

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8927 OF 2015

RAMESH BABULAL CHOUDHARI
VERSUS
PRASHANT SHARAD PATHAK AND OTHERS

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Advocate for Petitioner : Mr. R.R. Mantri h/f Mr. Deepak D. Chaudhari

Advocate for Respondents 1 to 5 : Mr. S.V. Natu

Advocate for Respondent No.11 : Mr. Rakesh Jain h/f Mr. D.S. Bagul

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CORAM : V. K. JADHAV, J.
DATED : 20th NOVEMBER, 2017

PER COURT:-

1. Being aggrieved by the order dated 23.4.2015 passed below Exh.22 in R.C.S. No. 102 of 2014, the petitioner-original defendant No.1 has preferred this writ petition.

2. The respondents-plaintiffs have filed said application Exh.22 under Order XXVI Rule 9 of C.P.C. for appointment of Court Commissioner. The trial court has allowed the said application by order dated 23.4.2015, which is impugned in this writ petition.

3. Learned counsel for the petitioner-original defendant No.1 submits that application Exh.22 has been filed for collection of evidence and the same should not have been entertained by the trial court. As per the prayers made in the said application, it appears

that the said application is also seeking direction to the Court Commissioner to inspect as to the damage caused to the compound wall of the S.T. stand and submit a report to that effect. Learned counsel submits that this is nothing but a fishing enquiry. The learned Judge has also not considered the same and directed the Court Commissioner to submit a report on the point of damage caused to the compound wall of S.T. stand when the M.S.R.T.C. is not impleaded as party defendant to the suit. Learned counsel submits that the petitioner-defendant No.1 as well as original defendant No. 7-Municipal Council have raised a point of jurisdiction and as such, trial court was bound to decide the said issue in terms of provisions of Section 9-A of C.P.C. (Maharashtra State Amendment).

4. Learned counsel appearing for the respondents-plaintiffs has supported the impugned order passed by the trial court. Learned counsel submits that the respondents-plaintiffs have instituted the suit for removal of encroachment and it is well settled that in case there is dispute of removal of encroachment, the order directing the appointment of Court Commissioner is justifiable.

5. On perusal of impugned order, I do not find any fault in the same. The respondents-plaintiffs have instituted the suit for removal

of encroachment. The said suit was not filed in the representative capacity but original owners, who have constructed the said complex i.e. defendant Nos. 2 to 6, sold the suit shops to the respondents-plaintiffs under registered sale deed for valuable consideration. The descriptions of suit shops with their respective sizes, have been given in the plaint. It has been specifically alleged in the plaint that inspite of repeated complaints, original defendant No.7-Municipal Council is not taking any action against the petitioner-defendant No.1 for removal of encroachment or to demolish the construction made by encroaching on the portion of suit shops. There is no question of collection of evidence. So far as the order passed below Exh.22 seeking appointment of Court Commissioner is concerned, the petitioner original defendant has not raised any objection to the application seeking appointment of Court Commissioner in terms of provisions of Section 9-A of the C.P.C. It is well settled that if the objection is raised to the jurisdiction, it does not mean that the Court has no power to pass any interim orders. Learned Judge has observed that the present petitioner-original defendant No.1 has vaguely opposed the application.

6. So far as the directions to the Court Commissioner to inspect the compound wall of S.T. stand is concerned, the same is unwarranted and uncalled for. The writ petition is allowed to that

extent only. Hence, I proceed to pass the following order:-

O R D E R

- I. The writ petition is hereby partly allowed.
- II. The directions to the Court Commissioner, as given in clause 6 of operative part of impugned order, is hereby quashed and set aside.
- III. Rest of the order stands confirmed.
- IV. Writ petition is disposed of accordingly.

(V. K. JADHAV, J.)

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