

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

WRIT PETITION NO. 12116 OF 2024

Kirit Purshottam Kapadia Since (Decd)

Thr. Lrs. & Ors.

... Petitioners

Versus

Rajendra Bhagwandas Choudhary & Ors

... Respondents

AND

WRIT PETITION NO. 12117 OF 2024

Kirit Purshottam Kapadia (Decd)

Thr. Lrs. & Anr.

... Petitioners

Versus

Ramgopal Bhagwandas Choudhary (Decd)

Thr. Lrs. & Ors

... Respondents

Mr. Jamsheed Master *a/w Ms. Natasha Bhot for the Petitioners.*

Mr. Alok Bagla *a/w Ms. Rekha Shukla & Ms. Bhargavi R. for the
Respondent Nos. 1 & 2.*

CORAM : SANDEEP V. MARNE, J.

DATE : 30 AUGUST 2024.

ORAL JUDGMENT :-

1) **Rule.** Rule made returnable forthwith. With the consent of the learned counsel appearing for parties, Petitions are taken up for hearing and disposal.

2) The Petitioners have filed this Petition challenging the Orders dated 11 July 2024, 26 July 2024, 7 August 2024 and 17 August 2024. All the Orders essentially arise out of Plaintiffs' endeavor to examine the Court Commissioner as a witness. By Orders dated 11 July 2024, the Applications filed by Defendants for not permitting examination of the Court Commissioner came to be allowed on the ground that since the Court Commissioner was appointed for collection of evidence, he cannot be permitted to be examined as a witness nor his report can be looked into. The second set of Orders dated 26 July 2024 are on application filed by the Plaintiffs for issuance of summons to the Court Commissioner for proving his report, documents and photographs, which application is rejected. The third set of Orders dated 7 August 2024 are seemingly passed in Plaintiffs' favour where the Court Commissioner is permitted to be called as a witness, but only in his individual capacity and not in the capacity as the Court Commissioner, which part is treated as adverse by Plaintiffs. The last set of Orders dated 17 August 2024 are passed rejecting the application at Exhibit 166 filed by Plaintiffs for admitting the bill of M/s. Arihant Digital Photo Studio as secondary evidence alongwith photographs already produced before the Court. Plaintiffs thus feel aggrieved by non-grant of opportunity to prove the observations of court

commissioner during his visit and photographs taken by him during such visit.

3) Thus, the entire genesis of dispute between the parties arise out of the initial Orders dated 11 July 2024 by which the Small Causes Court has rejected the prayer of Plaintiffs for examination of Court Commissioner for the purpose of proving his report.

4) It appears that the Court Commissioner was appointed by the learned Judge of the Small Causes Court by Order dated 1 November 2007 with the mandate to carry out inspection of the suit premises and submit his report. However, the Order passed by the Small Causes Court appointing the Court Commissioner came to be set aside by the Appellate Bench of the Small Causes Court by Order dated 24 March 2008. When Plaintiffs challenged the Order of the Appellate Bench by filing Writ Petition No. 2610 of 2008, by Order dated 12 January 2009 this Court left the issue of relevance of the Court Commissioner's Report to be decided by the Small Causes Court. It is in the above factual background that the Defendants opposed examination of the Court Commissioner at the behest of the Plaintiffs. The Small Causes Court has allowed the Application at Exhibit 151 filed by the Defendants referring to the Order passed by this Court in Writ Petition No. 2610 of 2008 and holding that the appointment of Court Commissioner was for the purpose of collection of evidence.

5) Mr. Master, the learned counsel appearing for Petitioners would submit that the Court Commissioner is a vital witness in the case and must be permitted to be examined for proving his report. He

would rely on order passed by this Court in ***Ubrajidevi Sohanlal Rajbhar Versus. Smt. Inraji Mithailal Pasi***¹ in support of his contention that in a Rent Act Suit, production of evidence about factual position at the suit premises provides the necessary aid for the Court to decide the controversy raised before it.

