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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 542 OF 2017

IN

APPEAL FROM ORDER NO. 419 OF 2017

Bhagwan Nivrutti Khade ...Applicant

Versus

Baburao Laxman Sankhe, deceased through LRs ...Respondents
Bharati Baburao Sankhe & Ors

AND

CIVIL APPLICATION NO. 543 OF 2017

IN

APPEAL FROM ORDER NO. 420 OF 2017

Namdeo Bhau Mohite ...Appellant

Versus

Baburao Laxman Sankhe, deceased through LRs ...Respondents
Bharati Baburao Sankhe & Ors

AND

CIVIL APPLICATION NO. 544 OF 2017

IN

APPEAL FROM ORDER NO. 421 OF 2017

Motilal Prasad Choudhari ...Appellant

Versus

Baburao Laxman Sankhe, deceased through LRs ...Respondents
Bharati Baburao Sankhe & Ors

Ms Neeta Karnik, for the Appellant.
Mr VA Gangal, for the Respondent.

CORAM: G.S. PATEL, J
DATED: 13th July 2017

PC:-

1. The Appeals are directed against a Judgment dated 10th August 2016 of the District Judge Palghar. The present Appeals are brought under Order 43 of the Code of Civil Procedure, 1908. Specifically they are said to fall under Order 43 Rule 1(u), which is referable to Order 41 Rule 23 and Rule 23-A. This is because the District Judge has reversed the decision of the Court below dismissing the Plaintiffs' suit for declaration and possession and remanded the matter for re-trial.

2. Ms Karnik points out that the fundamental difficulty with the District Judge's order is in paragraph 14 where on finding that the evidence of the District Inspector of Land Records, PW2, was unreliable, the District Judge proceeded to remand the matter for further local investigation and adjudication *de novo*. Her submission is that the attempt was to continually build up more and more evidence of alleged encroachments by her clients, the original Defendants.

3. There is ample merit to the submission that *prima facie* this approach in appeal was unsound. I have admitted the Appeals. The nature of the appellate order is to direct the learned Civil Judge Junior Division to appoint a Commissioner, obtain a report, re-

appreciate the evidence and return a finding. The learned Civil Judge Junior Division has been asked to decide — more accurately decide afresh — the suit within nine months. *Prima facie* it does not appear that this was a permissible course of action given the frame of the suit, the evidence that was before the Trial Court, and which fell for consideration before the Appeal Court.

4. Hence, there will be an order in terms of prayer clause (a) of each Civil Application. Specifically, the learned Civil Judge Junior Division is not to proceed with RCS Nos. 100/1992, 104/1992 and 107/1992. All further proceedings in those suits are stayed. No fresh survey or joint survey is to be carried out.

5. All three Civil Applications are disposed of in these terms with no order as to costs.

(G. S. PATEL, J)