

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 5584 OF 2015

Prakash Eknath Satpute & Anr. ... Petitioners
Vs.
Sou. Latabai Mallu Morbale & Anr. ... Respondents

Mr. Vaibhav R. Gaikwad, Advocate for the petitioners.
Mr. T.S. Ingale, Advocate for respondent No. 1.
Mr. Akshay P. Shinde, Advocate for respondent No. 3.

CORAM: MRS.MRIDULA BHATKAR, J.
DATE: 4th April, 2017.

P.C.:

Rule. Rule made returnable forthwith. By consent, Writ
Petition is heard finally and disposed of.

2. This Writ Petition is directed against the order dated 6th May, 2015 passed by learned II Joint Civil Judge Junior Division, Ichalkaranji below Exhibit 1 in Regular Civil Suit No. 447 of 2014 thereby appointing the Court Commissioner for local inspection as per the map.

3. The learned counsel for the petitioners submitted that the petitioners have moved an application under Order VII Rule 11 of the

Code of Civil Procedure challenging the maintainability of the suit itself on the ground of res-judicata and instead of deciding the said application, the trial Court of its own appointed the Court Commissioner. The learned counsel has further submitted that no application was moved by either of the parties for appointment of the Court Commissioner and thus, the order passed by the learned trial Judge is without application of mind and he ought to have taken into account the pendency of the application filed under Order VII Rule 11 of C.P.C. He further submitted that earlier Regular Civil Suit No. 52 of 1959 was filed by the erstwhile owner of the suit land through whom the plaintiffs claim against the predecessor of the defendants. Suit No. 52 of 1959 was filed for injunction and the order passed in the said suit ought to have been considered and said suit for injunction was dismissed and Appeal was also dismissed, that should have been considered by the learned trial Judge. He further submitted that predecessor of the petitioners/original defendants have filed Regular Civil Suit No. 4 of 1962 for injunction against the erstwhile owners of the suit land and it was decreed.

4. The learned counsel for the respondents support the order passed by the trial Court.

5. Considered the submissions of learned counsel. Perused the order dated 6th May, 2015. On query, the learned counsel for the petitioners submitted that the Application under Order VII Rule 11 of the C.P.C. was filed by the defendants/present petitioners on the same day, i.e., 6th May, 2015. Thus, it shows that the application for challenging the maintainability was filed on same day when the order of appointment of Court Commissioner was passed. The said application as such was not pending for long time and it is not the case that the said application was not decided by the Court. The Court has power to appoint the Court Commissioner without the application. I do not find any illegality in the order passed by the learned trial Judge. Hence, Writ Petition is dismissed. However, the petitioners are at liberty to press the application filed under Order VII Rule 11 of C.P.C. and the trial Court to decide the said application.

(MRIDULA BHATKAR, J.)