

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10244/2015

Office Notes, Office Memoranda of Coram, Appearances, court's orders or directions and Registrar's orders	Court's or Judge's orders
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Mr. Dilip Bodke for the petitioner

CORAM : K. K. TATED, J.
DATE : JULY 18, 2016

P.C.:

1. Heard. By this petition under Article 227 of the Constitution of India the Petitioner defendant challenges the order dated 09.10.2014 passed by the Civil Judge, Senior Division Pune below Exhibit- 64 appointing the Court Commissioner to visit the suit premises and submit a report about the construction carried out by the defendant.

2. The learned counsel for the petitioner submits that the Trial Court erred in coming to the conclusion that the respondent plaintiff made out a case for appointing Court Commissioner.

3. The learned counsel for the petitioner submits that in the present proceedings, the respondent plaintiff filed Regular Civil Suit No.

1519/2014 against the defendant for removal of construction as well as injunction not to carry out further construction. He submits that in that suit the respondent plaintiff applied before the Trial Court for ad-interim order. Court directed both the parties to maintain status-quo. Thereafter without complying the provisions of Order XXXIX Rule 3 of the Code of Civil Procedure, 1908, the respondent plaintiff made an application for appointment of court commissioner. Hence, same is required to be set aside.

4. The learned counsel for the petitioner submits that by appointing the Court Commissioner, the respondent plaintiff wants to bring on record the evidence against the defendant and same is not permitted. In support of this contention, he relies on judgments in the matter of *Sanjay Namdeo Khandare Vs. Sahebrao Kacharu Khandare & Ors.* 2001(1) ALL MR 653, *Syed Mustaque Ahmad s/o. Syed Ismail & Ors. Vs. Syed Ashique Ali Khan s/o. Haidar Ali* 2012(1) ALL MR 80, *Basanta Kumar Swain Vs. Baidya Kumar Parida and Ors* AIR 1989 Orissa 118, *Laxman Budha Choure & Ors. Vs. Tushar Rajanikant Parekh & Ors. in Writ Petition No.4910/2011* decided by this court on

02.08.2011 and Vasant Kedari More & Anr. Vs. Ramesh Pandurang Gaikwad in Writ Petition No.2364/2012 dated 16th April 2012.

5. On the basis of these submissions, the learned counsel for the defendant submits that the impugned order passed by the trial court dated 09.10.2014 as well as Commissioner report dated 28.10.2014 be set aside

6. Heard the learned counsel for the petitioner defendant at length. In the present proceedings, the respondent plaintiff filed Regular Civil Suit No. 1519/2014 directing the defendant to remove unauthorised construction carried out by them in the suit land bearing CTS No.617 and 620 situated at Mauje Wagholi, Tq. Haveli, Dist. Pune.

7. The plaintiff moved before the trial court below exhibit 5 in Regular Civil Suit No. 1519/2014, for urgent orders. At that time, the trial court by order dated 19.09.2014 directed the petitioner defendant not to disturb the peaceful possession of the plaintiff till hearing of exhibit 5. Said order reads thus:

“Heard at length. Perused material contentions. Both plaintiffs claim to be the owner of the suit

property described in paragraph no.1 of the plaint. The open plot admeasuring 5 guntha situated at city s.no.617 and 620 at Wagoli, Tq. Haveli, Dist. Pune. Perused the records of rights. Plaintiffs are having strong apprehension that their lawful possession will be disturbed by defendants. Hence, it would be proper to direct the defendants by way of purely ad-interim order that the defendants shall not disturb the peaceful possession only upto hearing of exhibit 5. Issue show cause notice to the defendant r/o.”

8. Thereafter the plaintiff again moved before the trial court for further order below exhibit 5 after giving notice to the petitioner defendant. At that time, the trial court directed the parties to maintain status quo as on 19.09.2014 till haering of exhibit 5 upto 29.12.2014. The order dated 22.11.2014 reads thus:

“Heard learned advocate at length. Perused report of Court Commissioner. The plaintiff claims to be exclusive lawful owner of plot No.5 guntha sitauted at S.No.617 and 620 at Waholi, Tq. Haveli, Dist. Pune and claims the adverse possession. It is submitted in open court at very hurriedly defendant encroached, proceeded with construction on it plot. So as to avoid multiplicity of litigation and complex issues, both parties are hereby directed to maintain status quo prevailing as on 19.09.2014 without fail. Till hearing on exhibit 5 by both sides by clear order defendants shall not proceed with construction or any other ancillary acts till hearing on exhibit 5 upto 29.12.2014. Issue show cause notice to the defendants.”

9. Thereafter, in spite of status quo order, the defendant started the construction activities in full force. Hence, the plaintiff made an application for appointment of court commissioner on 09.10.2014. The trial court allowed the said application by the impugned order on the ground, despite the order of status-quo, the defendant continued with construction activities over the suit property.

10. It is to be noted that, the Commissioner carried out the commission work and submitted report dated 28.10.2014. Thereafter the petitioner defendant filed the present petition after more than one year i.e. on 07.09.2015 for setting aside the order dated 09.10.2014 by which the court commissioner was appointed and report dated 28.10.2014. In view of these facts the authorities cited by the defendants are not applicable in the present case.

11. Considering the fact that the impugned order has already been complied with by the court commissioner and he has submitted his report, I do not find any substance in the Writ Petition. Same stands rejected.

JUDGE