

Vidya Amin

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 7245 OF 2019
WITH
CIVIL APPLICATION NO.1482 OF 2019
IN
WRIT PETITION NO. 7245 OF 2019**

Smt. Vasanti Gajanan Nerurkar & Ors.

... Petitioners/Applicants

V/s.

Sudhir Vasu Shetty & Anr.

... Respondents

Mr. Vishal Kanade a/w. Mrs. Farzana Z. Behramkamdin, Mr. Sahil Bijliwala i/b. FZB & Associates for the petitioners/applicants.

Mr. Jaswant Patel a/w. M. Thevar i/b. Mahesh Menon & Co. for the respondents.

CORAM : G.S.KULKARNI, J.

DATE : 25 September, 2019

ORDER:

This is a Petition filed under Article 227 of the Constitution of India whereby the petitioner has assailed an order dated 16 February 2019 passed by the learned Judge of the Small Causes Court at Mumbai, by which the application of the petitioner filed under Order XXVI Rule 9 read with Order XXXIX Rule 7 of Code of Civil Procedure for appointment of Commissioner Architect for inspection of the suit premises stands dismissed by the impugned order.

2. The petitioners are the plaintiffs in a Rent Act eviction suit, being

R.A.E. Suit No. 1301/2008 of 2010. It is an expedited suit of the year 2010 despite which the plaintiffs are yet to file their affidavit of evidence. This is one of the grievance of the respondents/defendants that for some reason or the other, the petitioners/plaintiffs are not diligently pursuing this suit which is causing a serious prejudice to the defendants being dragged into unwarranted litigation.

4. Earlier an application was filed on behalf of the petitioners/plaintiffs in the year 2011, (below Exhibit 8), for similar reliefs whereby the petitioners/plaintiffs had prayed for a fit and proper person or Architect to be appointed to visit the suit property and restrain the respondents/defendants from carrying out any addition, alteration in the suit premises or any part thereof. The said application was rejected by an order dated 6 June 2011 passed by the trial Court. While rejecting the said application, it was observed by the learned trial Judge that on 2 October 2010 the plaintiffs had taken inspection of the suit premises which was carried out in presence of an Architect, a Structural Engineer, photographer and advocate for the defendants. The petitioners being aggrieved by the rejection of the said application had preferred an appeal by approaching the appellate Bench in Miscellaneous Civil Appeal no. 139 of 2011. By an order dated 8th February, 2013 the Appellate Court did not interfere in the said order. The said Appeal

came to be disposed of observing that the suit filed by the petitioners/plaintiffs is ripe for hearing and no purpose will be served by going into the merits of the order impugned therein. The trial Court was accordingly directed to dispose of the suit as expeditiously as possible without giving undue adjournments to the parties. It would be appropriate to note the observations of the Appellate Bench as made in paragraphs 12, 13 and 14 of the said order, which reads thus:

“12. According to the plaintiffs, the defendants have carried out repairs in the suit premises without their consent and permission and without obtaining permission from the local authorities concerned. As against this, according to the defendants, predecessor-in-title of the plaintiffs vide clause-9 of the tenancy agreement had permitted them to carry out repairs in the suit premises with the permission of the local authorities.

13. Whether the repairs carried out by the defendants in the suit premises were authorised or unauthorized can be the subject matter of the suit and it cannot be decided at this interim stage.

14. Undisputedly, the suit filed by the plaintiffs is ripened for hearing and therefore, no purpose will be served by going into merits of the impugned order. At the same time, we are of the opinion that it would be desirable to direct the learned trial Court to dispose of the suit as expeditiously as possible without giving undue adjournments to the parties.”

