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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9426 OF 2017

Balaram Songya Gulvi & Ors.	..Petitioners.
V/s.	
Salauddin Sarafuddin Khan & Ors.	..Respondents.

Mr.Sachin Dhakephalkar for the petitioners.

Mr.Raju D.Suryavanshi for respondent No.1.

CORAM: M.S.SONAK, J.

DATE : NOVEMBER 21, 2017

PC.:-

Heard Mr.Sachin Dhakephalkar, learned counsel for the petitioners and Mr.Raju D.Suryavanshi, learned counsel for respondent No.1.

2. Challenge in this petition is to the order dated July 21, 2017 below Exhibit-15 in Regular Civil Suit No.1/2017 by the Civil Judge, J.D. Bhiwandi, by which the learned trial Judge has appointed a Court Commissioner by exercising powers under

Order XVI Rule 9 of the Civil Procedure Code.

3. Mr.Dhakephalkar submits that it is a clear case where appointing a Court Commissioner was sought for by the plaintiff to collect evidence for which he points out to averments in the plaint wherein, it is alleged that the petitioners had objected to the authorities from the Survey Department to undertake any survey. He points out that even the petitioners had instituted a suit against the original owners of the suit property and therein and relief has been granted to the petitioners. He points out that the purpose of seeking appointment of Court Commissioner is to collect evidence which is not permissible. Mr.Dhakephalkar further submits that in this case the respondents-plaintiffs are not at all clear as to their entitlement. There is no plan annexed to the plaint and, therefore, the appointment of Commissioner is only to collect evidence. For these reasons, Mr.Dhakephalkar submits that the impugned order suffers from jurisdictional error and, therefore, needs interference.

4. Mr.Suryavanshi submits that necessary details of the suit property has been set out in the plaint. He submits that the

respondents-plaintiffs have purchased the suit property by means of an registered document and also placed reliance on the revenue record. As a dispute is being raised as regards the identity of a portion of the suit property and encroached portion, the appointment of a Commissioner was applied for. He submits that there is absolutely no jurisdictional error in making of the impugned order.

5. On perusal of the material on record as well as the impugned order, there is really no case made out to interfere with the impugned order. This is not a case of any jurisdictional error. The Court has exercised discretion based on the material on record and it cannot be said that the discretion has been exercised perversely. Merely because, this Court, acting as a Court in first instance might have taken some different view, is not a ground to interfere with the impugned order by exercising extra ordinary jurisdiction under Article 2227 of the Constitution of India.

6. This is clearly a case of exercise of discretion and taking into account the averments in the plaint, it cannot be said

that the discretion has been exercised perversely. The Court has appointed Taluka Inspector of Land Record ('T.I.L.R.' for short) as the Court Commissioner and that seems to be some reasonable approach.

7. Needless to add that both the parties will be given full opportunity by the trial Court to lodge their objections to the Court Commissioner's Report and such objections, if any, shall be taken into consideration by the learned trial Judge while disposing of the suit on merits.

8. Accordingly, there is no case made out to exercise extra ordinary jurisdiction under Article 227 of the Constitution of India. The petition is, therefore, dismissed. There shall be no order as to costs.

(M.S.SONAK, J.)