
(2011) 07 BOM CK 0001
In the Bombay High Court
Case No : Writ Petition No. 389 of 2011

M/s. Ravalnath Builders

APPELLANT

Vs

Mrs. Sebastiana Escolastica Bea Triz Nunes Mendonsa @
Beatriz Mendonca, Represented by Her Constituted Attorney
Mr. Savio Nunes Dias

RESPONDENT

Date of Decision : 25-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Constitution of India, 1950 — Article 227

Citation : (2011) 07 BOM CK 0001

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : A.R. Kantak, for the Appellant; M.B. D'Costa with Mr. J.A. Lobo, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Heard Mr. Kantak, learned Counsel for the petitioner and Mr. D'Costa, learned Senior Counsel for the respondent. By this petitioner under Article 227 of the Constitution of India, the petitioner challenges the order dated 24th June, 2011 passed by the Civil Judge, Senior Division, Panaji in Special Civil Suit No.20/2005/B dismissing the application under Order XXVI, Rule 9 of C.P.C. for appointment of the Commissioner.

2. The petitioner is the defendant in the above suit filed by the respondent seeking specific performance of the agreement dated 18th September, 1995 and also for recovery of the amount with interest and declaration that the sale deeds are null and void.

3. It is the case of the defendant in the written statement that the defendant had incurred expenditure towards renovation/ reconstruction of residential house of the plaintiff bearing no. 140 and the defendant has submitted the documents indicating the works executed. The defendant filed an application for

appointment of the Commissioner to verify the exact works executed and the market value of the works executed in respect of the residential house. The application was opposed by the plaintiff. By the impugned order, the learned trial Judge has rejected the application primarily on the ground that the defendant has relied upon the report of Shri Ravindra Tamba, who had submitted the report regarding the works done in the house at the instance of grandson of the plaintiff. The trial Court held that since the report was already relied upon and produced on record by the defendant, it was not necessary to appoint a Commissioner and it was for the defendant to prove the same by leading evidence. The trial Court held that by filing the application, the defendant was indirectly seeking the assistance of the Court to confirm the report of Mr. Tamba which was already on record.

4. Mr. Kantak, learned Counsel for the petitioner submitted that the trial Court has erred in law in dismissing the application under Order XXVI, Rule 9 of C.P.C. According to learned Counsel, the trial Court ought to have appointed the Commissioner to find out the exact works done by the defendant since the defendant is not in a position to enter the house of the plaintiff to verify the exact works done and claim the amount due in respect of the works done. According to learned Counsel the trial Court has not exercised the jurisdiction in accordance with law while rejecting the application and, therefore, the impugned order is liable to be set aside. In support of his submissions, Mr. Kantak, relied upon the following judgments :

(i) Kolhapuri Bandu Lakade Versus Yallappa Chinappa Lakade, Decd., Through Pooja @ Poojari Y. Lakade and others; CDJ 2011 BHC 343.

(ii) Gurdial Singh and Anr. Versus S. Avtar Singh and Ors; AIR 2009 Punjab and Haryana 164

(iii) Mahendranath Parida Versus Purnananda Parida and others; AIR 1988 Orissa 248

5. Per contra, Mr. D"Costa, learned Senior Counsel for the respondent supported the impugned order and submitted that this is not a fit case in which this Court should exercise supervisory jurisdiction under Article 227 of the Constitution of India which has to be exercised in exceptional circumstances to prevent the miscarriage of justice.

6. Having heard the learned Counsel for the parties and having perused the record, I am of the considered view that no interference is warranted with the impugned order in exercise of supervisory jurisdiction under Article 227 of the Constitution of India. It is well settled by a catena of decisions of the Apex Court that the jurisdiction under Article 227 of the Constitution of India has to be exercised sparingly to prevent miscarriage of justice.

7. In the present case, the defendant has already relied upon the report of Mr. Ravindra Tamba in support of its case that the defendant has carried out works in

the house of the plaintiff bearing No.140. Therefore, the trial Court was perfectly justified in dismissing the application.

8. In my opinion, no jurisdictional error or irregularity has been committed by the trial Court so as to warrant exercise of jurisdiction by this Court under Article 227 of the Constitution of India. In so far as the authorities relied upon by Mr. Kantak are concerned, none of them advances the case of the petitioner.

In the case of Kolhapuri Bandu Lakade (supra), the learned Single Judge has allowed the application for appointment of Commissioner in the light of the dispute regarding the construction having been carried out in two different survey numbers. The factual matrix being entirely different, the ratio of the said judgment does not help the petitioner.

In the case of Gurdial Singh (supra), the learned Single Judge of Punjab and Haryana High Court held that the application for appointment of the Commissioner to ascertain the aged condition of a building and its habitability was liable to be allowed since the report of the Commissioner would play significant role in obtaining scientific tones to render just decision.

In the case of Mahendranath Parida (supra), the learned Single Judge of Orissa High Court has held that the Court has discretion under Order XXVI, Rule 9 of C.P.C. to appoint the Commissioner and the discretion has to be exercised in judicious and sound manner and not whimsically and capriciously. The learned Single Judge has held that when the controversy is as to identification, location or measurement of the land or the premises, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The facts in this case are entirely different and as such, this judgment is also of no help to the petitioner.

For the reasons aforesaid, I do not find any ground to interfere with the impugned order. Hence, the petition is dismissed with costs which are quantified at Rs.1,500/-.