5. Despite the rejection of the earlier application, a fresh application in question was moved after about four years by the petitioners/plaintiffs titled as “Affidavit of the plaintiffs for appointment of Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure”, praying for the same reliefs, which came to be rejected earlier by the trial Court by the order dated 6 July 2011 and not interfered by the appellate Bench. It can be clearly seen from

the averments as made in this new application that the application is not different from the application as made earlier in the year 2011. The relevant averments are contained in paragraphs 5 to 7 of the petitioner's application, which reads thus:

"5. I say that since the additions/alterations/demolitions/violations involved in the above suit are of a technical nature, therefore, it is absolutely necessary in order to bring on record the existing condition of the suit premises and is appurtenant and surrounding areas to appoint an Architect on the panel of this Honourable Court as a Commissioner to visit and inspect the suit premises, i.e., the entire Plot with its open spaces and structures therein, its boundaries, the building with ground floor, 1st floor, 2nd floor, terrace, staircases, garages in ground floor open space, take measurements, photographs and submit a detailed report with an observation on the nature of occupancy and user of the various premises, so that it will assist this Honourable Court to appreciate whether the existing structure and user of the suit premises observed by the Commissioner are in deviation from the plans sanctioned by the Municipal Corporation and in breach of the terms and conditions of the admitted Tenancy Agreements.

6. I say that as mentioned in the plaint, the plaintiffs had even earlier to the institution of the suit appointed an Architect/Engineer to inspect the suit premises, who has submitted a Report which is annexed as Exhibit 'H' to 'K' of the plaint. The reports however shows that the defendants obstructed the Architect and Engineer from visiting the entire suit premises and particularly denied access to the North Side garage and the toilet on the third floor portion of the suit property.

7. In the circumstances, I submit that it is in the interest of a fair and effective adjudication of the issues involved in the above suit that an Architect on the panel of this Honourable Court be appointed as Commissioner to verify the existing structural condition of the suit premises with directions to the said Architect Commissioner to arrange for photographs, as also take measurements, for the said purpose. In fact, the defendants have made additions/alterations even after the filing of the suit, which can also be reflected by the report that would be submitted by the appointed Commissioner-Architect of this Honourable Court."

6. Following are the prayers as made in the said application:

"a) Exercise powers under the provisions of Order XXXIX Rule 7 of the Code of Civil Procedure, 1908 and appoint a Commissioner Architect on the panel of this Honourable Court to visit the suit

premises building and plot on which the suit premises stand, to inspect the suit premises, i.e., the entire Plot with its open spaces and structures therein, its boundaries, the building with Ground floor, 1st floor, 2nd floor, terrace, staircases, garages in ground floor open space, be allowed to take measurements, photographs and submit a detailed report relating to the nature of occupancy and user of the various premises and prepare a plan of the suit property as described in the plaint with particular reference to the existing structures constructed therein and submit a report to this Hon'ble Court within the time as stipulated by this Hon'ble Court.

- b) Such other and further reliefs consequential to this application be granted.
- c) Cost of the application be provided for."

7. Before the trial Court a reply affidavit was filed on behalf of the respondents/defendants opposing this Application. In paragraph 7 of the reply, the respondents/defendants have categorically stated that a complete inspection of the suit premises was granted to the petitioners/plaintiffs. In paragraph 7, respondents/defendants have stated as under:

"7. With reference to paragraph no. 6 of the Application under reply, I deny that the defendant obstructed the Architect and Engineer from visiting the entire suit premises and particularly denied access to the North side garage and the toilet on the third floor portion of the suit property as falsely alleged. I say that the defendants at the request of the plaintiffs had given full and complete inspection of the every part of the suit premises. I crave leave to refer to and rely upon the recording letter which was sent by the defendant's advocate to the plaintiffs pursuant to the inspection taken by the plaintiffs. I further say that the photographs relied upon by the plaintiff and attached to the plaint also indicate the defendants not only permitted inspection by giving free access to the suit premises but the defendants also permitted the plaintiffs Architect to take measurement and the photographer to take photographs relating to the suit premises. I say that the very fact that the defendants permitted the plaintiffs, their architect, their structural engineer and the photographer to visit the suit premises even before filing the suit, indicates that the defendants never obstructed the plaintiffs from taking inspection of the suit premises. I crave leave to rely upon the photographs taken by the plaintiffs photographer in that connection." (emphasis supplied)

