

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.125 OF 2018

Russet Co-operative Housing Society Limited ... Applicant
Vs.
Narayandas Vitthaldas Shroff and others ... Respondents

Mr. Vivek Kantawala a/w. Mr. Amey Patil i/b. Vivek Kantawala & Co. for Applicant.
Mr. Nikhil R. Vidwans for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : APRIL 16, 2018

P.C. :

Heard Mr. Kantawala, learned Counsel for the applicant and Mr. Vidwans, learned Counsel for the respondent No.1 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'defendant No.2', has challenged the order dated 04.01.2018 passed by the learned Additional Judge, Small Causes Court, Pune below exhibit-84 in Regular Civil Suit No.209 of 2012. By that order, the learned trial Judge rejected the application made by the defendant No.2 under Order XXVI, Rule 9 of C.P.C. for appointment of Court Commissioner. Having regard to the proviso to Section 115 of C.P.C., setting aside of the impugned order will not result in disposal of the Suit. In view thereof, leave to convert C.R.A. into Writ Petition is granted. Amendment shall be carried out forthwith.

3. In support of this Petition, Mr. Kantawala invited my attention to paragraphs 1 and 2 of the plaint as also prayer clause (A). He also invited my attention to paragraph 6 of the written statement filed by the

defendant No.2 resisting the Suit. He submitted that defendant No.2 filed application exhibit-84 under Order XXVI, Rule 9 of C.P.C. and prayed for appointment of Court Commissioner for local investigation of the suit property and structures / buildings standing thereon. He submitted that he is not pressing rest of the prayers and the same may be treated as deleted. He submitted that by virtue of the application, defendant is not collecting the evidence but is obtaining the evidence. The learned trial Judge was, therefore, was not justified in rejecting the application.

4. On the other hand Mr. Vidwans supported the impugned order.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The learned trial Judge observed that as per Order XXVI, Rule 9 of C.P.C., appointment of Court Commissioner and local investigation of property in dispute is permissible only for the purpose of elucidating the matter. Without giving evidence about existing structure in the suit property, defendant cannot claim elucidation of the matter through Court Commissioner. The defendant is first required to lead his own evidence about the nature of the property, then and then only in order to elucidate the basic evidence, he can ask for appointment of Court Receiver. At this juncture, appointment of Court Receiver would tantamount to collection of evidence which is not permissible in the eyes of law. Defendant can prove the present status of the structure by various methods. He can examine the persons who are occupants of this structure. He can produce documentary evidence regarding the structure. Without adducing such kind of evidence, defendant cannot directly op for appointment of Court Commissioner. For the reasons recorded in the impugned order, I do not find that the learned trial Judge has committed

any error in passing the impugned order. Hence, Petition 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.)

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