

23 January, 2023.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 13407 OF 2022**

Dr. Chandrashekhar Vasudeo KinikarPetitioner

V/s.

Shri. Banashankar (Chaudeshwari)

Devi Devasthan Trust & Ors.Respondents

Mr. Prasad P. Kulkarni, Advocate for the petitioner.

Mr. Ashok Tajane i/by. Ms. Kavita P. Shinde, Advocate for the respondents.

CORAM : SANDEEP V. MARNE, J.

DATED : MONDAY, 23 JANUARY, 2023.

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. By consent of the parties, taken up for final hearing.

2. By this petition, the petitioner assails following orders:

(i) order dated 14 June, 2021 passed by the 5th Civil Judge Junior Division, Solapur below Exhibit-88 refusing to exhibit the Agreement allegedly permitting the petitioner to carry out repairs;

23 January, 2023.

(ii) order dated 27 July, 2022 passed below Exhibit-100, rejecting the application for impounding the Agreement and sending the same to Collector of Stamps, Solapur for computation of stamp duty and penalty;

(iii) order dated 12th September, 2022 passed below Exhibit-106 rejecting the application seeking review of the order dated 27th July, 2022.

3. Petitioner is the original defendant in Regular Civil Suit No. 766/2008 filed by the respondents (plaintiffs) seeking possession of the suit premises *inter-alia* on the ground of making unauthorised alterations in the premises and for bonafide requirements. By judgment and order dated 13 March, 2014 the suit came to be dismissed directing the petitioner to pay rent of Rs.2669/- per month. In Regular Civil Appeal No. 142/2014 filed by the respondents, the Appellate Court passed judgment and order dated 10 February, 2017 remitting Regular Civil Suit No. 766/2008 for framing additional issue, as to whether the plaintiffs prove that the defendant has carried out repairs without permission of the Municipal Corporation and of the plaintiff.

4. The petitioner thereafter filed application dated 20 February, 2018 seeking to produce Agreement dated 9 February, 1984 which allegedly permitted him to carry out repairs in the premises. Respondents-plaintiffs filed their reply to the application urging the Court to impound the document on the ground of same

23 January, 2023.

being insufficiently stamped. The trial Court was pleased to reject the application filed by the petitioner/defendant holding that the document cannot be exhibited on account of the same being insufficiently stamped.

5. Petitioner-defendant thereafter moved another application at Exhibit-100 seeking impounding of the Agreement dated 9 February, 1984 and for sending the same to Collector of Stamps for determination of stamp duty and penalty. The application was resisted by the respondents-plaintiffs and by order dated 27 July, 2022 the trial Court was pleased to reject the application holding that the burden to prove the allegation of unauthorised repairs lies on the plaintiff and thereafter it was not necessary to impound the document. The petitioner sought review of order dated 27 July, 2022 which came to be rejected by the trial Court by order dated 12 September, 2022. Aggrieved by the orders dated 14 June 2021, 27 July 2022, and 12 September, 2022 the petitioner has filed the present Writ Petition.

6. Appearing for the petitioner, Mr. Kulkarni, learned Counsel would submit that the Agreement dated 9 February, 1984 is necessary for the purpose of determining additional Issue No.3A framed by the Appellate Court. He would submit that on the basis of the agreement the petitioner/defendant would be in a position to prove that he is entitled to carry out the necessary repairs in the premises. He would further submit that the plaintiff themselves had sought impounding of the said document and could not have

23 January, 2023.

later resisted the application filed by the petitioner filed for the very same purpose. Mr. Kulkarni would submit that the burden of proof in respect of Issue No.3A could not have been the reason for denying an opportunity to the petitioner-defendant to prove his defence.

7. *Per-contra*, Mr. Tajane the learned Counsel appearing for the respondents would oppose the petition and support the order passed by the trial Court. He would submit that the suit has been remitted to the trial Court to record evidence in respect of the additional Issue No.3A with a further direction to complete the exercise by 13 October, 2017. He would further submit that the petitioner/defendant is delaying the proceedings by filing baseless applications. He would further submit that production of the Agreement in question is wholly irrelevant to the nature of controversy involved in the suit.

8. Rival contentions of the parties now fall for my consideration.

9. The Appellate Court by its order dated 14th August, 2017 has framed additional Issue No.3A, which reads thus:

"3A-" Does plaintiff prove that the defendant has carried out requires of Operation Theatre, Consulting Room, Waiting Room, 5 rooms for patients and Gallery without the permission of Solapur Municipal Corporation and Plaintiff?"

23 January, 2023.

10. After framing the additional Issue, the Appellate Court passed the following order :

"1) Application Exh.36 is hereby allowed and the papers in Reg. Civil Suit No. 766 of 2008 be sent back to the Ld. Trial Court for recording evidence and for giving reasoned findings on the said issue after permitting the parties to lead evidence on the said issue.

2) The Trial Court to conclude hearing on the said issue within two months and sent the record and the reasoned order to this Court on or before 13/10/2017.

