

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9147 OF 2014

Jaykumar Kalu Bagul & Ors.	..	Petitioners
vs.		
Lahu Maruti Kadam	..	Respondent

Mr. Rahul More for Petitioners.
Mr. M. S. Kadu for Respondent

CORAM : M. S. SONAK, J.
DATE: 18 MARCH 2015

P.C. :-

- 1] Rule. With the consent of and at the request of the learned counsels for the parties, Rule is made returnable forthwith.
- 2] This petition challenges order dated 5 July 2014, by which the Civil Judge, Senior Division, Mangaon, has directed the appointment of the Court Commissioner.
- 3] It is the case of the petitioners that by order dated 3 January 2012, the request for appointment of Commissioner had been declined by the Court. Civil Revision Application against the same was also dismissed by this Court by order dated 22 November 2011. In this context, relying upon the principle that principles of *res judicata* can apply to two different stages in the same suit, the petitioners had contended that the second application seeking appointment of Commissioner was barred by principles of *res judicata*.

4] If the impugned order is perused, then it is clear that the Civil Court has considered the plea of *res judicata*, but not in the context of its previous decision dated 3 January 2012. Rather, the Civil Court has made reference to certain measurements undertaken by the plaintiff – respondent prior to the institution of the suit and on the said basis recorded a conclusion that the taking of such measurements can under no circumstances have any nexus with the plea of *res judicata*. Thus, the Civil Court has not addressed itself to the issue which was raised by and on behalf of the petitioners.

5] On the aforesaid short ground, the impugned order dated 5 July 2014 is set aside. The Civil Court is directed to reconsider the application for appointment of Court Commissioner afresh. All contentions of all parties are kept open. It is clarified that this Court has not gone into the merits of the matter and the remand is only for the purposes of enabling the Civil Court to decide the matter afresh, in the light of the contentions raised by the parties.

6] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

7] Parties to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)