

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

30 WRIT PETITION NO.972 OF 2019

RAJU TRIMBAK DIXIT AND OTHERS
VERSUS
RAMKARAN BHAGURAM KAPADIA

.....
Advocate for Petitioners : Mr. Mahesh R. Sonwane
Advocate for Respondents : Mr. A. D. Kasliwal
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CORAM : V. K. JADHAV, J.
DATED : 2nd JANUARY, 2020

PER COURT:-

1. Heard both sides.
2. The petitioners are original defendants. The respondent original plaintiff has instituted the suit for recovery of amount of Rs.9,44,400/-. The petitioners-defendants have strongly resisted the suit by filing their written statement. The respondent-plaintiff had purchased the suit shop from petitioners-defendants under registered sale deed for valuable consideration. However, in a special drive, the CIDCO authorities have demolished the illegal constructions allegedly made on public road. In consequence thereof, the said suit shop came to be demolished. The respondent-plaintiff has thus instituted the said suit for recovery of consideration amount. The petitioners-defendants have strongly resisted the said suit on the ground that the respondent-plaintiff still runs the business in the suit shop and he has instituted false suit. The petitioners-defendants

have thus filed an application Exh.35 in Special Civil Suit No. 68 of 2017 for appointment of Court Commissioner directing the Court Commissioner to visit the suit shop and to file report in respect of suit shop No.11. Obviously, the said application came to be resisted by the respondent-plaintiff. The learned 5th Joint C.J.S.D. Aurangabad, by impugned order dated 21.12.2018 below Exh.35 in Special Civil Suit No. 68 of 2017 rejected the said application. Hence, this writ petition.

3. Learned counsel for the petitioners-defendants submits that there is specific pleading by the petitioners-defendants that the suit shop is still in existence and it was not demolished in its entirety. It is specific pleading of the petitioners-defendants that the respondent-plaintiff still runs his business in the said shop. The respondent-plaintiff has falsely instituted the suit claiming recovery of consideration amount. Learned counsel submits that the basic pleadings are there and in view of the same, the appointment of Court Commissioner is necessary to find out the factual aspects. Learned counsel for the petitioners-defendants placed reliance on the following two cases:-

- i) Kisanlal Maniklal Rathi vs. Dinkar Yashwant Patil, reported in 2004 (1) Mah.L.J. 138
- ii) Malhar s/o Ganpat Bokephod and others vs. Shivaji s/o Vishwanath Pawal, reported in 2014 (4) Mah.L.J. 237

4. Learned counsel for the respondent-original plaintiff submits that the suit is instituted for recovery of consideration amount. The petitioners-original defendants have fraudulently sold the suit shop to the respondent-plaintiff knowingly that the suit shop was constructed by making encroachment over the public way. Learned counsel submits that the CIDCO authorities by taking special drive demolished the illegal construction, including the suit shop. The respondent-plaintiff has adduced his oral and documentary evidence to substantiate his case and even the petitioners-defendants have examined two witnesses and when the case was posted for further evidence of the defendants, if any, or for closing of evidence, the petitioners-defendants have filed an application Exh.35 for appointment of Court Commissioner. Learned counsel submits that the trial court in para 9 of the order has rightly observed that it is for the parties to substantiate their pleadings by leading oral and documentary evidence and appointment of Court Commissioner will amount to delegation of powers of the Court to find out the truth. Learned counsel submits that such delegation is not permissible and evidence cannot be collected about possession of the respondent-plaintiff over the suit shop through the Court Commissioner. Learned counsel submits that the aforesaid two cases relied upon by learned counsel for the petitioners are in respect of identification of property and those are not relevant for deciding the issue involved in

this writ petition.

5. On careful perusal of impugned order passed below Exh.35 in Special Civil Suit No. 68 of 2017, it appears that after the plaintiff's evidence is over and even the defendants have examined two witnesses, belatedly application Exh.35 came to be filed for appointment of Court Commissioner. The respondent-plaintiff has instituted the suit for recovery of consideration amount. It is specific case of the respondent-plaintiff that though he has paid consideration for purchase of suit shop to the petitioners-defendants, the suit shop came to be demolished by the CIDCO authorities for the reason that the said shop was constructed by making encroachment over the public road. As against this, the petitioners-defendants have pleaded to the effect that the said shop is still in existence and the respondent-plaintiff still runs his business in the said suit shop. The respondent-plaintiff has already led his oral and documentary evidence. It is for the petitioners-defendants to substantiate their case by adducing oral and documentary evidence and even the petitioners-defendants can produce before the Court the necessary documents from the CIDCO authorities to substantiate their contentions. The trial court has however, rightly observed that the said delegation of powers to the Court Commissioner are impermissible. It is for the Court to decide whether the respondent-plaintiff is entitled for recovery of consideration amount as claimed in the suit and the Court for that purpose may consider the defence

raised by the petitioners-defendants. However, the said defence cannot be substantiated through the Court Commissioner. I do not find any fault in the impugned order. The cases relied upon by the learned counsel for the petitioners are not relevant to consider the issue involved in this writ petition. Hence, I proceed to pass the following order:-

O R D E R

Writ petition is hereby dismissed.

(V. K. JADHAV, J.)

rlj/