

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

WRIT PETITION NO. 7766 OF 2017

Rashid Papamiya Shaikh And Ors.

...Petitioners

Versus

Ahmed Hussain Mohammad

Hussain Shaikh And Ors.

...Respondents

Mr.Sachin Suryakant Punde for the Petitioners.

CORAM : M. S. SONAK, J.

DATE : 07th AUGUST 2017

P.C.

1. Heard Mr.Punde, the learned counsel for the petitioners.

2. The challenge in this petition is to the order dated 02nd November 2016 by which the learned Trial Judge has dismissed the petitioner's application at Exhibit.119 questioning the maintainability of the application dated 12th January 2016 taken out by respondents herein.

3. Mr.Punde, the learned counsel for the petitioners submits that the learned Trial Judge, in the impugned order dated 02nd November 2011 has framed the following three issues :

ISSUES

- 1) Whether third party proves that Decree Holder obtained the decree by practicing fraud on the Court and therefore, it is nullity?
- 2) Whether third party proves that Decree Holder obtained the possession by practicing fraud on the Court ?
- 3) Whether the third party is entitled for the reliefs as claimed ?

4. Mr.Punde, however, submits that the learned Trial Judge has not at all framed any issue with regard to the maintainability of the respondent's application dated 12th January 2016. He submits that the non framing of such issues is likely to be misconstrued as waiver, when in fact the petitioners are questioning the very maintainability of the respondents' application dated 12th January 2016. Mr.Punde submits that the petitioners will be satisfied if this aspect of issue of maintainability is left open.

5. Since, the petitioners, have objected the maintainability of the respondents' application dated 12th January 2016, it is only

appropriate that the issue of maintainability is gone into, together with the issue as to whether any fraud was practiced upon the Court. The impugned order dated 02nd November 2016, though, does not frame any specific issue as to the maintainability, it is only obvious that such an issue, if arises, will have to be decided along with the other issues framed by the learned Trial Judge. Accordingly, it is clarified that the learned Trial Judge will go into the issue of maintainability, without prejudice to any observations in the impugned order along with the other issues which the learned Trial Judge has framed in the impugned order. It is also clarified that in case, any adverse order is ultimately made against the petitioners, and the petitioners, choose to institute any proceedings against such adverse order, the petitioners will be at liberty to raise the issue of maintainability.

6. In view of the aforesaid clarification, there is no necessity to interfere with the impugned order. The Petition is accordingly dismissed.

(M. S. SONAK, J.)