.**

**DATE : 05/07/2016**

**PC:**

1. Not on Board. At the request of Mr. Sonawane, taken up for admission. Heard Mr.Tushar Sonawane, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant', has challenged the Judgment and order dated 1.7.2016 passed by the learned Jt. Civil Judge, Senior Division Nashik below Exhibit-7 in Regular Civil Suit No.415 of 2016. By that order, the learned trial Judge allowed the application Exhibit-7 filed by the respondents, hereinafter referred to as plaintiffs, under Order 39, Rule 7 of C.P.C.and appointed Court Commissioner for inspecting the suit premises.

3. The plaintiff instituted the suit on 23.6.2016, inter alia, praying for perpetual injunction restraining the defendant from

carrying out any permanent construction; for carrying out any structural changes and doing any acts contrary to Section 108(o) of the Transfer of Property Act, 1882. Pending the suit, the plaintiffs also took out application Exhibit-5 for appointing Court Commissioner in terms of Order 39, Rule 7 of C.P.C. Suit summons was served on the defendant on 29.6.2016 and was made returnable on 1.7.2016.

4. On 1.7.2016, the defendant filed application Exhibit-15 seeking time to file reply as also written statement. By order dated 1.7.2016, the learned trial Judge adjourned the matter by giving short time considering the urgency in the matter only to file say on Exhibit-5. The plaintiff also filed application Exhibit-7 on 23.6.2016 for appointing Court Commissioner.

5. Mr. Sonawane submitted that the learned trial Judge adjourned the hearing of applications Exhibits 5 and 7 to 11.7.2016. However, without giving opportunity to the defendant to file reply to Exhibit-7 as also without hearing the defendant, by the impugned order the learned trial Judge allowed the application and appointed Court Commissioner. He invited my attention to Order IX, Rule 1 of C.P.C to contend that the suit can be heard unless the hearing is adjourned to a future date fixed by the Court. In the present case, the learned trial Judge has adjourned hearing of application Exhibit-7 to 11.7.2016. The

learned trial Judge, therefore, was not justified in passing the impugned order on 1.7.2016. The impugned order was passed in gross violation of the principles of natural justice.

6. Mr. Sonawane further relied upon the decision of the Calcutta High Court in the case of Institution of Engineers Vs. Bishnu Pada, AIR 1978 Calcutta 296 to contend that no commission can be issued for the purpose of collecting evidence in suit. He submitted that if the Court is inclined to uphold the order, it may be clarified that the report of the Court Commissioner should not be considered while deciding the application for interim relief. Mr. Sonawane further relied upon the proceedings in Regular Civil Suit No.816 of 1999 instituted by the plaintiffs invoking the grounds under section 13(1)(a) read with Section 108(o) of the Transfer of Property Act and submitted that in that suit also identical allegations were made against the defendant herein and as per his instructions the suit is dismissed for non prosecution. In other words, the plaintiffs did not seriously prosecute the said suit and in the present case the plaintiff pressed for the application for appointment of Court Commissioner.

7. I have considered the submissions advanced by Mr Sonawane. I have also perused the material on record. By the impugned order, the learned trial Judge has appointed Court

Commissioner for inspection of the suit property. Order 39, Rule 7 (1)(a) enables the Court to make an order for inspection of any property which is the subject matter of the suit. Order 39 (8)(3) provides that before making an order under rule 6 or rule 7 on an application made for the purpose, the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the opposite party. In other words, without giving notice to the opposite party, the Court is empowered to make an order under Rule 6 or 7 for appointment of Court Commissioner for inspecting the suit premises. In paragraph 4 of the impugned order the learned trial Judge has observed that no prejudice would be caused to the defendant in case the Court Commissioner is appointed for bringing the factual position on record. If the request made by the plaintiffs is not acceded to by appointing Court Commissioner, it will cause prejudice to the plaintiffs. In my opinion, the impugned order passed by the learned trial Judge is purely discretionary. The learned trial Judge rightly observed that no prejudice will be caused to the defendant if the Commissioner is appointed. The defendant can remain present at the time of visit of the court commissioner. If defendant is not carrying out permanent construction, any structural changes, the said position will be brought in record. If the report is adverse to him can also

raise objections. Even the plaintiffs will have to examine the court commissioner to substantiate their case in the suit. Understood thus, I do not find any case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)