

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

3 WRIT PETITION NO.12385 OF 2017

SHAHAJADIBI BABUMIYAN SAYYAD AND OTHERS
VERSUS
THE UNION OF INDIA AND OTHERS

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Advocate for Petitioners : Mr. Tungar Hrishikesh V.
AGP for Respondents/State : Mr. P.S. Patil
Advocate for Respondent Nos.3 to 7 : Mr. S.S. Kazi
Advocate for Respondents : Mr. D.G. Nagode for R/1

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**CORAM : S.V. GANGAPURWALA &
MANGESH S. PATIL, JJ.**
DATE : 31.07.2019

PC. :-

Mr. Tungar the learned counsel for the petitioners submits that the petitioners had raised an objection under Section 3-H (4) of the National Highways Act. There is a dispute with regard to the title. The competent authority does not have jurisdiction to decide the title. The provisions of Section 3-H (4) of the National Highways Act mandates that the competent authority shall refer the dispute to the Court of Original Civil Jurisdiction. The filing of the earlier suit would not be of any avail. The issue of *res judicata* is an issue of fact the same is required to be proved. The learned counsel relies on the judgment of the Single Judge of this Court in Writ Petition No. 8206 of 2012 dated 06.11.2012.

2. The learned counsel submits that even otherwise in case of one branch this Court has already directed the issue to be referred to the Civil Court. In view of that the dispute in the present matter also requires to be referred to the Civil Court.

3. Mr. Kazi the learned counsel submits that the petitioners do not have any right, title and interest. Their claim has been determined by the Court of Competent Civil Jurisdiction in R.C.S. No. 159 of 1993 under judgment and decree dated 21.03.2001. The said judgment has become final. According to the learned counsel, no purpose would be served by again referring the dispute to the Civil Court.

4. We have considered the submissions. The filing of civil suit by the petitioner bearing R.C.S. No. 159 of 1993 in respect of the properties as detailed in the said judgment is a matter of record. The suit has been dismissed. All the petitioners herein are parties to the said suit. The petitioners would be bound by the judgment delivered by the Court. The Court concluded that the petitioners are not entitled for partition nor the sale-deed could be cancelled. The respondents herein are claiming pursuant to the sale-deed that was the subject matter in the said suit.

5. Mere filing of a subsequent suit by the petitioner would be of no

avail. The reliance placed by the learned advocate for the petitioner in a judgment in Writ Petition No. 8206 of 2012 dated 06.11.2012 would not be of any avail to the petitioner in as much as the same was delivered while considering the provisions of Section 9-A of the Code of Civil Procedure, wherein it was observed to try the issue of *res judicata* evidence will have to be led as it is a mixed question of law and fact. The petitioners themselves were the plaintiff they had sought for cancellation of the sale-deed, so also partition and separate possession the said relief is negated by the Court, the said judgment has become final.

6. In view of the above though the issue has already been referred to the Civil Court, we do not find any *prima facie* case at this stage in favour of the petitioner for granting stay to the extent of withdrawal of the amount by the legitimate claimants.

7. Nonetheless, if the issue is already referred to the Civil Court, the Civil Court would decide the same and the withdrawal of the amount by the respondents would be subject to the decision in the Civil court. Writ petition is disposed of.

[MANGESH S. PATIL, J.]

[S.V. GANGAPURWALA, J.]