

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

CIVIL WRIT PETITION NO. 7009 OF 2021

KIRAN SRINIVAS NAIKPETITIONER
V/s.
BHANUBHAI ISHWARBHAI PATELRESPONDENTS
SINCE DECD AND ANR

**WITH
CIVIL WRIT PETITION NO. 7010 OF 2021**

K MURGAN PILLAIPETITIONER
V/S.
BHANUBHAI ISHWARBHAI PATEL SINCERESPONDENTS
DECD AND ANR

**WITH
CIVIL WRIT PETITION NO. 7110 OF 2021**

DAYANAND NAIKPETITIONER
V/S.
BHANUBHAI ISHWARBHAI PATEL SINCERESPONDENTS
DECD AND ANR

**WITH
CIVIL WRIT PETITION NO. 7012 OF 2021**

SRINIVAS NAIKPETITIONER
V/S.
BHANUBHAI ISHWARBHAI PATEL SINCERESPONDENTS
DECD AND ANR

**WITH
CIVIL WRIT PETITION NO. 7016 OF 2021**

NEELA DANI

....PETITIONER

V/S.

BHANUBHAI ISHWARBHAI PATEL SINCE
DECD AND ANR

.....RESPONDENTS

Mr. Shreepad Murthy a/w Clarissa Miranda i/b Mr. Abhishek Patil Advocate for the Petitioner.

Mr. Akshay Patil a/w Mohan G. Salian, Devika Medekar, Harshita Kotian i/by MGS Legal Advocate for the Respondents.

CORAM : NITIN W. SAMBRE, J.

DATE : 30th JUNE, 2022

P.C.

1. All these petitions since involve common question of facts and law are tagged and heard together by consent of the parties. For the sake of convenience, facts in Writ Petition No.7009 of 2021 are taken into consideration.

2. In the execution proceeding, the petitioner/obstructionist faced with prayer for appointment of Court Commissioner moved vide Exh.18. Such prayer of the decree holder vide Exh.18 came to be allowed vide order impugned dated 11th October, 2021. As such, this petition.

3. It is the contention of the counsel for the petitioner/obstructionist that pending his objection under Section 47 r/w Order 21 Rule 97 of the CPC, powers of

appointment of Court Commissioner are invoked and so also allowed vide order impugned at the behest of respondents without recording any reasons by the Executing Court.

4. So as to substantiate his claim, he has invited attention of this Court to the reply furnished by the petitioner/obstructionist to the prayer for application Exh.18 i.e. prayer for appointment of Court Commissioner. He would urge that the appointment of Court Commissioner even if is justified, however, the Court must record reasons to grant such prayer which is absent in the case in hand.

5. While supporting the order impugned and resisting the aforesaid submissions, counsel for the respondents would invite attention of this Court to the provisions of Section 28 of the Maharashtra Rent Control Act r/w Order XXVI Rule 9 of the CPC. According to counsel for the decree-holder, major part of the decree was already executed, however, certain part remained with the respondents and so as to ascertain the exact location of the part of the property which is mentioned in the decree of which possession is to be obtained, a prayer for appointment of Court Commissioner is moved and rightly so granted. He would urge that the petitioner will have to be granted appropriate opportunity to meet with the report

of the Commissioner at an appropriate stage.

6. I have considered the aforesaid submissions.

7. If the legality of the order impugned is tested, the fact remains that the Court below has exercised powers for appointment of Court Commissioner pursuant to the provisions of Order XXVI Rule 9 of the CPC and Section 28 of the Rent Act.

8. As far as availability of such remedy to the decree-holder is concerned, there is no doubt about the same, particularly, having regard to the fact that the object with which such application is moved viz. ascertainment of part of the property in relation to which the decree was passed and remained to be executed.

9. Counsel for the respondents, in my opinion, was justified in drawing support from the judgment of Apex Court in the matter of Rahul S. Shah Vs. Jinendra Kumar Gandhi and Ors. reported in (2021) 6 SCC 418, particularly, paragraphs 41, 42, 42.1 and 42.2, which reads thus :-

“41. Having regard to the above background, wherein there is urgent need to reduce delays in the execution proceedings we deem it appropriate to issue few directions to do complete justice. These directions are in exercise of our jurisdiction under Article 142 read with Article 141 and Article

144 of the Constitution of India in larger public interest to subserve the process of justice so as to bring to an end the unnecessary ordeal of litigation faced by parties awaiting fruits of decree and in larger perspective affecting the faith of the litigants in the process of law.

42. All courts dealing with suits and execution proceedings shall mandatory follow the below mentioned direction:

42.1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order 10 in relation to third-party interest and further exercise the power under Order 11 Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third-party interest in such properties.

42.2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the court, the court may appoint Commissioner to assess the accurate description and status of the property.”

10. The fact remains that while exercising powers under Order XXVI which is applicable to execution proceedings, the Court below has failed to record appropriate reasons thereby justifying case for invoking powers. Apart from above, it is the case of the petitioner that on the relevant date on account of Mumbai Band counsel was handicapped as he could not attend the proceeding because of the movement embargo.

11. In the aforesaid background, all these petitions stand allowed. The orders impugned are hereby quashed and set aside.

12. Application for appointment of Court Commissioner moved by the decree-holder stands restored to file of the Executing Court.

13. Counsel for the petitioner assures that on the next date of hearing, he shall co-operate with the Executing Court in expeditious disposal of the said application.

14. In the aforesaid background, the Executing Court is requested to decide the application for appointment of Court Commissioner in this matter expeditiously, in any case, within a period of sixty days from the date of production of this order.

15. This Court expects the Executing Court would decide the same in accordance with law and without being influenced by the findings recorded herein-above.

[NITIN W. SAMBRE, J.]