8. Learned trial Judge, on hearing this second application in question, as filed by the petitioners/plaintiffs and the opposition to it, of the respondent, considering in the facts of the case has thought it appropriate to reject the said application by the impugned order. The learned trial Judge has interalia observed that not only an earlier application for similar relief was considered and rejected but also the appellate bench did not interfere in the order and the orders of the Appeal Court was accepted by the petitioners/plaintiffs. Considering the peculiar nature of the application, that the contention and allegation of the petitioners being of additions and alterations stated to be carried out by the respondents during the pendency of the suit, the learned trial Judge has observed that, what would be relevant for the adjudication of the suit would be the principal cause of action as pleaded in the plaint on the date of filing of the suit, namely, the petitioners' grounds of eviction interalia of additions and alterations prior to the institution of suit and subject matter of consideration in the suit. The case of the petitioners/plaintiffs that the present application is on different set of facts, than the one pleaded in Exhibit 8 application which was earlier dismissed was not accepted by the learned trial Judge who has observed that the petitioners/plaintiffs had taken inspection of the suit premises even prior to the institution of the suit, hence the learned trial Judge has observed that it would not be appropriate to grant

the petitioner's application to appoint a Commissioner as prayed by the petitioner.

9. My attention is also drawn to the letter dated 4 October 2010 addressed by the advocate for the respondents/defendants recording about inspection of the premises as taken by the petitioners/plaintiffs along with Architect, Structural Engineer and the photographer on 2 October 2010. Admittedly, the petitioners by themselves, after this inspection was taken, did not address any letter to the respondents recording the details and nature of inspection, and only after the said letter dated 4 October 2010 of the respondent/defendant's advocate was received, it appears that the letter dated 11 October 2010 came to be addressed by the petitioners/plaintiffs to the advocates for the respondents/defendants setting out various grievances in respect of inspection.

10. It is well settled that what would be relevant for an eviction suit, and relevant for the suit instituted by the petitioners/plaintiffs, is the principal cause of action which has accrued/existed to the petitioners/plaintiffs on the date of institution of suit so as to seek eviction of the respondent/tenant on grounds as permissible under the Rent Act. No doubt, the provisions of Section 28 of the Maharashtra Rent Control Act permits inspection of the

premises by the landlord after reasonable notice to the tenant, there is nothing on record to show such requests for suit inspection of the suit premises in a manner known to Section 28, was ever made and denied by the respondent. It is clear that what has been sought by the petitioners/plaintiffs is something different which cannot be merely conceived under Section 28, namely, a request made to the Court to appoint a Commissioner and make a report which would be surely an attempt to gather fresh evidence. The record clearly indicates that at all material times such a inspection was permitted by the respondents/defendants.

11. The provision invoked by the petitioners/plaintiffs for the application in question is the provision of Order XXVI Rule 9 of the CPC which provides for appointment of a commission to make local investigation which provides for discretion of the Court that a local investigation would be requisite or proper for the purpose of elucidating any matter in dispute. Order XXVI Rule 9 is required to be noted which reads thus:-

“9. Commissions to make local investigations -

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be

bound by such rules.”

12. A plain reading of the provision of Order XXVI Rule 9 clearly demonstrate that it is the Court which needs to form an opinion that a local investigation is necessary or proper for the purpose of elucidating any manner in dispute or for other purposes as provided under the Rule and it is for that purpose, the Court is empowered to issue a commission to an appropriate person as it thinks fit to make such investigation and report to the Court. This is clearly a power which is available to the Court to be exercised by the Court using sound discretion in the facts and circumstances of the case. Rule 9 is therefore not a provision to assist a party and that too absolutely to collect evidence.