6) Mr. Bagla the learned counsel appearing for Respondent/Defendants would submit that the Order appointing Court Commissioner was not only passed *ex-parte* but the appointment of Court Commissioner was clearly aimed at collection of evidence. He would submit that the Plaintiffs have otherwise failed to prove their case and are now wanting to rely upon the report of the Court Commissioner to fill in the lacuna. He would rely upon judgments of Himachal Pradesh High Court in ***Sanjeev Kumar alias Sanjeev Raizada Versus. Sh. Yudhvir Singh***² and of this Court in ***Sanjay Namdeo Khandare Versus. Sahebrao Kachru Khandare***³.

7) I have considered the submissions canvassed by the learned counsel appearing for parties. This is a suit filed for recovery of possession under the provisions of Maharashtra Rent Control Act, 1999 (**MRC Act**). Therefore, the usual principle which is made applicable to typical disputes relating to encroachment of lands or about possession of lands may not be attracted in the suit filed by landlord for recovery of possession from tenant on the grounds such as erection of unauthorized construction, change of user, non-user, etc. The Court can receive necessary assistance by ascertaining the factual position existing at the suit premises. Thus, appointment of Court Commissioner actually

¹ Writ Petition No. 10456 of 2023 on 19 August 2024.

² 2023 SCC OnLine HP 1650.

³ 2001(1) Bom. C.R. 800.

assists the Court in arriving at the correct factual position. This actually is the purpose behind empowering a Court to issue commission under provisions of Order XXVI Rule 9 of the Code of Civil Procedure. Rule 9 of Order 26 provides thus:

Commissions for local investigations

9. Commissions to make local investigations.—

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

8) Thus, the objective behind empowering the Court to issue commission is to essentially elucidating the matter in dispute. True it is that in a case involving dispute about encroachment of land or for seeking recovery of possession of land, Plaintiff needs to first elucidate his case by leading evidence and if the Court finds that the commission is necessary for better resolution of the factual controversy, it can direct appointment of commissioner even in those suits. In Rent Act Suits, particularly involving the allegation of unauthorised additions or alterations in the suit premises thereby causing injury or destruction thereto or erection of permanent structure, etc issuance of court commission many times becomes eminent to ascertain the ground reality. Similarly in a case involving change of user, sometimes ascertainment of nature of activity carried out at the suit premises may provide necessary assistance to the Court in deciding the factual controversy. Therefore, in every case appointment of Court Commissioner cannot be rejected on a broad principle that Plaintiff

cannot collect, gather or create evidence through Court Commissioner. In many cases like the present one, appointment of Court Commissioner for ascertainment of the factual position is actually aimed at providing the necessary assistance to the Court for determining the real question in controversy between the parties. In my view, therefore, the report of the Court Commissioner, which is already on record, cannot be completely discarded under a specious plea of collection of evidence.

9) Reliance of Mr. Bagla upon the judgment of Himachal Pradesh High Court in *Sanjeev Kumar* (supra) does not cut any ice as the case involved suit for removal of encroachment. Furthermore, the case involved raising of mutually destructive pleas and the learned Single Judge of the Himachal Pradesh High Court has observed that the Plaintiff was already aware of boundaries of suit property and therefore appointment of court commissioner was denied for ‘creation’ of evidence. The Court held thus:

4. This application has been dismissed by the learned Trial Court vide order dated 17.04.2019, by holding that the plaintiff had filed the suit for permanent prohibitory injunction and mandatory injunction, claiming the relief of possession upon the portion which was the part of Khasra No. 6720, on account of encroachment made by the defendant, which encroachment allegedly was made during the pendency of the suit. Learned Court held that the plaintiff had filed an application for amendment of the suit in which there was a specific averment made that portion ABCDEFHIA, which was part of Khasra No. 6720, was encroached upon by the defendant during the pendency of the suit. **In this background, the plaintiff was now taking a destructive plea by moving the application for appointment of the Local Commissioner on the plea that it was necessary to find as to whether the land in issue was part of Khasra No. 6720 or not because this implied that the plaintiff was not aware of his own boundaries and rather he was dragging the Court for collecting evidence on his behalf to prove that**

certain portion of suit land stood encroached upon by the defendant. Learned Court also observed that as the plaintiff had placed reliance upon the site plan, therefore, the onus was upon him to prove the same and the provisions of Order 26, Rule 9 of the Code of Civil Procedure could not be invoked so as to involve the Court in the process.

