

## CIVIL APPELLATE JURISDICTION

Gopal Traders Pvt.Ltd .. Petitioner

Versus

Sudarshan Malpani &amp; ors .. Respondents

...

Mr. Pravin Samdani, Sr. Counsel with Mr.Amogh Singh with Ms.Neuty Thakkar i/b Tushar Goradia for the petitioner.  
Mr.Dakshesh Vyas with Ms.Jinal Shah i/b Mr.Abhishek Prabhu for the respondents.

**CORAM: BHARATI DANGRE, J.**

**DATED : 8<sup>th</sup> DECEMBER 2021**

**P.C:-**

1 Rule. Rule made returnable forthwith. Heard by  
consent of parties.

2           The petitioner who is the plaintiff in the Special Civil Suit pending before the City Civil Court at Mumbai sought a decree for permanent mandatory injunction against the defendants from raising any construction over the suit premises described in the plaint. The plaintiff claim that the alleged encroached portion being the additional right of way was granted in his favour by an Indenture Deed allegedly executed and registered by Saraswatibai Charitable Trust on 4/11/2020 and thus, it acquired additional right of way abut 3.70 sq.m wider,

thereby making a way of 8 Meters available to him. The plaintiff pose a challenge to the very said document by filing a Suit.

I need not delve deep into the controversy as before me, an order passed in the Notice of Motion, taken out by the plaintiffs for grant of temporary injunction dated 17<sup>th</sup> September 2021 is questioned on the ground that the learned Judge has directed the appointment of Court Commissioner to inspect the status of the disputed portion.

3           This order which is the subject matter of the petition is to be read in the backdrop of an order of status quo granted on 5<sup>th</sup> February 2021. On the said date, the counsel for the defendant tendered photographs before the Court to show position of the spot; parties agreed to maintain status quo as reflected in the photographs tendered by the defendant. The said photograph is placed on record at page 207 of the paper book, which clearly reveal a right of way from the gate shown and which is in form of access to the defendants to reach his property.

4           A Notice of Motion vide No.1951 of 2021 is taken out by the plaintiffs with an allegation that despite an order of status quo on 22<sup>nd</sup> January 2021, he has noticed that on 30<sup>th</sup> August 2021, the defendant has carried out the construction activities by using concrete cement mix and other material for constructing a concrete road on the right of way which is under dispute.

While dealing with the said Notice of Motion and on hearing the counsel for the defendant who denied such a construction activity going on in the suit premises, the learned Judge record that certain photographs have been filed on behalf of the plaintiff which are responded to, by submitting that these photographs are not of the disputed site of the suit premises. This statement recorded in the order was, however, came to be corrected on an application taken out for Speaking to the Minutes out and instead, it is rectified by recording that the counsel for the defendant has submitted that the photographs on record are not disputed but the alleged construction is disputed.

5           The controversy today is whether there is a construction coming up on the right of way as depicted in the photographs placed on record at page 207, and based on this photograph, the position prevailing was noted and status quo was directed to be maintained by order dated 22/1/2021.

The photographs which are now placed on record by the plaintiff along with the affidavit in reply, are taken on 30<sup>th</sup> August 2021, but its perusal do not make it clear as to whether the construction which allege to have been undertaken is on the same place/spot shown as the open right of way, depicted on page 207.

This is quite possible because the photograph is taken from some different angle. In these circumstances, the course

open to the learned Judge was to seek the parties to bring on record the photographs which could have been super-imposed on the photograph at page 207 and not straight way jump to invoke the provisions of Order 26 Rule 9, by appointing the Court Commissioner to ascertain the alleged construction. It is trite position of law that the Commissioner cannot be appointed by the Court to collect the evidence since when the party come before the Court with a pleading, the burden is to be discharged by him to make good the said pleadings. The confusion in the photographs which have been placed on record which led the learned Judge to pass the impugned order of appointment of Court Commissioner, therefore, must be set aside by affording necessary opportunity to both the parties to place on record their respective photographs, by super-imposing the alleged construction upon the right of way as indicated in the photograph dated 22<sup>nd</sup> January 2021. This exercise ought to have been taken before appointment of Commissioner and if inspite an opportunity being afforded to the parties, if prevailing situation cannot be still ascertained, the provision under Order 26 Rule 9 was justified to be invoked.

Necessarily, the impugned order is quashed and set aside.

The Trial Court is directed to obtain necessary photographs from the plaintiff of the alleged structure has come up on the very spot which is indicated in the photographs of 22<sup>nd</sup>

January 2021. Needless to state that the defendant may permit the plaintiff to gain an access to the suit premises limited for the purpose of taking appropriate photographs.

6                      Writ Petition is made absolute in the aforesaid terms.

**SMT. BHARATI DANGRE, J**