

Shailaja

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 1890 OF 2018**

Vijay Balasaheb Patil] Petitioner

Vs.

Bapusaheb Ganpati Nipanikar & Ors.] Respondents

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Mr. Rajesh B. Parab, for petitioner.

Mr. Surel S. Shah, for respondents.

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CORAM : R.G. KETKAR, J.

DATE : 2nd MAY, 2018.

P.C.

Heard Mr. Rajesh Parab, learned Counsel for the petitioner and Mr. Shah, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 6th November, 2017 passed by the learned Joint Civil Judge, Junior Division, Kolhapur below Exhibit 26 and Exhibit 47 in Regular Darkhast No.554 of 2012. By that order, the learned trial Judge rejected the applications Exhibit 26 and 47. Mr. Parab states that the petitioner has restricted challenge in the present Petition only in respect of Order below Exhibit 47.

3. The petitioner, hereinafter, referred to as “judgment debtor” has filed application at Exhibit 47 under Order-XXVI, Rule-9 read with section 47 of the Code of Civil Procedure, 1908, inter alia, praying for appointment of surveyor in the City Survey Office, Shaniwar Peth, Kolhapur for carrying out

commission work and submitting his report with the map showing the property in his possession. The judgment debtor contended that the appointment of Court Commissioner is necessary for ascertaining area of the house property bearing CTS No.1994. The learned Judge observed that the question about area of the suit property was already concluded by the findings recorded by the learned trial Judge while deciding Regular Civil Suit No.1078 of 2003 and by the learned District Judge while deciding Regular Civil Appeal No.110 of 2008 and accordingly rejected the application.

4. In support of this Petition, Mr. Parab reiterated the submissions advanced before the trial Court. He has taken me through application Exhibit 47. He submitted that the judgment debtor had filed written statement at Exhibit 15. In paragraph 2 of the written statement, judgment debtor specifically contended that entire property bearing CTS No.1994, B. Ward, Mangalwar Peth admeasuring 55.2 square meter is in his possession and vahivat as a tenant. The said contention was reiterated during oral evidence adduced on behalf of the plaintiff namely Shri Chandrakant Vishwanath Malkar, Power of Attorney of the plaintiff. He, therefore, submitted that the learned trial Judge committed error in rejecting the application.

5. On the other hand, Mr. Shah, supported the impugned order. He has invited my attention to paragraph 9, 10 and 11 of the impugned order and submitted that the trial Court after appreciating the material on record in the earlier round of litigation held that no case is made out for appointment of Court Commissioner.

6. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that the respondent/decreed holder had instituted suit for eviction under section

15 and 16 (1) (i) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). The judgment debtor filed written statement contending that description of the suit property is not proper. In fact, the judgment debtor is in possession of 55.2 square meters. The learned trial Judge while answering Issue No.1 held that description of the suit property is correct and only two rooms are in possession of the judgment debtor. The said finding was based on assessment extract of the Municipal Corporation.

7. In paragraph 20 of the District Court's judgment in Regular Civil Appeal No.110 of 2008, the learned District Judge dealt with this aspect. It is not in dispute that aggrieved by the decision of the District Court, the judgment debtor preferred Civil Revision Application in this Court. In Civil Revision Application, the decree holder did not press ground u/s 15 of the Act and restricted the challenge only in respect of ground u/s 16 (1) (i). C.R.A was also dismissed. For the reasons recorded in paragraphs 9 and 10 of the impugned order, no case is made out for appointing Court Commissioner. Hence, the Petition fails and the same is dismissed. Liberty is granted to the parties to apply for expeditious hearing of the Execution Application. If such application is made, keeping in mind that suit is of the year 2003, learned District Judge is requested to decide Transfer Application within two weeks from re-opening of the Court after Summer Vacation. Order accordingly.

[R.G. KETKAR, J.]