13. The situation in the present case is quite peculiar. A perusal of the averments in the said application would show that what the petitioners intended was to bring on record the existing condition of the suit premises and appurtenant and surrounding areas as averred in paragraph 5 of the application. In paragraph 7 of the application, it is clearly averred that after filing of the suit certain alterations are made and it is in this context the prayers as noted above are made in the application. The petitioner/plaintiff has not taken any steps so far to file evidence and before it can file its evidence much less completion of its evidence, an application was filed to

appoint a commissioner to make a report. Thus, the object of the petitioner/plaintiff is nothing but to collect evidence.

14. The grievance of Mr. Kanade, learned counsel for the petitioners, on the impugned order is that according to him a clear position in law as emerging from Section 28 of the Maharashtra Rent Control Act, 1999 has been overlooked that the petitioner would be entitled for an inspection and hence for appointment of a Commissioner for such inspection ought to be permitted. In support of this contention, Mr. Kanade has placed reliance on the decision of the Supreme Court in **Pasupuleti Venkateswarlu vs. The Motor & General Traders**¹; decision of learned Single Judge of this Court in **Kamlabai Laxman Mutraj vs. Bherumal Verimal Haran**². Mr. Kanade's argument is in fact contrary to the prayers of the petitioners as made before the trial Court. The prayers were not simplicitor invoking an inspection as Section 28 would contemplate but a Commissioner to be appointed to make a report to the Court. There cannot be any quarrel on the propositions which the decisions as relied by Mr. Kanade lay down. The question is whether these decisions are applicable in the facts of the case and in the context of the impugned order. In my opinion, none of these decisions assists the petitioners/plaintiffs. Mr. Kanade would not dispute that even if there are

1 AIR 1975 SC 1409

2 (2009) 4 BOM CR 453

additions and alterations carried out during the pendency of the suit, the petitioners will not be remedyless to espouse the appropriate cause and seek eviction of the respondents/defendants on this ground. However, the question is of the appointment of the Commissioner as now prayed for and admittedly before the petitioners intend to lead their evidence. I persuade myself not to believe as the respondents so contend that it is for this reason of the Commissioner collecting evidence, the petitioners/plaintiffs have delayed their evidence for almost about 9 years from the institution of the suit. There is some relevance to the contention as urged on behalf of the respondents that the intention of the petitioners/plaintiffs is to collect evidence, which although it appears may not be relevant to the cause of action on the basis of which the suit was instituted. The petitioners are surely ill advised to be in such position that they go on filing successive applications for the same reliefs and delay filing their evidence.

15. Having perused the impugned order passed by the learned trial Judge in the facts of the present case, I am not inclined to accept the contentions as urged by Mr. Kanade, learned counsel for the petitioners that any opportunity ought to have been granted to the petitioners to have inspection of the premises by appointing a Commissioner.

17. The decision in **Pasupuleti Venkateswarlu vs. The Motor & General Traders** (supra) a celebrated decision, is wholly inapplicable in the facts of the present case. This is not a case arising from any application is moved under Order XXVI Rule 9 of the CPC. Moreover, it was a case where not only the trial adjudication but also the appellate adjudication was concluded. However, when the litigation reached the High Court, the High Court remanded the case to the appellate authority. The appellate authority thereafter further remanded the case to the trial court for fresh disposal. This was again assailed before the High Court. The High Court then restricted the remand as clear from paragraph (2) of the report, when their Lordships observed as under:-

“Instead of finishing the case at the trial court level, the landlord repeated a revision to the High Court on the perhaps technically correct stand that a wholesale remittal, as against calling for a finding on a specific point, was illegal. While hearing protracted arguments it came to the ken of the court that certain material events of fatal import to the maintainability of the eviction proceedings had come to pass and so it decided to mould the relief in the light of these admitted happenings. The learned judge observed "If the fact of the landlord having come into possession during the pendency of the proceedings of Shop No. 2 is to be taken into account, as indeed it must be, then clearly the petition is no longer maintainable under Section 10(3) (iii) of the Act, as the requisite condition for the invoking of that provision has ceased to exist viz., that the landlord was not occupying a non-residential building in the town. 'Building, of course means a portion of a building. As the prerequisite for the entitlement of the petitioner to institute and continue a petition has ceased to exist, it must follow that ABA No. 5/1967 is no longer maintainable and must be dismissed."

