



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 5619 OF 2022

(RAVIKANT MADHAVPRASAD SHUKLA & ANR..VS.. MANISH RAMESH SHUKLA & ANR.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.V.Deshmukh, Advocate for Petitioners.
Shri R.R.Shrivastava, Advocate for Respondents.

CORAM : ANIL S. KILOR, J.
DATED : OCTOBER 26, 2023.

1. Heard.
2. The order dated 22/07/2022 passed below Exh.27 by the Joint Civil Judge Senior Division, Nagpur, rejecting the application filed by the petitioner/ defendant No.2 for appointment of Court Commissioner, is under challenge in this writ petition.
3. The respondents filed suit for declaration and mandatory/permanent/prohibitory injunction against the petitioners with the following prayer clauses :

“(i) grant a decree of declaration declaring therein that the Defendants have no right to disturb the lawful, peaceful and exclusive physical possession of the plaintiffs over the suit property i.e., two Shop/ Office Blocks roughly admeasuring 200 sq.fts., each located on front side i.e. Eastern side of the property bearing City Survey No.2779, Corporation House No.462 and as shown in Red Colour in the Plaint Map and identified by alphabets “ABCD” in the

same, so also the residential premises roughly admeasuring 800 sq.fts., each located on First Floor consisting of Four Rooms and Second Floor consisting of Two Big Rooms bearing Corporation House No. 463, adjoining the property bearing Corporation House No.462 and as shown in Green Colour in the Complaint Map and identified by alphabets "EFGH" in the Complaint Map in any manner whatsoever, so also that the act of the Defendants in obtaining forcible possession of the Store Room located on a portion of Corporation House No.463 and shown in Green Colour in the Complaint Map and identified by alphabets "HIJK" in the same be declared as illegal and without jurisdiction.

ii) grant a Decree of declaration thereby it be declared that the Defendants have no right to deal with the property bearing City Survey No.2779, Ward No.3, admeasuring 180.20 Sq.Mtrs., known as "Madhav Niwas", Buty Road, Shukla Guest House, Sitabuldi, Nagpur bearing Corporation House Nos. 462 & 463 in any manner whatsoever and/ or to change the nature of the same in any manner whatsoever, the plaintiffs being the co-owners of the same and are in exclusive and physical possession of the suit property, so also that the Defendants have no right to deal with the property bearing City Survey No. 2778, Ward No.3, admeasuring 300.80 Sq.Mtrs., known as "Madhav Niwas", Buty Road, Shukla Guest House, Sitabuldi, Nagpur bearing Corporation House Nos. 434 & 435 in any manner whatsoever and/ or to change the nature of the same in any manner whatsoever.

iii) grant a decree of prohibitory/ permanent injunction thereby the Defendants and anybody acting on their

behalf be permanently restrained from preventing the plaintiffs from using the suit property and from disturbing the physical possession of the plaintiffs over the suit property i.e. two Shop/ Office Blocks roughly admeasuring 200 Sq.fts., each located on front side i.e., Eastern side of the property bearing City Survey No. 2779, Ward No.3, Corporation House No. 462 and as shown in Red Colour in the Plaint Map and identified by alphabets "ABCD" in the same, so also the residential premises roughly admeasuring 800 sq.fts., each located on First Floor consisting of Four Rooms and Second Floor consisting of Two Big Rooms bearing Corporation House No. 463 adjacent to the property bearing Corporation House No.462 and as shown in Green Colour in the Plaint Map and identified by alphabets "EFGH" in the same and by way of a mandatory injunction, the Defendants be directed to handover the physical possession of the Store Room admeasuring about 250 sq.fts., located on a portion of Corporation House No.463 and as shown in Green Colour in the Plaint Map and identified by alphabets "HIJK" in the same.

iv) direct an enquiry into mesne profits in relation to forcible possession of the Store Room from the date of such illegal possession i.e. 29.05.2022 till the plaintiffs receive the physical possession of the same.

v. allow the suit with costs and grant any other relief."

4. The plaintiffs filed a plaint map along with the plaint, which is referred in the prayer clauses.

5. The plaintiffs have also filed application Exh.5 for grant of temporary injunction, to which the petitioners filed reply and raised preliminary objections.

