

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7244 OF 2023

Virendra Girdharilal Khandelwal

...Petitioner

Versus

Vipul Gopaldas Ashar & Anr.

...Respondents

Ms. Anjali Helekar for the petitioner.

Mr. Nikhil Wable & Mr. Bhoomi Upadhyay i/b Jayakar & Partners for the respondents.

Coram : Sharmila U. Deshmukh, J.

Date : July 5, 2023.

P. C. :

1. Heard.
2. By this petition, challenge is to the order dated 6th December, 2022 passed in Notice of Motion No. 3024 of 2022 rejecting the petitioner's application for appointment of Court Commissioner for inspection of the suit flat and to submit the report consequent of the inspection by the Court Commissioner.
3. Heard Ms. Anjali Helekar, learned counsel appearing for the petitioner and Mr. Nikhil Wable, learned counsel appearing for the respondents.

4. Learned counsel appearing for the petitioner submits that the application for appointment of Court Commissioner is necessitated in view of the notice dated 20th April, 2022 issued by the Municipal Corporation of Mumbai under section 381 of the Mumbai Municipal Corporation Act. She has invited the attention of this Court to the requisition of the notice calling upon the owner/occupier to remove, discontinue or abate the nuisance due to heavy water leakage from open terrace above flat No. 501 which is in possession of owner/occupier of flat No. 601 of building known as Abhilasha building. She would further submit that it is necessary for the protection of the suit property that the Court Commissioner be appointed with a direction to submit the necessary report as well a direction to the respondent to carry out the necessary repairs.

5. *Per contra*, learned counsel appearing for the respondents submits that by Special Civil Suit No. 44 of 2018 the petitioner seeks a declaration as regards the writing executed between the plaintiff and defendant dated 15th February, 2013 for the possession of the suit premises i.e. flat No. 601 of Abhilasha building. He would further submit that the appointment of the Court Commissioner in this case is not necessary in as much as it is neither the case of boundary dispute nor the case of encroachment. He would further submit that the

notice issued by the Municipal Corporation of Mumbai gives rise to separate cause of action and it is open for the petitioner to adopt the necessary proceedings. He would further point out that there is no reply given by the petitioner to the said notice.

6. Considered the submissions of the parties.

7. The Special Civil Suit No. 44 of 2018 has been instituted by the petitioner seeking declaration that the purported writing dated 15th February, 2013 executed between the plaintiff and defendant is bad in law, illegal and null and void and not binding upon the plaintiff and for a direction to hand over the vacant and peaceful possession of the suit premises. The writing in question is at page 25 of the petition and this Court is informed that the said document has been impounded for the purpose of the payment of necessary stamp duty.

8. It is not in dispute that the notice has been issued under section 381 of the Mumbai Municipal Corporation Act calling upon the owner/occupier to rectify the issue of the water leakage of the open terrace above the flat No. 501 which is in possession of the owner occupant of flat No. 601 of Abhilasha building. In such a situation the proper course of action would be for the petitioner to file a reply to the said notice pointing out the fact that the premises in respect of

which the notice was issued is in possession of the respondents and necessary action, if any, will have to be initiated against the occupier of the flat.

9. Pertinently, the petitioners have not filed any reply to the notice as such and have instead preferred an application seeking appointment of the Court Commissioner in the proceeding which have nothing to do with the issue of the repairs of the premises. The purpose of appointment of Court Commissioner under the provision of Order-26, Rule-9 is to direct a local investigation for the purpose of elucidating the matter in dispute. The purpose of appointment is to assist the Court in proper adjudication of the controversy in question. In the present case, the notice under section 381 of the Mumbai Municipal Corporation Act is not subject matter of the dispute between the parties as such and in my opinion, appointment of the Court Commissioner is not necessitated.

10. In light of the above, I do not find any infirmity in the order dated 6th December, 2022. The writ petition stands dismissed.

[Sharmila U. Deshmukh, J.]