

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

WRIT PETITION NO. 9696 OF 2022

Mr. Mayur Sakharam Paricharak

..... Petitioner

Vs.

Shri Ramesh Haridas Bhise

....Respondent

Mr. R.M.Haridas i/by Mr. Prasad P. Kulkarni for the Petitioner.

Mr. Abhijit Devkhile for the Respondent.

CORAM: SANDEEP K. SHINDE, J.

CLOSED FOR ORDERS ON : 12TH SEPTEMBER, 2022.

PRONOUNCED ORDER ON : 30TH SEPTEMBER, 2022.

P.C. :

1. This Petition under Article 227 of the Constitution of India takes exception to the order dated 13th July, 2022, by which the learned Civil Judge, Junior Division in exercise of the powers under Order 39 Rule 7 of the Code of Civil Procedure, 1908 appointed, Shri S.N. Kulkarni, Advocate to inspect the Suit Shop and submit report along with the map.

2. Respondent/Plaintiff, instituted the suit against the Petitioner-defendant for mandatory injunction and the damages. He

claimed his possession in the suit shop over a period of 40 years, as statutory monthly tenant, of petitioner-landlord. His case is, that the Suit Shop was damaged substantially, because of which it was not feasible to run grocery business therein. As such, Petitioner/Landlord, had agreed to repair the building in which the Suit Shop is housed. For that end, he handed over possession of the shop to the Petitioner/Landlord, on 30th October, 2020. Plaintiff claims that Petitioner-Landlord had agreed to complete the repairs within 15 days and this understanding was reduced into writing on 30th October, 2020 in presence of two independent witnesses. In spite of it, landlord did not commence repair work and, therefore, plaintiff lodged a complaint with police, followed by Advocate's notice. It appears, Petitioner/Landlord, denied execution of contract dated 30th October, 2020 and also denied that plaintiff, was his tenant at any point of time. It is plaintiff's case that the Petitioner/Landlord under the guise of repairs, made material structural changes, by merging existing door in Wall, on the Western end of the shop. As a consequence, he instituted suit, seeking mandatory injunction, to direct the Petitioner to remove the Wall constructed on the Western end of his shop and restore the door, that was in existence. He, also seeks mandatory order directing Petitioner/Defendant, to restore his possession in the Suit Shop.

Pending suit, he filed application under Order 39 Rule 7 of the CPC and prayed for appointing, Commissioner, for inspecting the Suit Premises. The learned Judge by order impugned, appointed Shri. Kulkarni to inspect the Suit Property and submit report. Aggrieved by the said order, defendant has preferred this Petition.

3. Mr. R.M.Haridas, learned counsel for the Petitioner submitted that the trial Court could not have exercised the jurisdiction under Order 39 Rule 7 of the CPC for collecting the evidence. He further submitted that in the facts and circumstances of the case, Court could not have taken recourse to Order 39 Rule 7 of the CPC. Submission is that the trial Court has committed error in exercise of the jurisdiction and, therefore, the order impugned be quashed and set aside.

4. On the other hand, Mr. Abhijit Devkhile, learned counsel for the Respondent, supported the impugned order.

5. Power under Order 39 Rule 7 of the Code of Civil Procedure, 1908 is to be exercised when inspection is necessary for appreciation and adjudication of the matter. It may be stated that it is open to the Court to direct inspection of the property for limited

purpose for elucidating any matter in dispute. There is basic difference between the issues of commission under Order 26 Rule 9 and commission under Order 39 Rule 7 or 8. It is so explained, by the learned Judge of this Court in the case of **Kishore H. Desai v. Lilawati Virji Chheda and Ors. 1993 Maharashtra Law Journal 1155**. The learned Judge has held that, Commission under Order 39 Rule 7 or 8 is issued only for limited purpose, in-as-much as, when Court is concerned with preservation of the property and inspection of the property; whereas, issuance of commission under Order 26 Rule 9 read with Order 26 Rule 10, Sub-rule (2) indicates that commission is necessary for the purpose of 'investigation', Thus, to be understood, that issuance of commission under Order 39 Rule 7 is not for collection of evidence and/or for the investigation, but simply when inspection is necessary for proper appreciation and adjudication of the matter. Therefore, apprehension of the petitioner, that the order impugned would cause and result in collection of evidence is unfounded. The trial Court has appointed the Commission, with a purpose to satisfy on certain aspect of matter, about structure and nature of alteration. The learned trial Judge in consideration of the facts of the case and for the proper adjudication of the dispute sought inspection report which, in no manner prejudices the interest of the Petitioner/defendant.

Therefore, the order by the trial Court cannot be faulted with, either for want of jurisdiction or otherwise. Petition, therefore, deserves no consideration. It is dismissed.

(SANDEEP K. SHINDE J.)