

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1102 OF 2018

NIVRUTTI TUKARAM MUNDHE AND ANOTHER
VERSUS
PADMABAI PREMRAJ LUNAWAT AND OTHERS

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Advocate for Petitioners : Shri Tungar H.V.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: January 30, 2018
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PER COURT :-

1. This matter was heard at length yesterday and today as well. Reliance is placed upon the judgment of this Court in the matter of Chandramani Marotrao Pantavne Vs. Smt. Shashikala Brijlal Bisen [2016 (3) All M.R. 139], to support the contention of the petitioners that a Court Commissioner can be appointed while hearing a First Appeal as well as the Second Appeal.

2. The petitioners are original defendant Nos.3 and 4 in RCS No.331 of 2005, which was decreed by the judgment of the trial Court dated 7.9.2011. RCA No. 103 of 2011 is pending before the appellate Court. Grievance as against the impugned order dated 21.12.2017 is that the appellate Court has rejected application Exhibit 24, filed by the appellants seeking appointment of a Court Commissioner.

3. The record reveals that one of the important grounds for appeal raised by the petitioners herein is that the suit property as described by the plaintiff was not in conformity with the Surveyor's report and as such, the suit property cannot be properly identified or described. The cross-examination of the Surveyor has added further confusion and therefore, the trial Court could not have decreed the suit when the suit property itself was not properly identified. This ground raised by the petitioners is in support of their contention that the judgment and decree of the trial Court deserves to be quashed and set aside.

4. It is not disputed that these petitioners did not seek appointment of a Court Commissioner before the trial Court as well as for seven years during the pendency of the appeal before the appellate Court. When the matter is at the stage of final arguments, Exhibit 24 has been filed seeking appointment of a Court Commissioner.

5. In my view, the ground for appeal raised by these petitioners is that the suit property, if compared with the description in the plaint, would indicate that the plaintiff has putforth a wrong description. Ground Nos.10 and 12 in the appeal are putforth by

these petitioners, praying for the quashing of the judgment and decree for the reason that the trial Court could not have decreed the suit when the property itself was erroneously identified by the plaintiff and the cross-examination of the Surveyor indicates that there is no identification of the plot with regard to which the plaintiff was seeking relief of injunction.

6. In this factual background, seeking appointment of a Court Commissioner, in my view, was rightly refused by the appellate Court.

7. Further contention of the petitioners is that the appellate Court would now refrain from going into ground Nos.10 to 13 as it had rejected Exhibit 24. This apprehension of the petitioner is ill-founded since the petitioners have invited an order from the appellate Court only to the extent of the application Exhibit 24. Observations of the appellate Court would, therefore, be restricted only to the prayer made in Exhibit 24.

8. Considering the above, this petition is disposed off with the observation that the appellate Court shall decide RCA No.103 of 2011 as expeditiously as possible and in any case on/or before the 31.5.2018 keeping in view that the appeal is pending for seven

years.

9. Needless to state, the appellate Court would consider all the grounds raised by these petitioners in the appeal on their own merits, in the light of the record and proceedings in RCS No.331 of 2005 and the observations made in the impugned order dated 21.12.2017, below Exhibit 24 shall not influence the appellate Court.

(RAVINDRA V. GHUGE, J.)

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