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

WRIT PETITION 6902 OF 2022

Pavan Ashok Dombe

... Petitioner

Versus

Prabhakar Krishnaji Tarlekar and Ors.

... Respondents

Mr. Utkarsh S. Desai for the Petitioner.

Mr. A. M. Kulkarni for the Respondents.

CORAM: ROHIT B. DEO, J.

DATE : 14th JUNE, 2022

P.C. :-

. The grievance of the petitioner is that while allowing Misc. Civil Appeal 71 of 22 partly, and setting aside the order dated 10th March, 2022 rendered by the Trial Judge granting injunctive reliefs in favour of the petitioner-plaintiff, the Appellate Court has directed rehearing, and has further issued a direction to the rival parties to jointly apply for appointment of Court Commissioner. The Appellate Court has further articulated that if any party does not join in the application, an adverse inference shall be drawn while dealing with the interim and final relief.

2. The plaintiff instituted the suit seeking injunctive reliefs against dispossession, apprehending that the suit shop shall be demolished by the defendants-landlord under the guise of complying with the notice issued by the Municipal Council, on the premise that the same is in dilapidated and dangerous condition.

3. The plaintiff sought temporary injunction, which was granted by the Trial Court. In appeal, the issue is considered by the learned Appellate Court thus :-

“13. I have also considered the order of learned trial court. It appears that learned trial court has granted the temporary injunction against the defendants. Further, before learned trial court, there were 2 maps of 2 different Structural Engineers. Learned trial Court has relied on the map of Engineer Mulik and discarded the map of Mr Kulkarni. The reason for accepting the map of Mr. Mulik is that' he is authorised Engineer suggested by the Municipal Council. It is also seen that both the reports of these structural auditors are inconsistent with each other. In the light of that it was necessary for learned trial court to appoint court commissioner structural auditor, who would be authorized Government structural auditor or learned trial code should have directed the Public Works Department to Audit the property. In the conflicting reports the report of Mr Mulik suggests the suit property is stable, in good condition and there is no risk. Further, other report of Mr. Mulik filed before Ld. Trial Court is reparable condition. As against this Mr.Kulkarni suggest that the building is in risky condition at western wall. Further, it is not in fit for occupancy and it should be demolished. In the light of that the proper recourse would be to appoint a court commissioner to do the structural audit of the property.

14. Further the suit is filed on 13/12/2021 the Structural audit report filed by the plaintiff is dated 01/12/2021. It is 10 days before filing of the suit. In the light of that learned trial court should have considered what was the condition of the suit property on the date of filing of the suit. Notably, the Structural Audit report filed by the defendants is of January 20, 22. It is also a case of the plaintiff that even after the filing of the suit, the defendants continued the demolition under the garb of the notice and summons were not served. In these circumstances, based only on the report of authorized structural engineer is not sufficient to ascertain the condition of the suit property. It was necessary for learned trial court or for the parties to seek the recourse of court Commissioner to ascertain the exact position in the suit property and its structural stability. In the light of that, there is error committed while passing the order. Considering this, I would remand back this application before learned trial court and I would direct both parties jointly file an application to appoint court Commissioner to get the suit property 1B & C audited and the structural stability of the suit

property should be considered by the Ld. Trial court in accordance with law after receipt of the report. In the light of that I answer the points accordingly and pass following order by keeping all contentions open.”

4. Part of the order which directs rehearing, does not suffer from any infirmity and I do not propose to interfere. This petition can be disposed of by observing that even if a party does not join in the request for appointment of Commissioner, the question of drawing adverse inference shall have to be left to the exclusive domain of the Trial Court, which shall not be influenced by any observations of the Appellate Court in the order impugned. The Trial Court shall decide the application for temporary injunction on its own merits and in accordance with law.

5. It is further clarified that the view of the Appellate Court that it would be appropriate to appoint Commissioner is not being disapproved.

6. With the observations supra, petition is disposed of.

[ROHIT B. DEO, J.]