

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.3227 OF 2019

Abbas Ali Haji Mohamad Khaja ... Petitioner
Vs.
Umesh Dattatray Dhone and another ... Respondents
Mr. Drupad S. Patil for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : MARCH 14, 2019

P.C. :

Not on Board. At the request of Mr. Patil, learned Counsel for the petitioner, taken up for admission.

2. This Petition takes exception to the order dated 18.01.2018 passed by the learned 5th Additional Judge, Small Causes Court, Pune below exhibit-27 in Civil Suit No.266 of 2012. By that order, the learned trial Judge allowed the application made by the plaintiff under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for appointment of the Court Commissioner. The learned trial Judge allowed the application in the following terms:

- “1] Court Commissioner is appointed for measurements of the suit property and taking its photographs, as sought in the application.
- 2] After the measurement and photographs are taken, Court Commissioner to prepare detail report as to factual position of the suit property.
- 3] Plaintiff to pay Rs.2000/- to the Court Commissioner towards commission fees.
- 4] Commissioner to submit the report on or before next date.
- 5] Parties to suggest the name of the Court Commissioner.”

3. Mr. Patil has invited my attention to the application filed by the

plaintiff and submitted that the plaintiff had filed application under Order XXVI, Rule 9 of C.P.C. The plaintiff did not invoke Section 28 of the Maharashtra Rent Control Act, 1999. Even in the first paragraph of the impugned order as also in paragraph 3, the learned trial Judge has observed that the application made by the plaintiff is under Order XXVI, Rule 9 of C.P.C. He submitted that if the application is made under Order XXVI, Rule 9 of C.P.C. then the said provision cannot be utilized for conclusion of evidence. He also relied upon the decision of this Court in ***Suresh Manoharlal Jumani Vs. Aasia Manaagement & Consultancy Pvt. Ltd.***, 2013 (6) ALL MR 117, and in particular paragraph 18 thereof. He submitted that even if the Commissioner submits the report, nonetheless, plaintiff will have to prove the Commissioner's report.

4. I have considered the submissions advanced by Mr. Patil. I have also perused the material on record. In paragraph 18 of ***Suresh Manoharlal Jumani*** (*supra*), the learned Single Judge of this Court has observed thus,

“18. In the present case, the plaintiff had given a notice to the defendant to allow him to inspect the premises along with his architect/surveyor (the said fact is denied by the defendants) and as the suit is pending the plaintiff thought it fit to obtain leave of the Court and the same has been granted by the Court. However, the said order of the Court cannot be construed of having appointed a Court Commissioner nor the measurement carried out by the plaintiff through his surveyor would be construed as a measurement carried out by the Court Commissioner. The measurement carried out by the surveyor of the plaintiff would be for satisfaction of the plaintiff to ascertain exact area in occupation of tenant. It will be for the plaintiff to prove his case with all corroborative evidence.”

5. A perusal of above paragraph shows that the order of the Court cannot be construed as having appointed a Court Commissioner nor the measurement carried out by the plaintiff through his surveyor would be

construed as a measurement carried out by the Court Commissioner. The measurement carried out by the surveyor of the plaintiff would be for satisfaction of the plaintiff to ascertain exact area in occupation of tenant. It would be for the plaintiff to prove his case with all corroborative evidence.

6. In view thereof, subject to the plaintiff proving the report of the Commissioner and establishing his case by producing corroborative evidence, no case is made out for interfering with the impugned order. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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