

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

CIVIL APPLICATION NO.8256 OF 2019
IN
WRIT PETITION NO.8065 OF 2017

WITH
WRIT PETITION NO.8065 OF 2017

DIPTIBEN JITENDRAKUMAR PATEL
VERSUS
RAMESH SHANKAR PATIL AND ANOTHER

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Advocate for the applicant/ petitioner : Shri Tripathi Sushilkumar H.
Advocate for respondents 1 and 2 : Shri Shah J.R.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 06th September, 2019

Per Court:

1 I have heard the learned advocates for the respective sides
and have considered the strong objection raised by the respondents.

2 For the reasons set out in the Civil Application and
considering the case put forth in the writ petition, this Civil Application is
allowed. Delay of 637 days caused in seeking restoration of the writ
petition is condoned without imposing costs as the applicant/ petitioner
has already deposited Rs.10,000/- in this court in the writ petition.

3 The writ petition stands restored forthwith.

4 By the consent of the parties, I have heard their submissions

on the writ petition. The learned advocate for the respondents submits that though the impugned order refusing to appoint the court commissioner in Regular Civil Appeal No.35/2012 is in tune with the crystallized position of law, the said application could have been considered along with the main appeal. As the petitioner/ appellant insisted that the application exhibit 26 seeking appointment of the court commissioner should be decided urgently, that the appellate court passed the order assigning reasons for rejecting the application.

5 The learned advocate for the petitioner has drawn my attention to the grounds formulated in the memo of the petition. He vehemently submits that the Taluka Inspector of Land Records (TILR) could be appointed as a court commissioner. In the alternative, he submits that the application exhibit 26 could be restored and be heard along with the main appeal.

6 I find from the record that the petitioner/ appellant had filed an application seeking appointment of the TILR as a court commissioner before the Trial Court. The measurement was earlier carried out by the TILR and the map was placed on record. The rejection of the request for the second appointment of the court commissioner, though the measurement and map submitted by the TILR was on record, appears to be a view taken by the appellate court, which is consistent with the law.

7 Moreover, the Honourable Supreme Court has concluded that

leading additional evidence or seeking permission to lead additional evidence under Order 41 Rule 27 of the Code of Civil Procedure can be considered by the appellate court while deciding the main appeal in the following judgments :-

- (a) *Malayalam Plantations Limited vs. State of Kerala and another, AIR 2011 SC 559 : (2010) 13 SCC 487.*
- (b) *Union of India vs. Ibrahim Uddin and another, [(2012) 8 SCC 148].*
- (c) *A. Andisamy Chettiar vs. A. Subburaj Chettiar, [AIR 2016 SC 79 : (2015) 17 SCC 713].*
- (d) *Jagdish Prasad Patel vs. Shivnath, (2019) 6 SCC 82.*

8 In view of the above, I do not find that the impugned order could be faulted at the stage at which it was passed. However, the application exhibit 26 could be decided by the appellate court along with the main appeal. It is made clear that though this court is setting aside the impugned order dated 29.03.2017, it is only on account of such an application deserving consideration along with the main appeal when it is heard finally.

9 As such, this writ petition is partly allowed. The impugned order dated 29.03.2017 is set aside and the application exhibit 26 is restored in Regular Civil Appeal No.35/2012. It is made clear that the

appellate court would be at liberty to draw its own conclusions, while independently considering exhibit 26, if it finds that the measurement and map submitted by the TILR were already on record in the suit and a measurement was not required for the second time in the appeal.

10 The learned advocate for the respondents submits that the amount deposited by the petitioner could be donated for a public cause. As such, the Registry of this Court shall transfer the said amount of Rs.10,000/- (Rupees Ten Thousand) along with accrued interest, if any, to the orphanage home **“Shantivan”, Arvi, Tq.Shirur Kasar, District Beed** i.e. in the name of **“Bhavani Vidhyarthi Kalyan Pratishthan, Arvi”** by way of electronic transfer **(State Bank of India, Branch Shirur (Kasar), Account No.33446000963, IFSC Code : SBIN0005995)** and shall report compliance.