5. Having gone through the order passed by the learned Court below and having heard learned Senior Counsel for the petitioner/plaintiff as also learned Counsel for the respondent/defendant, this Court does not find any perversity in the impugned order. **When it is a matter of record that the petitioner had sought amendment in the suit on the ground that during the pendency of the suit, certain part of the suit land stood encroached by the defendant, this pre-supposes that the petitioner was aware of his boundaries and only thereafter, he levelled allegations against the respondent of encroaching upon his land. In this background, but natural, the petitioner cannot be permitted to call upon the Court by way of appointment of a Local Commissioner to create evidence to prove his allegation as to whether part of the suit land mentioned in the application filed under Order 26, Rule 9 of the Code of Civil Procedure stood encroached upon by the defendant or not.**

(emphasis added)

10) Therefore, the judgment of Himachal Pradesh High Court in ***Sanjeev Kumar*** cannot be cited in support of an absolute proposition that in no case court commissioner can be appointed if Plaintiff seeks assistance in proving his case in a better manner.

11) Similarly, the judgment of this Court in ***Sanjay Namdeo Khandare*** (supra) deals with appointment of court commissioner for collection of evidence regarding actual possession of suit field. This Court, in its short order, held thus:

2. This revision application takes exception to the order passed by the Civil Judge, Junior Division, Mahagaon, dated July 24, 1998, directing appointment of Court Commissioner. On going through the said order, it would appear that the Court has appointed the Court Commissioner

empowering him to visit and inspect the spot being suit field and to submit report regarding actual possession of the suit field. This would tantamount to appointing Court Commissioner for collecting evidence regarding possession. It is well settled law that the Court Commissioner cannot be appointed for collecting evidence. The learned counsel for the respondent has supported the order by contending that in the peculiar facts and circumstances of the case, there is no reason to interfere with the order passed by the Court below.

12) On the contrary, the reliance placed by Mr. Master on the order passed by this Court in ***Ubrajidevi Sohanlal Rajbhar Versus. Smt. Inraji Mithailal Pasi***⁴ would be apposite in the present case. In paragraph 3 of the order, this Court held as under:

"3) It is seen that one of the grounds for seeking ejectment of the tenants is unauthorised additions and alterations in the suit premises. With a view to prove allegation of unauthorised additions and alterations, Plaintiffs desire taking of photographs as well as carrying out measurements in respect of the suit premises. It appears that the Plaintiffs witness is still in the witness box and at this stage the application for inspection was filed. In my view, though the right to inspect under Section 28 of the M.R.C. Act is restricted to the landlord alone, the purpose for carrying out inspection during pendency of the suit is altogether different. Section 28 of the M.R.C. Act confers general right on the landlord to inspect the premises. Such right can be exercised in absence of filing of any suit. However, once the suit for ejectment is filed, it is for the Court to exercise necessary powers under the provisions of Order 26 Rule 9 of the Civil Procedure Code (Code) for seeking such assistance as may be required for enabling it to decide the factual controversy in best possible manner. This is the reason why the Court is clothed with power to appoint commissions to make local investigations under Order 26 Rule 9 of the Code. In the present case as well, the Court has permitted photographer, as well as competent person to accompany the landlord during the course of inspection so that the Court would be in a position to appreciate and decide the allegations of unauthorised additions and alterations to the suit premises. Production of photographs, as well as, presentation of measurements would assist the Court in deciding the subject matter of controversy in a better manner. I therefore do not see any reason why the photographer or competent person cannot accompany the landlord during the course of inspection. I therefore do not find any valid reason to interfere in the impugned order dated 21 April 2023. The Writ Petition is accordingly ejected."

⁴ Writ Petition No. 10456 of 2023 on 19 August 2024.

