

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1325 OF 2015

DASHRATH GENA VALHEKAR AND OTHERS
VERSUS
KALINDAR HAYATKHAN PATHAN AND ANOTHER

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Advocate for Petitioners : Shri Syed Masood Chand
Advocate for Respondents : Shri Bora S.S.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 18, 2015
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PER COURT :-

1. I have heard Shri Syed and Shri Bora, learned Advocates for the respective parties.
2. The petitioners are original defendants in RCS No.181 of 2013. Suit is preferred for seeking removal of encroachment and perpetual injunction. The petitioners have filed their Written Statement, along with a counter claim, claiming a right over 80 Ares land of the suit property and therefore, have sought injunction against the respondents / plaintiffs.
3. The plaintiffs have filed an affidavit in lieu of examination-in-chief and thus, recording of oral evidence has commenced.
4. The petitioners / defendants filed an application Exhibit 44, praying for an appointment of Court Commissioner under Order XXVI Rule 9 of the CPC which has been opposed by the respondents / plaintiffs. By the impugned order dated 27.8.2014, application Exhibit 44 has been rejected.

5. I have considered the submissions of the learned Advocates. Having gone through the petition paper book, it appears that the prayer made by the petitioners in Exhibit 44 is as regards the appointment of a Court Commissioner for finding out the truth in the face of the rival pleadings of the parties. The said application is in Marathi and which indicates that the Court Commissioner be appointed so as to collect such evidence, as would assist the Court, in deciding the controversy. It is not prayed in the application that the suit property be measured or that the boundaries be fixed and a report pursuant thereto be filed.

6. The trial Court has rejected the said application on the ground that the defendants cannot seek appointment of Court Commissioner for finding out as to who is in the actual possession of the suit property. The trial Court has in fact, observed that, *"Specifically for local inspection of boundaries, measurement, particular trees, barbed area, Court Commission is certainly required."* The trial Court has also noted that there are no disputes between the parties on the said points.

7. I do not find that the observations of the trial Court in the impugned order, in the light of the specific prayers made by the petitioners in application Exhibit 44, especially the last two lines on the first page and the first four lines on the second page of Exhibit 44, could be termed as being perverse or erroneous. Nevertheless, in the event, any of the litigating parties are desirous of moving an application for appointment of the Court

Commissioner for the fixing or measurement of the boundaries, in light of settled law, or for any similar cause the trial Court shall consider the said application on its own merits and without being influenced by its observations set out in the impugned order dated 27.8.2014, below Exhibit 44.

8. With the above observations, this petition is disposed of without causing interference in the impugned order.

(RAVINDRA V. GHUGE, J.)

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