

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4034 OF 2016
WITH
WRIT PETITION NO.4038 OF 2016

Yusuf Haji Ibrahim ... Petitioner
Vs.
Haji Mangroo Alladdin Arsi (decd) through
LRs Akhtar Ansari and others ... Respondents

Mr. Atul Damle, Senior Advocate a/w. Mr. Rupesh R. Lanjekar for Petitioner.
Mr. Madhusudan B. Joshi for Respondents.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 27, 2017

P.C. :

Heard Mr. Damle, learned Senior Counsel for petitioner and
Mr. Joshi, learned Counsel for respondents at length.

2. Writ Petition No.4034 of 2016 takes exception to the judgment and order dated 18.03.2016 passed by the learned Judge of the City Civil Court, Greater Mumbai in Notice of Motion No.1193 of 2016 in Suit No.7748 of 1996. By that order, the learned trial Judge rejected the Motion taken out by the petitioner, hereinafter referred to as 'plaintiff', under Order XXVI, Rule 9 of C.P.C. for appointment of Court Commissioner.

3. Writ Petition No.4038 of 2016 takes exception to the judgment and order dated 18.03.2016 passed by the learned trial Judge in Notice of Motion No.1192 of 2016 in Suit No.7748 of 1996. By that order, the learned trial Judge rejected the Motion taken out by the plaintiff for directing defendants to produce original / copy of the lease deed dated 11.05.1970.

4. In support of these Petitions, Mr. Damle has taken me through paragraph 5 of the plaint. In paragraph 5, plaintiff asserted that some times in March 1996, defendant started encroaching upon adjoining land belonging to the plaintiff. As of date, defendant has constructed the unauthorized construction on the open plot of land admeasuring 50' x 80' ft. As per the agreement of lease only an area of 40' x 75' ft was given to the defendant for his own use, occupation and enjoyment. Inspite of this, defendant is now using an area admeasuring about 50' x 80'ft., by way of unauthorizedly constructing the structures in the excess area. Mr. Damle invited my attention to the Motion taken out by the plaintiff for appointment of the Court Commissioner as also affidavit of plaintiff in support of that Motion. He submitted that as the defendant had carried out unauthorized construction admeasuring 50' x 80' ft, there is dispute over the open space of land given to the defendant. In view thereof, it is absolutely necessary to appoint Court Commissioner for making investigation of actual area, which is now in possession of the defendants.

5. He further submitted that defendant has admitted execution of agreement to lease dated 11.05.1970. He has also annexed list of documents on which defendants rely as also the documents including copy of the agreement to lease. It clearly shows that the original lease deed is in the custody of the defendants. He, therefore, submitted that plaintiff took out other Notice of Motion for directing the defendants to produce the agreement to lease. The learned trial Judge however rejected the Motion on the ground that it is not in his custody. He, therefore, submitted that the impugned orders deserve to be set aside thereby appointing Court Commissioner as also directing defendants to produce the original or copy of the lease deed dated 11.05.1970.

6. On the other hand, Mr. Joshi supported the impugned orders and submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As far as the Motion for appointment of Court Commissioner is concerned, perusal of the prayers made by the plaintiffs shows that plaintiff has sought declaration that the agreement of lease entered into between the parties stands terminated / cancelled and revoked from the date of notice dated 08.03.1996; for declaration that defendant is not entitled to remain in occupation, possession and enjoyment and he be directed to handover vacant and peaceful possession of the suit property more particularly described in the lease as well as in the exhibit-B i.e. rough sketch. In other words, plaintiff has sought possession of the entire property. The Suit is not for recovery of possession of encroached area. In view thereof and for the reasons recorded in the impugned order, I do not find any case is made out for appointment of the Court Commissioner. No fault can be found with the impugned order. Hence, Writ Petition No.4034 of 2016 fails and the same is dismissed.

8. As far as Writ Petition No.4038 of 2016 is concerned, perusal of paragraphs 9 and 10 of the impugned order shows that the learned trial Judge has observed that in paragraph 7 of the written statement, defendant positively made statement that original agreement was not given to him. Plaintiff did not issue notice for production of documents as contemplated under Order XI, Rule 16 of C.P.C. For the reasons recorded in paragraphs 9 and 10, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Writ Petition No.4038 of 2016 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.)

Minal Parab