

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 2090 OF 2016

Shri. Kondaji Karbhari Pagar
And Ors.

...Petitioners

Versus

Shri. Balu Laxman Pagar
And Ors.

...Respondents

....

Mr.Rahul D. Motkari, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.
DATE : 1st DECEMBER, 2016

P.C.

1. Heard Mr.Rahul Motkari, learned Counsel for the petitioners, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants No.1 to 5', have challenged the orders dated 27.3.2015 below Exhibits-13 and 19 in Civil Appeal No.106/2011 passed by the learned Additional District Judge, Niphad.
3. Defendants No.1 to 5 preferred appeal challenging the judgment and decree dated 23.9.2011 passed by the learned trial Judge in Regular Civil Suit No.53/2005.
4. During pendency of the appeal, they took out

application Exhibit-13 *inter alia* praying (a) for setting aside the trial Court's order and remitting the matter to the trial Court and (b) for leading additional evidence. Respondent No.1/plaintiff filed reply dated 10.1.2014 at Exhibit-18 opposing the application. Respondent No.1 contended that the appeal was not for final hearing and, therefore, the application praying for remission of the matter is premature.

5. Defendants No.1 to 5 thereafter filed application Exhibit-19 on 10.4.2014 for appointing Court Commissioner for inspection of the suit premises. Respondent No.1 opposed that application by filing reply dated 19.9.2014 at Exhibit-21. By order dated 27.3.2015, the learned District Judge rejected the application on the ground that as the application Exhibit-13 is rejected, application Exhibit-19 has become infructuous.

6. As noted earlier, one of the prayers made by defendants No.1 to 5 is for setting aside the trial Court's judgment and remanding the matter to the trial Court. As the appeal is pending for final hearing, the learned District Judge was justified in rejecting this prayer. Unless and until the appeal is taken up for final hearing, at interlocutory stage request for

setting aside the trial Court's judgment and remitting the matter to the trial Court cannot be acceded to. To this extent, I do not find that the learned District Judge committed any error.

7. Insofar as other prayer made by defendants No.1 to 5 for leading additional evidence is concerned, paragraph-7 shows that defendants No.1 to 5 have contended that in view of the changed circumstances, it is necessary to lead additional evidence. Perusal of paragraph-7 does not indicate that any case is made out under XLI Rule 27 of C.P.C. for leading additional evidence.

8. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed reserving liberty to defendants No.1 to 5 to take out fresh application making out case under Order XLI Rule 27 of C.P.C. If such an application is made, the learned District Judge will decide the same uninfluenced by the observations made herein. Order accordingly.

(R. G. KETKAR, J.)