

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 760 OF 2010

Pushpak Jugmandar Shah

...Petitioner

Versus

Shakuntalabai Omprakash Vaishnav

...Respondent

....

Mr. N.M. Deshpande I/b. S.R. Page, Advocate for the Petitioner.

Mr. Vasant Adsul, Advocate for the Respondent.

....

CORAM : R. G. KETKAR, J.

DATE : 13th JULY, 2018

JUDGMENT:

1. Heard Mr.N.M. Deshpande, learned counsel for the petitioner and Mr.Vasant Adsul, learned counsel for the respondent, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the order dated 8.12.2009 passed by the learned 7th Additional Small Cause Judge, Small Cause Court, Pune below Exhibit-37 in Civil Suit No.380/2008. By that order, the learned trial Judge allowed application Exhibit-37 filed by the respondent, hereinafter referred to as the 'defendant', and appointed the Court Commissioner.

3. In support of this Petition, Mr. Deshpande submitted that the learned trial Judge was not justified in allowing the application Exhibit-37. He has invited my attention to application Exhibit-37 filed by the defendant and submitted that by filing application for appointment of the Court Commissioner, the defendant intends to use the machinery of the Court for collecting evidence. He submitted that the defendant can adduce the evidence in support of his contention instead of seeking appointment of the Court Commissioner. He further states that in pursuance of order dated 16.4.2010, the plaintiff has filed affidavit before the trial Court furnished information sought by the defendant in prayer clause (b) of the application at Exhibit-37. He, therefore, submitted that even otherwise the impugned order is liable to be set aside.

4. On the other hand, Mr. Adsul supported the impugned order. He submitted that in the peculiar facts and circumstances of the present case, it is absolutely necessary to appoint the Court Commissioner. The Court Commissioner will be in a position to bring the factual situation of the property as also will bring on record whether the plaintiff requires the suit premises reasonably and bonafide for expansion of business as the plaintiff is in possession of area admeasuring around five acres. He submitted that by allowing the application for

appointment of the Court Commissioner, the learned trial Judge has not exercised the discretion arbitrarily or capriciously so as to warrant interference in writ jurisdiction. He relied upon following decisions :

[i] **Lekh Raj v. Muni Lal and others, AIR 2001 SC 996; &**

[ii] **Madhukar R. Javle v. Baskar Ramnath Shibad, AIR 1996 Bombay 96.**

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the defendant has filed application Exhibit-37 *inter alia* praying for (a) inspection of Survey No.39/1A/2/4/1 through the Court Commissioner; (b) for furnishing detailed information as regards bringing on record area of Mangal Karyalaya and the building situate therein as also dividing wall as also the area in possession of Sandesh Bhanudas Gujar, Nilangi Sandesh Gujar, Karanraj Sandesh Gujar, Vandana Rajiv Sheth, Anil Rajguru, Atul Dattatraya Atre as also sheds which are lying vacant and details of tenant who are occupying the suit premises to the Court Commissioner and for a further direction to the Court Commissioner to submit report along with map.

6. Mr. Deshpande submits that in pursuance of the order dated

16.4.2010, the plaintiff has filed affidavit disclosing information sought by the defendant in terms of prayer clause (b) of the application Exhibit-37. Mr. Adsul submitted that the plaintiff has not furnished full details. It would be open to the defendant to make this grievance before the trial Court.

7. After perusing the impugned order, I find that the learned trial Judge was not justified in appointing the Court Commissioner. By filing application for appointment of the Court Commissioner, the defendant is really intending to collect the information by using machinery of the Court. The defendant can very well adduce evidence instead of applying for appointment of the Court Commissioner.

8. Mr. Adsul relied upon the decision of Apex Court in **Lekh Raj** (supra). In that case, the question whether the disputed property was fit for human habitation was in issue. The Revision was pending for almost 18 years and it is in that context the landlord sought appointment of the Commissioner for fresh assessment of further deterioration of the building during pendency of the Revision. It is in that context the Apex Court observed that the High Court did not exceed its revisional jurisdiction by appointment of the local commissioner for fresh assessment in view of pendency of Revision

Application for 18 years. In my opinion, said decision is not applicable in the facts of the present case.

9. Mr. Adsul also relied upon the decision of this Court in **Madhukar Javle** (supra). In that case, the learned Single Judge of this Court observed that the Court has ample powers to order inspection of the property which is not the subject matter of the suit. The question in the present petition is not about the powers of the Court to appoint the Court Commissioner, but, the question is whether in the facts and circumstances of the present case appointment of the Court Commissioner is necessary and whether the defendant is trying to collect the evidence from the machinery of the Court.

10. In my opinion, the learned trial Judge was not justified in appointing the Court Commissioner. Hence, the impugned order is set aside. The petitioner has already filed affidavit placing information sought by the defendant in terms of prayer clause (b). Subject to this, the Petition allowed. Rule is made absolute in aforesaid terms with no order as to costs. Office to transmit R & P forthwith. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)

Pradipkumar
Prakashrao
Deshmane
Digitally signed
by Pradipkumar
Prakashrao
Deshmane
Date: 2018.07.21
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