

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO.8151 OF 2019

Nandlal Vasudeo Mishra] Petitioner
Vs.
M/s. Uptown Construction Co. and Anr.] Respondents

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Ms. Tahira Siddique i/b K.T. Thomas, Advocate for the Petitioner.
Mr. Jehaan Mehta a/w Anagha Mhatre, Swanand Tavde i/b Vis
Legis Law Practice, Advocate for Respondent No.1.

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CORAM : R.G. KETKAR, J.

DATE : 2nd AUGUST, 2019.

P.C.

Not on board. At the request of Ms. Siddique, taken up for admission.

2. Heard Ms. Siddique, learned Counsel for the petitioner and Mr. Mehta, learned Counsel for respondent No.1, at length.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.1' has challenged the order dated 17th November, 2018 passed by the learned trial Judge below Exhibit 10 in R.A.E Suit No.1377 of 2017 as also the order dated 20th June, 2019 passed by the Appellate Bench of the Court of Small Causes at Mumbai in Revision Application No.531 of 2018. By these orders, the Courts

below appointed Architect Shri H.S. Hariani as Court Commissioner for inspection of Shop No.7A also called as Shop No.7 situate at Plot No.9, J.B. Road, Cotton Green (West), Mumbai 400 033 bearing C.S. No.18/147 in Parel Sewri Division (for short 'suit premises') with direction to submit report in respect of present nature, condition, position and use and measurement of the suit premises. The Court Commissioner is authorized to take photographs of the suit premises and its situation.

4. Respondent No.1, hereinafter referred to as 'plaintiff' has instituted suit against defendant No.1 and respondent No.2, hereinafter referred to as 'defendant No.2' for recovery of possession of the suit premises, inter alia, contending that the suit premises admeasures 180.50 square feet built up area (120 square feet carpet area) inclusive of loft since inception of tenancy. The plaintiff alleged that on 7th September, 2017, members of the Society informed him that defendant No.1 demolished the common/separating wall of brick and masonry between the suit premises and the Society Office as shown by portion marked in red ink in the plaint. The said plan is prepared by the plaintiff and counter signed by defendant No.2. While doing so, defendant No.1 also encroached upon office premises of the plaintiff. The plaintiff further alleged that defendant No.2 informed Director of the plaintiff and sought explanation from defendant No.1 as to how the wall can be demolished between the suit premises and office of Society. Defendant No.1 asserted that as per the tenancy agreement his shop is 180.50 square feet and therefore, the

premises of the Society Office was also part of his Shop and, therefore, he had right to take possession of the Society Office.

5. During pendency of the suit, the plaintiff took out application Exhibit 10, *inter alia*, praying for appointment of Court Receiver in respect of the suit premises, appointment of Court Commissioner for visiting and inspecting the suit premises for finding out its present nature, condition, position and its use and occupation by taking photographs and submit the report.

6. Defendant No.1 filed reply at Exhibit 15 and additional reply at Exhibit 22 and resisted the application. Defendant No.1 contended that the application is misconceived, illegal and not maintainable. Suit is instituted in collusion with defendant No.2. Defendant No.1 has not committed any breach of the tenancy. The suit premises admeasures 180.50 square feet built up area. Area of the suit premises was never disputed by the plaintiff since inception of tenancy till filing of the suit. In fact, on 7th September, 2017 at about 5.30 a.m, three persons Narayan Natwarlal Rajput, Mahadev Shelke and Ramdas Mahadev Kadam, office bearers of the Society attempted to take forcible possession by demolishing the wall of common toilet abutting the suit premises on the South West side and abutting the back door the suit premises. While doing so, they assaulted defendant No.1 and his staff. However, the attempt was resisted by defendant No.1 and his staff and neighbouring shop owners. Defendant No.1 has also lodged report about the incident before the Police Station.

7. By the order dated 17th November, 2018, the learned trial Judge appointed the Court Commissioner. Aggrieved by that decision, defendant No.1 preferred Revision Application which was dismissed by the Appellate Court. In paragraph 10, the learned trial Judge noted that plaintiff is pressing prayer clause (b) of application Exhibit 10 only at this stage which reads thus;

“(b) Pending the hearing and final disposal of suit the Hon'ble Court may be pleased to appoint a Court's Commissioner to visit and inspect the suit premises viz: Shop No.7A also known as Shop No.7 situated at Plot No.9, J.B. Road, Cotton Green (West), Mumbai – 400 033 bearing C.S. No.18/147 in Parel Sewri Division to find out its present nature, condition and position and its use and occupation and also take photograph and submit his report and photographs to assist this Hon'ble Court to adjudicate the suit and incidental matters”.

8. In support of this Petition, Ms. Siddique strenuously contended that the plaintiff is trying to collect evidence by using machinery of the Court. She submitted that area of the suit premises is 180.50 square feet built up area (120 square feet carpet area) which is also admitted by the plaintiff in paragraph 2 of the plaint. It is the case of defendant No.1 that three persons and office bearers of the Society attempted to take forcible possession by demolishing the common/separating wall of brick and masonry between the suit premises on the South West Side abutting back door of the suit premises. Ms. Siddique also relied on the decision in **K.M.A Wahab Vs. Eswaran, 2008 (3) CTC, 597** to contend that Commissioner cannot be appointed to collect evidence. She, therefore, submitted that the Petition requires consideration.

9. On the other hand, Mr. Mehta supported the impugned orders. He submitted that the plaintiff has taken out application under Order-XXXIX, Rule-7 of the Code of Civil Procedure, 1908 (for short 'C.P.C') which permits the Court to authorize any person for taking inspection of the subject matter of the suit. He, therefore, submitted that no case is made out for interfering with the impugned orders.

10. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The plaintiff is the landlord and defendant No.1 is the tenant. As mentioned earlier, the plaintiff has pressed prayer clause (b) of application Exhibit 10 for appointment of Court Commissioner for taking inspection of the suit premises.

11. Order-XXXIX, Rule-7 (1) (a) and (b) read thus;
“7. Detention, preservation, inspection, etc., of subject-matter of suit._

- (1) The Court may, on the application of any party to a suit and on such terms as it thinks fit,_
 - (a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;
 - (b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit;

That apart, section 28 of the Maharashtra Rent Control Act, 1999 for the first time recognizes right of the landlord to take inspection of the premises let or given on licence, at a reasonable time after giving prior notice to the tenant, licensee or occupier. In the present case, the plaintiff has filed application Exhibit 10, *inter alia*, praying for inspection of the suit premises by appointing Court Commissioner.

12. In view thereof, reliance placed on behalf of defendant No.1 on Order-XXVI, Rule-9 of the C.P.C does not advance his case. The application made by the plaintiff is not referable to Order- XXVI, Rule-9 of the C.P.C. Hence, the Petition fails and the same is dismissed with no order as to costs.

13. 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 memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]