

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

WRIT PETITION NO. 7511 OF 2015

Suhail Khandwani and Anr

..Petitioners.

Vs

1. Arif Usman Mithaiwala and
Ors.

.. Respondents

Mr.N.D. Jaywant , Advocate for Petitioners.

Ms. M.S.Bane, Panel Counsel A.G.P. for Respondents no.6 to 8.

DCP Anand Mandya, IPS, Security Mumbai present.

CORAM : R.G.KETKAR,J.

DATE : 16/11/2016

PC:

1. Heard Mr.N.D. Jaywant, learned counsel for the petitioners and Ms. M.S.Bane, learned A.G.P for respondents no.6 to 8 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants no.1 and 3', have challenged the Judgment and order dated 27.8.2014 passed by the learned Judge, City Civil Court, Greater Mumbai in Chamber Summons No.548 of 2014 in S.C.Suit No.3942 of 2007. By that order, the learned trial Judge rejected the Chamber summons taken out by defendants no.1 and 2 with a prayer that the respondents no.6 to 8 herein be impleaded as party defendants in the suit instituted by respondent no.1, hereinafter referred to as 'plaintiff'.

3. In support of this petition, Mr. Jaywant invited my attention to the findings recorded by the learned trial Judge in paragraph

6. In paragraph 6, the learned trial Judge has observed thus:

“6. Since the parties admitted that the suit site belonged to the State and it is in the administration of Municipal corporation, the role of Municipal corporation would prevail subject to ascent of the State for any construction over this site. . . . ”

4. Mr. Jaywant invited my attention to plaint as also written statement and affidavit-in-reply to the Chamber summons. In particular, he submitted that neither in the plaint nor in the affidavit-in-reply to the chamber summons, the plaintiff averred that the suit site belongs to the State Government. In the written statement filed by defendants no.1 and 3, it is specifically contended in paragraph 12(a) that the Pir Mukhdum Saheb Dargah is situate at Mahim, Mumbai. The Pir Mukhdum Saheb Charitable trust is the owner of the property. In short, he submitted that the finding recorded by the learned trial Judge in paragraph 6 that the suit site belongs to the State Government is nobody's case.

5. Ms. Bane submitted that the said position may be clarified.

6. After considering the submissions advanced by the learned counsel appearing for the parties, I do not find that the learned trial Judge has committed any error while dismissing the chamber summons. For the reasons recorded in paragraph 5, I do not find that any case is made out for interfering with the impugned

order. Hence, Petition fails and the same is dismissed. However, it is clarified that the learned trial Judge will decide the suit on its own merits and in accordance with law on the basis of evidence on record and shall not be influenced by the observations in paragraph 6, extracted herein above, to the effect that the parties admit that the suit site belongs to the State government.

7. 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.)