3) Both the parties to co-operate Ld. Trial Court speedy disposal of matter.

4) Parties to appear before Ld. Trial Court on 21/08/2017.

5) Place the Appeal for hearing on 13/10/2017."

11. Immediately after passing of the order dated 14 August, 2017 by the Appellate Court, the petitioner-defendant moved application for production of Agreement dated 9 February, 1984 on 20 February, 2018. On that application, the plaintiffs filed their say, urging the trial Court to impound the document. The say filed by the plaintiffs is reproduced below :

"R/submitted: that the agreement is act on papers stamp hence, earned be exhibited, moreover in view of the Provision Of Stamp Act, the same may impounded."

23 January, 2023.

12. Despite there being specific request on the part of the plaintiffs to impound the document, the trial Court proceeded to reject petitioner's application for production of Agreement dated 9 February, 1984 by its order dated 14 June 2021. This triggered filing of application at Exhibit-100 by the petitioner seeking impounding of the agreement. At least at this stage, the trial Court ought to have impounded the document and sent the same to the Collector of Stamps for determination of stamp duty and penalty, so that the same could have been paid by the petitioner. The trial Court, however, proceeded to reject the application at Exhibit-100 on 27 July, 2022 by passing following order :

"Ld. Advocate of defendant and defendant are absent when called out. The present case is remanded to this court to decide the re-casted issue (3-A), the document wanted to be proved has no hearing with that issue. No direct exh. with the issue. On the other hand, the burden to prove that issue lies on the plaintiff and as a corollary to the rule of natural justice, defendant has opportunity to cross-examine witness, if any, examined by plaintiff. Hence considering said fact, this application is considering said fact, this application is rejected."

13. The order dated 27 July, 2022 passed by the trial Court, in my opinion, is clearly unsustainable. The undisputed position is that the Agreement dated 9 February, 1984 is not sufficiently stamped. The same came to the notice of the trial Court. It was the

duty of the trial Court to impound the said document and send the same to Collector of Stamps for determination of stamp duty and penalty. Instead of doing so, the trial Court went into the issue of relevancy of the document. In my opinion, the trial Court ought not to have embarked upon the enquiry as to whether the document was relevant or not. It ought to have straightaway impounded the document and later decided its relevancy while giving its finding on Issue No.3A.

14. One of the reasons cited by the trial Court for passing order dated 27 July, 2022 is time limit set in remand order of the Appellate Court for rendering finding on additional Issue No.3A. The remand order envisaged recording of evidence and finding on Issue No.3A on or before 13 October, 2017. By 27 July, 2022 period of five long years had elapsed and the trial Court was yet to record evidence and render its findings on the additional issue. The entire exercise of impounding the document could not have been completed by the trial Court in an expeditious manner. The trial Court had, at its first available opportunity, failed to undertake the exercise of impounding the document while deciding petitioner's application dated 20th February, 2018. It kept that application pending for more than three long years and rejected the same on 14 June 2021. This rejection was uncalled for in view of the specific prayer of the plaintiffs to impound the document. Be that as it may. The trial court was presented with more than one opportunity to undertake the exercise of impounding the document by filing application at Exhibit-100 on 28 October, 2021. The trial Court,

23 January, 2023.

however took period of nine months to decide that application and then used the pretext of urgency involved in deciding Issue no.3A on account of remand order for rejecting petitioner's application. This led to filing of application for review by the petitioner-defendant, which again was rejected by order dated 12 September, 2022 accusing petitioner-defendant of playing delaying tactics to prolong the matter.

15. The reason of irrelevancy of the Agreement dated 9 February, 1984 cited by the trial Court in its order dated 27 July, 2022 also does not commend this Court. The remand order by the Appellate Court is for the purpose of deciding Issue No.3A which involves the question of carrying out repairs/additions in the premises without permission of the plaintiff. Defendant wants to prove that he was permitted by the Agreement dated 9 February, 1984 to carry out such repairs/alterations. Therefore, the Agreement may have bearing on the decision on Issue No.3A.

16. I am therefore of the view that the orders passed by the trial Court are unsustainable. I accordingly proceed to pass the following order :

(i) order dated 14 June, 2021 passed on application below Exhibit-88 by the Civil Judge Junior Division, Solapur; (ii) order dated 27 July, 2022 passed on application below Exhibit-100 and (iii) order dated 12

23 January, 2023.

September, 2022 on application below Exhibit-106, are set aside.

(iii)the trial Court shall proceed to impound the Agreement dated 9th February, 1984 and send the same for determination of amount of stamp duty and penalty payable on the same to the Collector of Stamps, Solapur.

(iv)In the event of the petitioner/defendant paying the requisite amount of stamp duty and penalty so determined, the trial Court shall provide an opportunity to the petitioner/defendant to lead evidence for proving the Agreement dated 9 February 1984 and proceed accordingly.

17. With the above directions, the Writ Petition is allowed. Rule is made absolute.

(SANDEEP V. MARNE, J.)