

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

WRIT PETITION NO.11640 OF 2019

**BABASAHEB RAMNATH PATHADE AND OTHERS
VERSUS
BHANUDAS MADHAV SHIRSATH AND OTHERS**

...
Advocate for the Petitioners : Shri S. V. Dixit
Advocate for Respondent No. 1 : Shri S. R. Andhale

...

CORAM : RAVINDRA V. GHUGE, J.

DATED : 26th SEPTEMBER, 2019.

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PER COURT :

1. The petitioners, original defendants in Regular Civil Suit No. 498/2012, are aggrieved by the order dated 31/07/2019 passed by the Appellate Court, by which, application Exhibit 19 filed by the original plaintiff / Appellant in Regular Civil Appeal No. 5/2017, seeking appointment of a court commissioner, has been allowed.

2. I have considered the strenuous submissions of the learned Advocates for the respective sides.

3. Contesting respondent No. 1 has filed an affidavit in

reply. It is stated that pursuant to the order of the Appellate Court, the fees for appointment of a court commissioner had been deposited by the plaintiff. The receipt is also placed on record. The 7/12 extract is also placed on record.

4. The learned Advocate for the petitioners submits that the record will reveal that this plaintiff who had filed the suit for injunction, had admitted in cross examination before the Trial Court that he was not in possession. The cross-examination was before the Trial Court and considering the same, the suit was dismissed.

5. It requires no discussion that the appointment of a court commissioner would lead to bringing certain aspects before the Court in the form of an additional evidence. Any party aggrieved by the report of the commissioner is at liberty to examine the court commissioner and therefore the issue of leading evidence arises.

6. The Honourable Apex Court has settled the issue in the following four judgments that an application for seeking liberty

to bring a new or more evidence on record in a Regular Civil Appeal, would be entertainable under Order XLI Rule 27 of the Code of Civil Procedure and any such an application has to be considered alongwith the main appeal :-

(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].

7. Considering the above, I find that the ends of justice would be met by setting aside the impugned order and by restoring Exhibit 19 to the file of RCA No. 5/2017 to be considered alongwith the Appeal at the final stage.

8. In view of the above, this petition is partly allowed. The impugned order dated 31/07/2019 is quashed and set aside.

9. Exhibit 19 shall stand restored to the file before the Appellate Court and the said application would be considered by the Appellate Court while finally deciding RCA No.5/2017. Since the Appeal is lodged on 02/01/2017 and is more than 2½ years old, the appellant shall submit the private paper book, if not already submitted, within six weeks from today. If the matter is already at the stage of final hearing, the Appellate Court would record the final oral submissions of the litigating sides and would endeavour to decide RCA No. 5/2017 as expeditiously as possible and in any case on or before 31/01/2020.

(RAVINDRA V. GHUGE, J.)

shp/-