

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

WRIT PETITION NO. 9571 OF 2019

**SAVELRAM RAMCHANDRA GONDKAR AND OTHERS
VERSUS
DASHRATH TRIMBAK GONDKAR AND OTHERS**

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Advocate for the Petitioners : Shri A. S. Gandhi
Advocate for the Respondents : Shri S. S. Kulkarni

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 2nd AUGUST, 2019.

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PER COURT :

1. I have heard the learned Advocates for the respective sides, who are litigating in RCA No. 33/2019. Issue is as regards appointment of a Court Commissioner in the pending appeal and the applicability of Order XLI Rule 27 of the CPC.

2. The Honourable Apex Court has crystalized the position in *(1) Malayalam Plantations Limited Vs. State of Kerala and another [(2010) 13 SCC 487] = [AIR 2011 SC 559]. (2) Union of India Vs. Ibrahim Uddin and another [(2012) 8 SCC 148] = [2013 AIR SCW 2572]. (3) A. Andisamy Chettiar Vs. A. Subburaj Chettiar [(2015) 17 SCC 713] and*

(4) Jagdish Prasad Patel (Dead) through LR's & another Vs. Shivnath & others [(2019) 6 SCC 82]

3. The appellate Court has appointed a Court Commissioner by the impugned order dated 10/07/2019.

4. The learned Advocate for the respondent has strenuously opposed this petition and places reliance upon the judgment delivered by the Honourable Apex Court in the matters of ***Uttardi Mutt Vs. Raghavendra Swamy Mutt, AIR 2018 SC 4796*** and ***Ram Lal and others Vs. Salig Ram and others, 2019 SCC OnLine SC 121.***

5. Considering the law crystalized, though a court commissioner can be appointed even in appeal proceedings as is held in the matter of *Uttaradi (supra)* and *Ramlal (supra)*, the Honourable Apex Court has laid down the law that such an application can be entertained while deciding the appeal finally.

6. It also cannot be ignored that in a Regular Civil Appeal,

if a court commissioner is to be appointed, the Appellate Court has to consider the entire R & P of the suit and has to find out as to whether a court commissioner needs to be appointed in the light of the oral and documentary evidence available on record. Appointment of a court commissioner is neither a right of a party, nor a formality. The court commissioner's assistance can be derived by the Court only if it is convinced that information by the measurement of the properties and fixing of boundaries would assist it.

7. In view of the above, this petition is partly allowed. The impugned order dated 10/07/2019 is quashed and set aside. The application Exhibit 10 shall stand restored to the file of the Appellate Court in Regular Civil Appeal No. 33/2019 and which would be considered alongwith the appeal. Needless to state, while dealing with the appeal and Exhibit 10, the Appellate Court would keep the observations set out in the forgoing paragraphs and the judgments cited, in focus.

(RAVINDRA V. GHUGE, J.)

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