

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

WRIT PETITION NO.1688 OF 2016

(Vijaykumar s/o Harichand Mehta and others ..vs.. Mukund s/o Shrikrishna Rathi and others)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A. HAQ, J.

DATED : 29-03-2017

Heard Shri G.I. Dipwani, Advocate for the petitioners.

2. The original defendants have filed this petition to challenge the order passed by the trial Court rejecting the application (Exhibit No.25) filed by them under Order XXVI Rule 9 read with Order XXXIX Rule 7 of the Code of Civil Procedure praying that commissioner be appointed to conduct local inspection.

3. By the order dated 09-12-2016, this Court directed issuance of notice to the respondents, recording the submission made on behalf of the petitioners that they will not obstruct the respondents in carrying out the repairs. The petitioners have filed Civil Application No.357/2017 praying that the order passed on 09-12-2016 be recalled. This civil application was listed before Shri R.K. Deshpande, J. who had passed the order dated 09-12-2016. An order is passed on this civil

application that as the petition is not yet admitted, the civil application can be considered at the time of hearing on admission and the regular Bench before which the petition would be listed can pass order on the application also. The civil application is again listed for orders. None appears for the respondents though served. In view of the order passed on 17-03-2017, the petition is taken up for further consideration.

4. The learned trial Judge has recorded in paragraph No.9 of the impugned order that in the earlier proceedings which were taken up to the State Government, directions were given to the Municipal Corporation to re-examine the structural audit of the suit premises and in view of these directions, the Principal of Government Engineering College, Amravati was appointed to conduct the structural audit of the suit premises and he submitted the report dated 18-12-2014 which report is placed on record of the civil suit. After going through the impugned order, I find that the learned trial Judge has rightly adverted to all the relevant aspects and has recorded proper reasons for not granting the prayer made on behalf of the defendants. It cannot be said that the impugned order suffers from any illegality or perversity which necessitates interference by this Court in the extra-ordinary jurisdiction.

5. The apprehension of the petitioners that the order

passed on the application filed by the plaintiffs under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure will be passed solely on the basis of the report dated 18-12-2014, is ill-founded. At this stage, it cannot be said that the trial Court will not consider all the material placed on the record and will pass orders only on the basis of the above referred report.

In view of the above, I see no reason to interfere with the impugned order.

The petition is dismissed. No costs.

The learned Advocate for the petitioners states that the statement as recorded in the order dated 09-12-2016 was made by him without taking instructions from the petitioners and therefore the order dated 09-12-2016 be recalled. It is clarified that the statement made on behalf of the petitioners/original defendants as recorded in the order passed on 09-12-2016 will not have any effect on adjudication of the application filed by the plaintiffs under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure and adjudication of any other point in the civil suit.

Civil Application No.2636/2016.

In view of dismissal of the writ petition, the civil application praying for permission to amend the writ petition has become infructuous.

The civil application is disposed accordingly.

Civil Application No.357/2017.

In view of the order disposing the writ petition, the civil application praying for recalling the order dated 09-12-2016 has become infructuous.

The civil application is disposed accordingly.

JUDGE

adgokar