

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

**WRIT PETITION NO.363 OF 2020**

Hirachand s/o Nensibhai Shah,  
Age: 79 years, Occ: Business,  
R/o. Vazirabad, Nanded.

... Petitioners

Versus

1) Hirachand s/o Nensibhai Shah,  
Age: 72 years, Occ: Business,  
R/o. Vazirabad, Nanded.

2) Laherchand s/o Nensibhai Shah,  
Age: 78 years, Occ: Business,  
R/o. Visavannagar, Nanded.

... Respondents

...

Advocate for Petitioner : Mr. Anil H. Kasliwal  
Advocate for Respondent No.1 : Mr. G. N. Chincholkar

...

**CORAM : NITIN B. SURYAWANSHI, J.**

**DATE : 31<sup>st</sup> JANUARY, 2022**

**ORAL JUDGMENT :**

1. Rule. Rule made returnable forthwith. Heard finally by the consent of the parties.

2. This petition is directed against the order passed below Exhibit-1, order dated 15-06-2019 passed below Exhibit-145 and order dated 20-11-2019 passed below Exhibit-160, in Regular Civil Suit No.381/2011, by the learned Civil Judge, Junior Division, Nanded.

3. The petitioner is the original defendant No.1. Respondent

No.1 is the original plaintiff and respondent No.2 is the original defendant No.2, who has expired. The plaintiff filed suit for partition and separate possession of the residential house claiming that the house in question is an ancestral property. The defendants appeared and resisted the claim on the ground that there was a partition and the house in question is divided in three shares. During the pendency of the suit, application Exhibit-122 was filed by the defendants seeking examination of witness Visanji Kunwarji Lodaya r/o Pune, on commission. The said application was allowed by the order dated 15-03-2018 and the Commission was made returnable on or before 31-03-2018. At the instance of the defendants, corrigendum was issued to the order passed below Exhibit-122, thereby correcting figure of Rs.1,000/- towards commission fees as Rs.5,000/-.

4. Thereafter, the defendants deposited the commission fees, however, at the instance of defendant No.1 – petitioner, on account of death of his wife, two weeks adjournment was sought by filing application below Exhibit-133. By the order dated 02-08-2018 passed below Exhibit-133, the trial Court granted opportunity to the defendant to conduct commission returnable on 21-08-2018, failing which the commission ordered would stand automatically vacated. The Court Commissioner thereafter filed pursis Exhibit-134, Exhibit-135 and

application Exhibit-142 and Exhibit-143, seeking extension of time to execute Court Commission. By order dated 24-10-2018 passed below Exhibit-143, the order for appointment of Court Commissioner was vacated by the trial Court. The defendants, thereafter, filed application Exhibit-145 under Order 47 Rule 1 of the Code of Civil Procedure, seeking review of the order dated 24-10-2018. This application was rejected by order dated 15-06-2019.

5. The petitioner – defendant No.1 thereafter filed application Exhibit-160, seeking appointment of commission for recording evidence of witness Visanji s/o Kunwarji Lodaya, r/o Pune, which was rejected by the impugned order dated 20-11-2019. Hence, the present writ petition.

6. I have heard the rival submissions of the learned advocate for petitioner and the learned advocate for respondent No.1.

7. It is not in dispute that the Commissioner was appointed for examining witness of the defendants namely Visanji s/o Kunwarji Lodaya, r/o Pune. On account of death of wife of the petitioner – defendant No.1, extension of time was granted to the Commissioner. As per the record, thereafter the Commissioner, from time to time, by filing pursis and applications sought extension of time, however, in view of the order passed below Exhibit-133 the trial Court rejected the said prayer

of the Commissioner and vacated the order of appointment of Commissioner.

8. It is not in dispute that the witness is more than 80 years old and he needs to be examined by appointing a Court Commissioner and the defendants cannot be blamed for non-compliance of the order passed by the trial Court, as the Commissioner has, from time to time, filed applications for extension of time. In that view of the matter, the trial Court ought to have favourably considered the applications of the petitioner – defendant No.1, seeking extension of time. The impugned order passed by the trial Court proceeds on the premise that the defendants failed to comply the order within stipulated time. The trial Court has erred in arriving at conclusion that the defendants failed to comply with the order within stipulated time, ignoring the fact that the Commissioner has sought time by filing pursis and applications. The impugned order, therefore, cannot be sustained.

9. The learned advocate for respondent No.1 vehemently opposed prayer of the petitioner contending that the petitioner was trying to prolong the matter and the suit is old. All the parties are above 70 to 75 years of age. In that view of the matter, the trial Court was justified in rejecting the applications filed by the petitioner. There is

substance in the contention of the learned advocate for respondent No.1 – plaintiff that the suit is old and since the parties are aged, it is necessary in the interest of justice to direct the trial Court to expedite the suit.

10. In the result, writ petition is allowed in terms of prayer clause 'B'. The impugned order passed below Exhibit-1, the order dated 15-06-2019 passed below Exhibit-145 and order dated 20-11-2019 passed below Exhibit-160, in Regular Civil Suit No.381/2011, by the learned Civil Judge, Junior Division, Nanded, are hereby quashed and set aside.

11. The application Exhibit-160 in Regular Civil Suit No.381/2011 is hereby allowed. The Commissioner be appointed to examine witness Visanji Kunwarji Lodaya, r/o Pune, within a period of two weeks from the date of receipt of writ of this order.

12. The Commissioner shall examine the said witness and submit report to the trial Court within a period of three weeks thereafter.

13. The trial Court shall endeavour to decide the suit within a period of six months from today.

14. Rule is made absolute in the above terms, with cost of Rs.10,000/- (Rupees Ten Thousand Only), to be paid by the petitioner – defendant No.1 to respondent No.1 – plaintiff, in the trial Court.

**(NITIN B. SURYAWANSHI, J.)**