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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5970 OF 2015

Yunus Abdul Kadir Rakhanghi .. Petitioner

Vs.

Alimiya A. Aziz Rakhanghi and others .. Respondents

Mr.R.V. Govilkar i/b Mr.SM.Kazi, Advocate for the Petitioner.

CORAM : R.G.KETKAR, J.
DATED : 18th JANUARY, 2016

P.C. :

. Heard Mr.R.V. Govilkar, learned Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 04/04/2015 passed by the learned Civil Judge, Junior Division, Rajapur below Exhibit 66 in Regular Civil Suit No.41 of 2014. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as plaintiff for appointment of the Court Commissioner for conducting auction for selling mango crop cultivated in the suit land.

3. Mr.Govilkar submitted that the plaintiff has instituted Suit for partition and separate possession. While rejecting the application, the learned trial Judge, prima facie, held that the name

of the plaintiff is not recorded in the revenue record between 1939 and 2008. The plaintiff has also not claimed any share in the past income and in the future income. Prima facie, the defendants are cultivating the suit land. If the amount is ordered to be deposited in the Court, the defendants will not be in a position to cultivate the suit land. As the rights of the plaintiff and defendants are not determined, application is liable to be rejected.

4. Mr.Govilkar submitted that the learned trial Judge herein has recorded that the rights of the plaintiff and defendants are yet to be determined. The learned trial Judge, however, has not recorded a finding to the effect that prima facie, plaintiff has no share in the suit property. Having regard to the fact that the Suit is for partition implicit therein is the plaintiff's have share in the past and future income.

5. I have considered the submissions advanced by Mr.Govilkar. I have also perused the material on record. Perusal of the prayers in the Suit shows that plaintiff has claimed partition and separate possession of his 1/3rd share as also costs of the Suit. While rejecting the application, the learned trial Judge has noted that right from 1939, name of Abdul Aziz is recorded. By mutation entry No. 1660 dated 11/04/2008, name of the plaintiff and others are recorded. The plaintiff has also not claimed share in the past and future income. The plaintiff claimed that he was paying Rs.6,000/-

to Rs.12,000/- to the defendants and prima facie, i.e. also the said fact is not established. For the reasons recorded in the impugned order, I do not find that any case is made out for appointing the Court Commissioner. Hence, Petition fails and the same is dismissed. It is needless to observe that while deciding the Suit, the learned trial Judge will not be influenced by the observations made in the impugned order and in this order and will decide the Suit on the basis of the evidence on record and in accordance with law. Order accordingly. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)