

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10654 OF 2019

Mrs. Hoorbano Sagir Sayed and ors.	...Petitioners
vs.	
Shri. Sayed Zahoor Noor	...Respondents

Mr. Manish Diwadkar with Pooja Rane for the Petitioners.
Mr. A.G.Kalawadia for the Respondents.

CORAM : REVATI MOHITE DERE, J.
DATE : 29th January, 2020

PC:

1. Heard learned counsel for the parties.

2. By this petition, the petitioners have impugned the order dated 23.7.2019 passed by the Ad-hoc Judge, City Civil Court, Dindoshi, Mumbai below Exh. 24 in S.C. Suit No. 2696 of 2007, by which the petitioners' application for exhibiting the Court Commissioner's report dated 24.7.2007 under Order XXVI Rule 10 of the C.P.C. is rejected.

3. Learned counsel for the petitioners (original plaintiffs) submits that, the learned Judge ought to have permitted the petitioners to exhibit the document i. e. Court Commissioner's report while recording the petitioners' evidence. He submitted that some of the observations made in the impugned

order are factually incorrect. He submits that although the cross examination of the plaintiffs' witness P.W.1 was over, the plaintiffs have not closed their evidence. Learned counsel relied on the Judgment in the case of *State of Kerala vs. Kottammal Mammeeriyakutty and others reported in AIR 1985 Kerala 109*.

4. Learned counsel for the respondents opposed the petition. He submitted that no interference is warranted in the impugned order.

5. Perused the papers including the impugned order dated 23.7.2019 passed by the Trial Court under Order XXVI, Rule 10 (2) of the C.P.C. Order XXVI Rule 10(2), with which the petition is concerned reads thus:

“10-Procedure of Commissioner-(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and depositions to be evidence in suit- The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has

made the investigation.”

6. A perusal of the said relevant rule shows that the Commissioner's report and the evidence taken by him shall be the evidence in the suit and shall form part of the record. As per the said rule either the Court or with the permission of the Court any of the parties are permitted to examine the Commissioner personally in open Court touching any of the matters mentioned in the report with respect to the investigation made by him.

7. According to the learned counsel for the petitioners, the Commissioner's report ought to be marked as exhibit. This argument is completely misplaced, inasmuch as, it is always permissible under Order XXVI Rule 10(2) to examine the Court Commissioner where report is on record. Hence, no infirmity can be found in the impugned order.

8. Accordingly, petition is dismissed.

9. Needless to mention that, it is always open to the petitioners to file an appropriate application under Order XXVI Rule 10(2) for examining the Court Commissioner as its witness. If such an application is filed, the learned Judge to consider the same on its own merits and in accordance with law.

10. The petition is disposed of in the aforesaid terms.
11. All parties to act on an authenticated copy of this order.

REVATI MOHITE DERE, J.