13) In the present case, recovery of possession of the suit premises is sought *inter alia* on the ground of change of user and unauthorized subletting. It appears that appointment of Court Commissioner was sought essentially to prove the factum of the Defendant No. 2 actually using the suit premises for commercial purposes. So far as use of the suit premises by Defendant No. 2 is concerned, there appears to be no factual dispute as the Defendants claim that Defendant No. 2 in his capacity as brother of Defendant No. 1 is entitled to use the suit premises as a family member. The learned counsel for the Respondents would submit that the second Defendant also uses the suit premises for residential purposes and that there is no element of exclusivity in relation to the possession of premises by the second Defendant. In my view, all these aspects will have to be determined by the Small Causes Court after assessing the evidence on record. What Plaintiffs desires to prove through the report of the Court Commissioner was that on the relevant date, the premises were being used for commercial purposes by the second Defendant. Whether the report would prove use of the entire suit premises for commercial purposes and whether such use was continuous in nature or not, are questions of fact which need to be decided after assessing the entire evidence on record. The Court Commissioner has made observations during the course of his appointment and has apparently taken photographs. I do not see why the Court should turn a complete blind eye to the said material on record which would in fact assist the Court in deciding the real question in controversy involved in the suit.

14) The present cases also involve unique circumstances. The Court Commissioner was appointed at the initial stage of the suit. The

Appellate Bench set aside the order of appointment of court commissioner, after he made the visit and prepared his report. This Court has not upheld the order of the Appellate Bench by holding that court commissioner was appointed for collecting evidence. On the contrary, this Court left it to the trial court to decide whether to consider the court commissioner's report or not. Plaintiffs have elucidated their case by leading evidence. Plaintiffs can otherwise seek appointment of court commissioner at this stage. I therefore do not see any reason why Plaintiffs should be denied opportunity to prove the commissioner's report placed on record.

15) Mr. Bagla would seek to highlight an endorsement made by the Advocate appearing on behalf of Plaintiffs on application at Exhibit 151 that Plaintiffs would comply with the Order passed by the Court. According to him, the said endorsement prevents Plaintiffs from challenging the Order dated 11 July 2024 passed on Exhibit 151. I am unable to agree. The endorsement cannot be interpreted to mean that by Order dated 11 July 2024 has been passed with the consent of Plaintiffs. He would also submit that Plaintiffs have accepted the order dated 11 July 2024 and cannot now be allowed to turn around and challenge the same. However, it is seen that the Court has been conducting hearing of the suit on day-to-day basis, which is why the further impugned orders dated 11 July 2024, 7 August 2024 and 17 August 2024 are passed by the Court in quick succession. Considering this position, I am unable to hold that Plaintiffs have acquiesced in the order dated 11 July 2024.

16) Considering the peculiar facts and circumstances of the present case, I am of the view that the report of the Court Commissioner would provide necessary assistance to the Trial Court in deciding the contesting claims between the parties. The Trial Court therefore ought to have allowed Plaintiffs to examine the Court Commissioner for proving the report. If there are any inconsistencies in the report submitted by the Court Commissioner, the Defendants would be at liberty not only to cross-examine the Court Commissioner but also invite the attention of the Trial Court to such inconsistency during the course of hearing of the suit.

17) In my view, therefore, the Orders dated 11 July 2024 passed by the learned Judge of the Small Causes Court is unsustainable and liable to set aside. Once the Order dated 11 July 2024 is set aside and the Court Commissioner is allowed to be examined for the purpose of proving his report, the subsequent Orders dated 26 July 2024, 7 August 2024 and 17 August 2024 would be rendered meaningless.

18) Accordingly, the Petition succeeds. Orders dated 11 July 2024 passed by the learned judge of the Small Causes Court are set aside and application filed by the Defendants for discarding the court commissioner's report are dismissed. Plaintiffs would be at liberty to examine the Court Commissioner for the purpose of proving his report alongwith the necessary photographs and other accompanying documents. All questions relating to the validity of the observations of the report as well as capacity of the Court Commissioner to prove the

Report are kept open to be agitated by the parties before the Small Causes Court. It is clarified that the Orders dated 26 July 2024, 7 August 2024 and 17 August 2024 shall not come in the way of Plaintiffs in proving the Court Commissioner's report, photographs and all other accompanying documents, if they are otherwise admissible in law. All points raised by parties on merits of the suits are expressly kept open.

19) With the above directions the Writ Petitions are allowed. Rule is made absolute, without any order as to costs.

[SANDEEP V. MARNE, J.]

20) After the Order is dictated, Mr. Bagla would pray for stay of the order for a period of two weeks. The request is opposed by Mr. Master submitting that the suit has been expedited by the Supreme Court. Considering the facts and circumstances of the case, the order shall stand stayed for a period of two weeks from today.

[SANDEEP V. MARNE, J.]