6. One of the preliminary objections was that the subject matter of the property was not sufficiently described so as to identify it and the directions, measurement, dimensions, number of rooms and even area of the property in question are wrongly mentioned in the temporary injunction application and incorrectly shown in the plaint map. Thus, to support the preliminary objections the petitioners have filed four maps describing each floor.

7. It is the case of the petitioners that as the plaint map is not in scale, which is the requirement under the law, the petitioners have filed the maps in scale. It is submitted that the plaint map cannot be relied upon since there are variations in the actual map and the plaint map.

8. The above referred preliminary objections prompted the petitioners to file an application for appointment of Court Commissioner, which came to be rejected vide impugned order dated 22/07/2022.

9. After going through the reasons recorded by the trial Court for rejection of the application in paragraph No.9, the findings recorded by the trial Court that since the matter does not relate to the encroachment hence, there is no need to appoint a Court Commissioner is erroneous.

10. As far as the findings recorded in respect of collection of evidence is concerned, I do not find any error at this stage, for the reason that the learned trial Court has not yet gone through the maps filed by the plaintiffs and the defendants to arrive at any conclusion as regards its correctness and whether there are discrepancies in the maps and in that event whether there is any ground available for appointment of the Court Commissioner.

11. The learned counsel for the petitioners has relied upon the judgment of this Court in the case of *Ramchandra ..vs..Dudharam Langruji Padvekar and ors.*, reported in **2004(1) Mh.L.J. 278**. The relevant portion of the said judgment reads thus:

“8. The analysis of the aforesaid section would show that the words employed, "but maps or plans made for the purpose of any cause must be proved to be accurate" would clearly "indicate that the maps or plans made for the purpose of any cause must be proved to be accurate and no presumption of law can be drawn that those maps or plans are accurate which are prepared at the

instance of the parties for the purpose of the cause. The onus of proving that such a map is accurate lies on the party who produced it. The maps must be proved by the person who has prepared them. They are post litem motam and lack necessary trustworthiness. Where the maps are made for the purpose of a suit there is, even apart from fraud which may exist, a tendency to colour, exaggerate and favour which can only be counteracted by swearing the maker to the truth of his plan. Hence, there is no presumption of accuracy in respect of the map or plan which is made for a particular cause and it goes without saying that a map prepared for the purpose of a particular suit must, therefore, be duly proved and it is not admissible in evidence in absence of proof of its accuracy. In any case, in which there is a dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same and/or subsequent reference in the pleadings or judgment to place the mark on a map should be referred to this map which must be attached to the decree and signed by the Judge. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case all over again. The map should be drawn with the North at the top and letters marking points should not be put in side ways or upside down.”

12. Thus, from the above referred judgment it is evident that if there is a dispute about an encroachment or dimension of a site, the first essential is to get an agreed

map and if the parties cannot agree on one, a Commissioner must be appointed to prepare the same.

13. Thus, it is evident that after going through the maps filed by the plaintiffs and the defendants the Court has to undertake an exercise to get an agreed map, and if there is any dispute about the dimensions of the site and if the parties cannot agree on one the Court may appoint a Commissioner to prepare the same.

14. In the present matter, yet the Court has not heard the application for temporary injunction and hence, the stage has not come when the parties would refer the maps while advancing their arguments and making their submissions in support of their respective case. After such arguments and if reliance is placed on the maps by the parties and in case the Court finds that there are variations in the dimensions, the trial Court has a discretion to appoint a Court Commissioner and call report for further clarification, if necessary to decide the issues involved in the suit.

15. In the circumstances, at this stage, this Court does not want to interfere with the impugned order.

16. It is made clear that while hearing the parties on the application for grant of temporary injunction, if the parties refer to the maps and the Court finds any deviation

in it and finds it necessary to have an agreed map to consider the prayer for grant of interim relief, in that event, the Court may undertake the exercise of appointment of the Court Commissioner for this purpose.

17. In the above referred contingency, the trial Court may not get prejudiced by the observations made in the impugned order.

The writ petition is **disposed of** accordingly. No order as to costs.

JUDGE

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