

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 12444 OF 2015

Mr Subodh Bhupatrai Mody ...Petitioner

Versus

Mr Nandkumar Yeshwant Gupte
since deceased, through L.Rs. ...Respondent

....

Mr.Devendra Sharma, Advocate for the Petitioner.
Mr. Sachin J. Kadam, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 09th FEBRUARY, 2017

P.C.

1. Heard Mr.Devendra Sharma, learned Counsel for the petitioner and Mr.Sachin J. Kadam, learned Counsel for the respondent, at length.

2. Rule. Mr. Kadam waives service on behalf of the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 10.1.2014 passed by the learned Civil Judge, Senior Division, Palghar below

Exhibit-46 in Special Civil Suit No.81/2010. By that order, the learned trial Judge allowed the application and appointed Advocate N.R. Joshi as Court Commissioner.

4. In support of this Petition, Mr. Sharma invited my attention to prayers in the suit as also paragraph-4 of the impugned order. He submitted that the learned trial Judge has given reasons in paragraph-4. Except the reasons given in paragraph-4, no other reasons are given by the learned trial Judge. He submitted that having regard to the prayers made in the suit, the learned trial Judge was not justified in appointing Court Commissioner.

5. On the other hand Mr.Kadam supported the impugned order. He invited my attention to the amended plaint as also the letter dated 31.5.2013 passed by the respondent-plaintiff and the reply of the petitioner/defendant. In letter dated 31.5.2013, the plaintiffs specifically alleged that despite order of injunction dated 8.1.2013 the defendant has started construction of compound wall on the boundary of the property. The defendant has committed contempt of the Court by commencing the construction of wall on the boundary of the property. The

defendant gave reply on 4.6.2013. In reply the defendant referred to the order dated 8.1.2013. After referring to that order, he stated that he did not violate the Court order as by no stretch of imagination fortifying the compound / boundary wall is restrained by the said order. He submitted that the plaintiff has filed proceedings under Order XXXIX Rule 2(a) of C.P.C. and the same are pending.

6. Mr. Kadam relied upon Order XXXIX Rule 7 of C.P.C. to contend that the Court has powers to appoint the Court Commissioner. The appointment of the Court Commissioner is not with a view to collecting evidence. In support of his submissions, he relied upon following decisions :

1. *Subal Kumar Dey v. Purna Chandra Giri and others, AIR 1989 ORISSA 214.*
2. *J. Satyasri Rambabu v. Smt. A. Anasuya & Anr., AIR 2005 Andhra Pradesh 529.*

7. He submitted that in the case of **J.Satyasri** (supra), the Andhra Pradesh High Court observed in paragraph-6 as under :

“6. It is no doubt true that the Courts are normally reluctant to appoint a Commissioner for noting physical features of the suit schedule property,

particularly in a suit for injunction since the same would amount to collecting evidence in favour of one of the parties. However, there is absolutely no reason to hold that it is a hard and fast rule. Having regard to the facts and circumstances of the case and particularly whenever the Court prima facie finds that there is an attempt on the part of one of the parties to alter the physical features of the suit property and it is necessary to take note of the same, it is always open to the Court to appoint a Commissioner for inspection of such property. It is relevant to note that Order XXXIX, Rule [7](#) of the Code of Civil Procedure empowers the Court to make an order for detention, preservation or inspection of any property, which is the subject matter of the suit, if the Court feels that such action is necessary or expedient for the purpose of obtaining full information or evidence. In the light of the above said provision, I am unable to agree with the contention of the learned Counsel for the petitioner that the Court below has committed an error in appointing an Advocate Commissioner. As already noted above the specific plea of the plaintiffs is that in spite of the order of temporary injunction the defendant has been taking steps to alter the nature of the suit schedule land. In the circumstances, the Court below having considered the entire material on record has rightly appointed an Advocate Commissioner. The said order cannot be said to be vitiated on account of any patent error of fact or law and therefore, does not warrant interference in exercise of supervisory jurisdiction under Article [227](#) of the Constitution of India.”

