

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

SECOND APPEAL NO. 581 OF 2017

Khushal s/o Ganpati Karamunge
& Anr.

... Appellants.

Versus

Parashram s/o Wamanrao Joshi
& Anr.

... Respondents.

....

Mr.A.S.Kale, Advocate for the Appellants.

....

CORAM : V.L. ACHLIYA, J.

DATED : 3rd May, 2018

PER COURT:-

1. The appellants/original defendants have preferred this Second Appeal challenging the decision of trial Court and confirmed in Appeal to dismiss the counter claim of appellants/original defendants.

2. The counter claim made by the appellants/defendants in the suit seeking injunction filed by the respondents came to be dismissed. As against the dismissal of counter claim and suit being decreed in favour of the respondent – plaintiff, the appellants preferred appeal before District Court Nanded. The

appellate court dismissed the appeal and maintained the decree passed by trial Court. Being aggrieved, appellants have preferred this appeal.

3. Heard the learned counsel for the appellants and perused the impugned judgment and order passed by the trial court as well as the appellate court.

4. In nutshell, it is the contention of the learned counsel for the appellants that the appellate court has committed error in relying upon the report of the Court Commissioner in passing the decree in favour of the plaintiffs and as against the defendants. It is contended that though the Commissioner was appointed on joint request of plaintiffs and defendants, the report of Commissioner should not have been admitted in evidence and marked as exhibit in absence of examination of commissioner. It is contended that the defendants have not accepted the report, nor given consent to admit the same in evidence. It is contended that there is substantial question of law involved in this Appeal, whether the Courts below are justified in admitting the report of the Commissioner in evidence.

5. On due consideration of the submission advanced in the light of the overall facts of the case, I am of the view no substantial question of law is involved in the case to entertain the Appeal. It is admitted position that the Court Commissioner was appointed on the joint request made by the plaintiffs as well

as defendants. The suit is decreed in favour of the plaintiffs and as against the defendants by dismissing counter claim of appellants by considering the overall evidence adduced in the case not solely on the basis of report of commissioner. While deciding the case the trial court has decided the case on the basis of the pleadings of the plaintiffs as well as defendants and evidence adduced in the case. The report of the Commissioner has been considered as a report of spot inspection and used for the purpose of assessing the evidence led by the plaintiffs as well as defendants. It is specifically observed in the impugned judgment that the report has been admitted in evidence with consent of the plaintiffs as well as the defendants. It is also not disputed by the learned counsel that during the entire proceeding defendant has not raised objection to the report of the Commissioner. In this view, the appeal preferred is devoid of merit. No substantial question of law is involved in the Appeal to entertain the appeal. I am therefore not inclined to entertain the Appeal. Accordingly the Appeal is dismissed.

6. In view of dismissal of the Appeal, the pending Civil Application, if any, also stands disposed of in terms of disposal of appeal.

(V.L. ACHLIYA)
JUDGE