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

**CIVIL APPLICATION NO.8847 OF 2017
IN
SECOND APPEAL NO. 51 OF 2017**

Ashok s/o Vishwanath Dange,
Age: 55 years, Occ: Agri.,
R/o. Ardhapur, Tq. Ardhapur,
Dist. Nanded.

..APPLICANT

VERSUS

1. Govind s/o Vishwanath Dange,
Age: 57 years, Occ: Agri.,
R/o. Ardhapur, Tq. Ardhapur,
Dist. Nanded, at present
Sharadanagar, Nanded,
Tq. & Dist. Nanded.

2. Chandrakant s/o Vishwanath Dange,
Age: 64 years, Occ: Agri.,
R/o. Ardhapur, Tq. Ardhapur,
Dist. Nanded.

..RESPONDENTS

Mr S.S. Deshmukh (Patnoorkar), Advocate for
applicant;

Mr D.Y. Nandedkar, Advocate for respondents

CORAM : N.W. SAMBRE, J.

DATE : 31st JULY, 2017

ORAL ORDER :

While hearing the application for
injunction before the lower appellate Court,

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parties to the appeal consented for appointment of Court Commissioner, whose report is at Exhibit-24. The said report was considered by the lower appellate Court only for the purpose of deciding injunction application.

2. The said report is sought to be relied upon while hearing present appeal and as such, the application under order 41 Rule 27 of the Code of Civil Procedure is taken out by the defendant.

3. The application is opposed by the respondents-plaintiffs on the ground that no convincing explanation is coming forward from the appellant-defendant for not taking out such steps during hearing of the first appeal. According to them, application is moved by way of afterthought for collection of evidence. As such, same be rejected.

4. Considered submissions. In my opinion, the application needs to be allowed in terms of

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prayer clause (B), directing the parties to appear before learned Civil Judge, Junior Division, Ardhapur on 4th September, 2017 for recording evidence on Exhibit-24 after examining the Court Commissioner, who gave said report. The reason for passing such order is the Court Commissioner was appointed by consent of parties and his report was called may be for deciding application for injunction. Once such document is part of the record of the lower appellate Court, in my opinion, there is every right in applicant to invoke the provisions of Order 41 Rule 27 of the Code of Civil Procedure at the stage of hearing of second appeal.

5. One cannot lost sight of factual matrix i.e. real brothers are fighting *inter-se* claiming right to fetch water from common well since 2002.

6. As a consequences, the entire record from this Court be sent to the learned Civil Judge, Junior Division, Ardhapur, who shall record the evidence of Court Commissioner on Exhibit-24 report

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submitted by him during the hearing of appeal and injunction application before learned District Judge. Such recording of hearing and his finding thereon be forwarded to this Court within three months from the date of recording of evidence. With the above observations, civil application stands allowed.

Stand over to 13th November, 2017.

(N.W. SAMBRE, J.)

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