

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

904 WRIT PETITION NO.5100 OF 2021

BABUBHAI MOHAMMAD SHAIKH ..PETITIONER
VERSUS
KALPNA DNYANDEO PAWAR AND OTHERS ..RESPONDENTS

...
Advocate for Petitioner : Mr. Chate Vitthal M.
AGP for Respondents: Mr. S.P. Tiwari
....

CORAM : SANDEEP K. SHINDE J.
DATE : 15TH JUNE, 2021

PER COURT :-

1. Heard.
2. This petition under Articles 226 and 227 of the Constitution of India, challenges the order of the trial Court *inter alia* refusing to exercise the powers under Order 26 Rule 9 of the Code of Civil Procedure i.e. appointment of the Court Commissioner, as sought by the petitioner-plaintiff in Regular Civil Suit No. 208 of 2013.
3. At the first place, the subject petition is not maintainable under Article 226 of the constitution of India, in view of the law laid down by the Hon'ble Apex Court in the case of *Radhey Shyam and Another Vs. Chhabi Nath and Others (2015) 5 SCC 423*. In paragraph 21 the apex Court has held thus ;

"21. Thus, it has been clearly laid down by this Court that an order of the civil court could be challenged under Article 227 and not under Article 226."

4. Thus, it has been clearly laid down, that the order of Civil Court could be challenged under Article 227 and not under Article 226.

5. Bearing in mind, the learned counsel for the applicant-appellant is directed to carry out the appropriate and consequential amendments.

6. It may be stated that the order under challenge is interlocutory in nature. Under Article 227 of the constitution of India, the orders of the Civil and Criminal Courts can be examined only in very exceptional cases, when manifest miscarriage of justice has been occasioned and such powers, are not to be exercised to correct a mistake of facts and of law. In consideration of the facts of the case, no obvious error was committed by the trial Court in exercise of jurisdiction and therefore, I am not inclined to entertain the petition. However, it is open to the petitioner- plaintiff, to make a grievance

against the impugned order in the appeal against the final judgment, which may be passed by the trial Court.

7. The petition is dismissed accordingly.

(SANDEEP K. SHINDE, J.)

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