8. In the case of *Subal Kumar Dey* (supra), the Orissa High Court observed in paragraph-9 as under :

“9. Next question of consideration relates to the validity of direction of the trial court to the officer-in-charge. Baliapal P.S. to render assistance for implementation of the order of injunction. As has

been held in the decisions reported in AIR 1971 Andh Pra 53 (Rayapati Audemma v. Pothineni Narasimham) and AIR 1983 Cal 266 (Sunil Kumar Halder v. Nishikanta Bhandari), direction to the police for implementation of order of temporary injunction is given by a Court in exercise of the inherent powers under Section [151](#), C.P.C. Inherent power is wide in its nature to protect the interest of the parties in a given case. It is not a power to be exercised for implementation of an order of the Court. Where violation of the order would be so prejudicial to a party that remedies or penalty for violation of the order available under the statute would not be sufficient, inherent power may be exercised. Therefore, a Court is to be careful before taking external help of police for implementation of the order. The present case is not such. At least there is no finding why such drastic power to take external help is being taken when proceeding for violation of order of injunction is pending. For this purpose also local inspection as envisaged under Order 39, Rule 7, C.P.C may be material. Whether direction to the police would be given, would depend upon the facts and circumstances of the case and in the present case, I am satisfied that the trial court has been hasty in granting prayer of the plaintiffs to give direction to the police without further materials in its possession. Since this order is not res judicata, the Court on further materials being furnished can give cogent reasons despite my setting aside the order in this civil revision to that effect.”

9. Mr. Kadam, therefore, submitted that no case is made out for interfering with the impugned order.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has

instituted suit *inter alia* praying for declaration that the defendant is a trespasser and/or in unauthorized occupation of the suit property, namely, Survey No.114, Hissa No.1/B, admeasuring 20 gunthas and Survey No.6 admeasuring 10 gunthas with house No.414; for possession and for perpetual injunction. Pending the suit, the plaintiff took out application for injunction at Exhibits-5 and 35. By order dated 8.1.2013, the learned trial Judge issued injunction restraining the defendant from creating (1) third party interest, (2) parting with the possession, and (3) carrying out construction or demolition of the construction in the suit property.

11. It is the case of the plaintiff that despite injunction order, the defendant has started construction of compound wall on the boundary of the property. As against this, it is the case of the defendant that he has not violated the order dated 8.1.2013. He is not restrained from fortifying the compound / boundary wall by the trial Court. It is not in dispute that the plaintiff has already filed proceedings under Order XXXIX Rule 2(a) of C.P.C. being Case No.12/2013 for breach of the injunction order and the same are pending. In my opinion, it is a matter of evidence as to whether the defendant has committed breach of

the injunction order. As noted earlier, the only reason given by the trial Court in allowing the application is to be found in paragraph-4. The learned trial Judge simply observed that whether the defendant has constructed the compound unauthorizedly or carried out unauthorized construction can be brought on record by appointment of the Court Commissioner. In my opinion, the reason given by the learned trial Judge cannot be sustained. In my opinion, it is a matter of evidence and for that purpose Court Commissioner cannot be appointed under Order XXXIX Rule 7 of C.P.C. which gives discretion to the Court for appointment of the Court Commissioner. That discretion has to be exercised judiciously. Said discretion cannot be exercised with a view to collecting evidence.

12. Mr. Kadam relied upon the decision of *J. Satyasri (supra)*. In paragraph-6, extracted hereinabove, the Andhra Pradesh High Court held that the Courts are normally reluctant to appoint a Commissioner for noting physical features of the suit property. It depends upon the facts and circumstances of each case and when the Court prima facie finds that there is an attempt on the part of one of the parties to alter the physical features of the suit property, it is open to the Court to appoint a

Commissioner. As the proceedings under Order XXXIX, Rule 7 of C.P.C. are pending before the Court, it is for the plaintiff to substantiate his claim and for that purpose Court Commissioner cannot be appointed.

13. In the case of *Subal Kumar Dey* (supra), in paragraph-7, the learned Single Judge of Orissa High Court held that the power under Order XXXIX Rule 7 of C.P.C. is to be exercised by the Court when occasion demands and when inspection is necessary for proper appreciation and adjudication of the matter. In my opinion, in the present case Court Commissioner cannot be appointed to collect the evidence. The parties will to lead evidence in support of their respective case. The decisions in *J. Satyasri* (supra) and *Subal Kumar Dey* (supra), therefore, do not advance the plaintiff's case.

14. In view thereof, the Petition succeeds. The impugned order is set aside the the application Exhibit-46 is dismissed. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)