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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.823 OF 2019

Sulbha D.Bharadwaj

..Petitioner.

V/s.

Shrikant Bhagwat (since deceased) & Ors. ..Respondents.

Mr.Vishal Kanade i/b. Mr.Shashank Thatte for the petitioner.

Mr.Abhishek Pungliya for respondent Nos.1A,1B, 1C & 1D.

CORAM : N.J. JAMADAR, J.

DATE : SEPTEMBER 23, 2019

P.C. :-

Heard learned counsel for the petitioner and learned counsel for the respondents.

2. The petition assails an order dated September 7, 2018 passed by the learned District Judge-15, Pune on an application seeking appointment of Commissioner (Exhibit-21) in Civil Appeal No.118/2016, whereby the application came to be rejected.

3. The petitioner-appellant has sought appointment of Court Commissioner by making averments to the effect that the respondents have violated the restraint order passed by

this Court in Civil Application No.4851 of 2008 in First Appeal No.1930 of 2008. It was averred that the respondents have not only carried out new construction and changed the nature of the suit property, but have also created third party interest therein.

4. The order passed by this Court on November 18, 2008 reads as under :-

"1. Heard both sides. The dispute is in respect of two Wills executed by the deceased mother of the applicant and the respondent, Mandakini, who expired on 23/1/1996. She has left certain properties and dispute is in respect of the said properties in view of the two wills executed by the deceased. This is an said application to protect the said properties till the final disposal of the appeal. If during the pendency of the present appeal the properties are alienated the appeal will become infructuous. Therefore, order in terms of prayer clause (a). Application stands disposed of."

The prayer clause (a) reads as under :-

"(a) That pending the hearing and final disposal of the present First Appeal, by an Order of injunction of this Hon'ble Court, the opponent his agents, servants and/or persons claiming through him be restrained from transferring and/or alienating and/or creating any third party right of any nature in respect of the suit properties

and also from carrying out any work of construction on the suit properties or changing the nature of the suit properties in any manner. "

5. In the aforesaid backdrop, perused the impugned order. The learned District Judge was persuaded to reject the application by assigning a solitary reason that the Court Commissioner cannot be appointed for collection of evidence. In fact, the learned District Judge has indicated the factors which weighed with him to reject the application in para 5 of the impugned order, which reads thus:-

"After conscious hearing of both sides, it appears that, no any new construction has been carried out by the Respondents. The Law is well settled that, Court Commissioner cannot be appointed for the collection of evidence. Thus, I do not find any merit in the contention of the appellant...."

6. Evidently, this Court has specifically restrained the respondents from carrying out new construction or changing the nature of the suit properties or from creating any third party rights in the suit property. In this backdrop, the learned District Judge ought to have considered the assertions on behalf of the appellant that there has been deliberate violation of the order passed by this Court. Whether to appoint a Court

Commissioner or not to verify the said aspect is an altogether different matter. However, the learned District Judge ought to have considered the application from the perspective of allegations of breach of orders passed by this Court.

7. In the aforesaid view of the matter, without going into the merits of the question of appointment of Court Commissioner, it would be in the interest of justice to remit the application (Exhibit-21) for afresh adjudication by the learned District Judge.

8. At this stage, learned counsel for the respondents canvassed that the appellant has been making efforts to delay the disposal of the appeal and thus time limit be fixed for deciding the application. The submission seems reasonable.

9. Hence the following order :-

- a) The petition stands allowed;
- b) The impugned order dated September 7, 2018 below application (Exhibit-21), for appointment of Court Commissioner in Civil Appeal No.118/ 2016 passed by the learned District Judge, is quashed and set aside and the application (Exhibit-21) stands remitted to the learned District Judge, Pune for adjudication afresh;
- c) The learned District Judge shall deal with the application

afresh and decide the same in accordance with law after providing opportunity of hearing to all concerned parties;

- d) The learned District Judge shall make an endeavour to decide the application as expeditiously as possible and in any case within a period of six weeks from the date of communication of this order;
- e) It is hereby made clear that this court has not gone into the merits of the matter and all contentions of the parties, on merits, are expressly kept open;
- f) All concerned to act on an authenticated copy of this order.

(N.J. JAMADAR, J.)