

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5490 OF 2015

Shri Dattu Udrya Bangar
And Anr

...Petitioners

Versus

Shri Bimal Madhukar Shelarkar
And Ors

...Respondents

....

Ms.Gauri Godse, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 05th JANUARY, 2017

P.C.

1. Heard Ms.Gauri Godse, 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 the 'plaintiffs' have challenged the judgment and order dated 1.4.2015 passed by the learned Civil Judge, Junior Division, Shahapur below Exhibit-42 in R.C.S. No.5/2014. By that order, the learned trial Judge rejected the application made by the plaintiffs under Order XXVI Rule 9 of C.P.C. for appointment of T.I.L.R., Shahapur as a Court Commissioner.

3. The plaintiffs have instituted the suit for perpetual injunction restraining the defendants from causing obstruction to their possession over the land bearing Old Survey No.77-2/2 (New Gat No.185) admeasuring 1 Hectare 21 Ares as also restraining the defendants from encroaching upon or carrying out any construction and/or creating third party interest.

4. The learned trial Judge rejected the application principally on the ground that by the application for appointment of the Court Commissioner, the plaintiffs are trying to collect the evidence. The plaintiffs have to establish their case and the Court Commissioner cannot be appointed for that purpose. Having regard to the fact that the suit is essentially for perpetual injunction on the footing that the plaintiffs are the owners and are in possession of the suit property, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, the Petition fails and the same is dismissed.

5. It is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a

ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

6. Ms.Godse submitted that pending the suit, the plaintiffs have filed application dated 3.9.2014 for amending the plaint so as to claim possession from the defendants of the area which is encroached by them and said application is pending. If the application is allowed, liberty is reserved to the plaintiff to apply for review of this order. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)