

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8589 OF 2024

M/s. Babubhai Construction Co. and Ors. .. Petitioners

Versus

Rajan Nemisharan Goyal and Ors. .. Respondents

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- Ms. Sonali Chavan a/w. Ms. Sakshi Inamdar, Advocates for Petitioners.
- Mr. Abhijeet Joshi a/w. Ms. Leena Sawant, Advocate for Respondent No.1.

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CORAM : MILIND N. JADHAV, J.

DATE : JUNE 27, 2024

P.C.:

1. Heard Ms. Chavan, learned Advocate for Petitioners and Mr. Joshi, learned Advocate for Respondent No.1.

2. On 10.05.2024, the following order was passed:-

“1. Not on board. Mentioned. Taken on board.

2. Perused the praecipe dated 09.05.2024.

3. Heard Ms. Chavan, learned Advocate for Petitioners.

4. Respondent No. 1 (Org. Plaintiff) has filed RCS No. 18/2024 before the learned Trial Court. Copy of the Suit plaint is appended at Exh. D, page Nos. 20-30 of the Petition. Suit is filed for declaration of ownership, demarcation of the boundaries of the suit property, injunction against Defendants from interfering with the suit property, appointment of Court Commissioner and unliquidated damages. There are in all seven reliefs which are prayed for by the Plaintiff. Suit is filed on 06.03.2024 and immediately along with the Suit, Application is moved for appointment of the Court Commissioner under O. XXVI, R. 9 of the CPC on the same date.

5. This Court has deprecated the practice of filing Application for appointment of the Court Commissioner along with the Suit plaint when parties pray of demarcation

of the boundaries of the suit property. Remedy of the Petitioners in that regard would lie elsewhere under the Maharashtra Land Revenue Code, 1966 and not in the Civil Court. The Application is filed in such a manner that it clearly amounts to gathering of evidence before witness action begins. The Suit plaint is camouflaged with the relief seeking declaration and injunction also but that does not mean that such an Application for appointment of the Court commissioner to demarcate the boundaries should be allowed in the first instance itself. Plaintiff's Suit itself proceeds on the premise that he seeks a declaration of title in respect of the suit property. In that view of the matter, consequences of filing such an Application are extremely serious as this action would gather evidence in favor of the Plaintiff without the Plaintiff requiring to prove his case as pleaded in the Suit plaint.

6. In view of the above, prima facie the impugned order dated 24.04.2024 allowing the Application is not sustainable. However, the Plaintiff will have to be heard in that view of the matter. Hence, issue notice to the Respondents made returnable on 12.06.2024. Humdast permitted. In addition to Court's notice, Petitioners are directed to serve copy of the Petition along with copy of this order on the Respondents and inform them about the next date of hearing by any permissible mode of service and file appropriate affidavit of service with tangible proof thereof on or before the next date. After receiving the notice, Respondents to file affidavit-in-reply on or before the next date, if so desired with an advance copy to the Advocate for Petitioners.

7. Respondents are directed to remain present either themselves or through their Advocate on the next adjourned date. It is made clear that if Respondents remain absent despite service on the next adjourned date, this Writ Petition shall be heard and disposed of at the stage of admission in the absence of the Respondents.

8. In the meanwhile, order dated 24.04.2024 shall not be acted upon until the present Writ Petition is determined.

9. Liberty to the parties to move the Vacation Court in case of any difficulty or exigency.

10. I am informed that the next date before the learned Trial Court is 10.06.2024. Learned Trial Court is directed to defer the hearing of the Suit on that date beyond 15.06.2024.

11. Stand over to 12th June, 2024.”

3. Considering that witness action of parties is not over, the

impugned order dated 24.04.2024 passed below Exhibit-28 in Regular Civil Suit No.18 of 2024 is quashed and set aside with liberty to either of the parties to prefer an application seeking appointment of Court Commissioner after completion of witness action.

4. If such an application is filed after completion of evidence in rebuttal of Defendants, it shall be at discretion of the Trial Court to consider the said application on its own merits and not as a matter of right. Trial Court shall consider the evidence that is led by both parties i.e. by Plaintiff and evidence in rebuttal by Defendants and after analysing the same and on the strength of the evidence of both parties, may at its discretion decide whether the application seeking appointment of Court Commissioner is to be allowed or otherwise, strictly in accordance with law. All contentions of both parties are expressly kept open.

5. With the above directions, Writ Petition stands allowed and is disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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