

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.368 OF 2016

Yashwant Bhauso Khot-Kadam and another	...	Petitioners
Vs.		
Dynandeo Vithoba Khot-Kadam (decd) through heirs Radhabai D. Khot-Kadam and others	...	Respondents

Mr. Kuldeep S. Patil for Petitioners.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 14, 2016

P.C. :

Heard Mr. Patil, learned Counsel for petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as defendants No.1 and 3, have challenged the order dated 30.09.2015 passed by the learned trial Judge appointing Advocate Nadeem Peerzade as Commissioner for effecting partition of house property.

3. Mr. Patil submitted that Anubai Vithoba Bendarkar had instituted Suit for partition and separate possession against her brothers – 1) Aaba, 2) Vithoba and 3) Bhau and their legal heirs. Anubai and her brothers are children of one Appa Kadam. The Suit was decreed. It was declared that plaintiff has 1/16th share and her brothers have 5/16th share each. The sons of Vithoba – 1) Dnyandeo, 2) Tukaram and 3) Shankar claimed that Sonabai, wife of Aaba had bequeathed 5/16th share of her husband in their favour. They also obtained Letters of Administration in that regard. Sonabai died leaving behind daughter Radhubai Shinde. Husband of Radhubai Shinde has instituted Appeal challenging the grant of Letters of Administration in favour of sons of Vithoba and the said

Appeal is pending. He submitted that on the strength of Letters of Administration, the sons of Vithoba are claiming share to the extent of 10/16th. That apart, by the impugned order, the learned trial Judge appointed Court Commissioner for effecting partition of house property without hearing the petitioners. He, therefore, submitted that the impugned order is liable to be set aside and the learned trial Judge may be directed to hear the parties and thereafter consider appointment of Court Commissioner.

4. It is not in dispute that the Suit for partition filed by Anubai is decreed and that sons of Vithoba have filed Final Decree Application No.10 of 2014. It is also not in dispute that house property is liable to be partitioned among the plaintiff and her brothers, who are the defendants. For effecting partition of house property, it is necessary to appoint the Court Commissioner. Even if accepting the case of the petitioners that appointment of Court Commissioner is made without hearing the petitioners, having regard to the nature of the decree and the property to be partitioned, I do not find it fit to interfere with the impugned order. If at all petitioners are aggrieved by the partition of the house property as suggested by the Court Commissioner, it will be always open to them to raise such objections as are available.

5. As far as the contention advanced by the petitioners that the sons of Vithoba are claiming 10/16th share is concerned, it is evident that they are claiming 10/16th share on the basis of Will executed by Sonabai, wife of Aaba. It also appears that Sonabai died leaving behind her daughter Radhubai Shinde and her husband has filed Appeal challenging the order granting Letters of Administration in favour of sons of Vithoba. It will be open to the parties to move that Court for obtaining appropriate interim orders. Unless and until, the appropriate interim orders are

sought in the appeal preferred against grant of Letters of Administration, executing Court is bound to take into consideration this subsequent development. Understood thus, no case is made for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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