The inevitable sequel was the dismissal, not only of the civil revision, but also of the eviction petition. Thus, after a marathon forensic battle lasting over six years, the landlord lost even the flickering hope of success before the trial Court as a result of supererogatory revision to

the High Court. It is against this adverse decision he has, by special leave, come to this Court.”

18. It is in the above context the Supreme Court made observations in paragraph 4 as relied by Mr.Kanade. I am at a loss to understand as to how, when the facts of the present case being completely distinct, the observations of the Supreme Court in paragraph 4 would become applicable which required to be read in the context in which they are made. The context in the present facts is completely different.

19. The other decision of the learned Single Judge of this Court in **Kamlabai Laxman Mutraj vs. Bherumal Verimal Haran** (supra) would also not assist the petitioner as I do not think that it lays down any principle of law that it would be an absolute entitlement of a party to the suit to seek appointment of a commissioner.

20. In so far as the reliance of Mr.Kanade on the order passed by the learned Single Judge in **Vithal Shetty Vs. M/s.Motiram Tolaram & Anr.**³, there can be no dispute on what Section 28 of the Maharashtra Rent Control Act would provide namely that the landlord is entitled to inspect the premises let by him at a reasonable time after giving notice to the tenant or lessee of the

3 WP 12042 of 2015 decided on 15/12/2015

premises. However, the question is whether to take such inspection it is always necessary that a party seeks assistance of the Court praying for appointing of a commissioner and make a report. It is certainly not so. As noted above the application of the petitioner was not for mere inspection of the premises but for a Commissioner to be appointed and certainly for collecting evidence and making report to the Court. It cannot be accepted as an absolute proposition that Section 28 is required to be taken recourse to only by making an application to Court under Order XXVI Rule 9. It would be for the Court to consider the application under Order XXVI Rule 9 and take appropriate decision in the facts and circumstances of the case as to whether a Commissioner should be appointed or such a request ought to be rejected.

21. It cannot be lost sight that the petitioners have invoked the supervisory jurisdiction of the Court under Article 227 of the Constitution in assailing the impugned order. It is a well settled principle of law that in exercising this supervisory jurisdiction the Court would consider whether the conclusions are perverse and/or whether the inferior Court or the Tribunal has proceeded within the parameters of its jurisdiction and in exercising the jurisdiction under Article 227 the Court would not act as an Appeal Court (See **Raj Kumar Bhatia Vs. Subhash Chander Bhatia (2018) 2 SCC 87.**). The High Court accordingly would not interfere in the discretionary orders passed by the trial

Court if there is no perversity or any gross illegality in the orders.

22. In the present case in my opinion the learned trial Judge has cogently exercised the discretion as vested in him in rejecting the application of the petitioner/plaintiff filed under Order XXVI Rule 9 having due regard to the facts and circumstances of the case. This more particularly when the petitioner/plaintiff four years prior to the filing of the present application has moved an earlier application for the same reliefs which came to be rejected.

23. Considering the overall facts and circumstances, in my opinion, there is neither any illegality or any factual perversity in the observations as made by the learned trial Judge passing the impugned order.

24. Thus no case is made out by the petitioners for any interference in the discretionary powers conferred on the Court under Article 227 of the Constitution of India. The petition accordingly fails. It is rejected. No costs.

25. Civil Application would also not survive in view of the dismissal of the Petition and is accordingly disposed of.

(G.S.KULKARNI, J.)