

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

WRIT PETITION NO. 2761 OF 2017

SHIVDAS GANPATI KADAM AND OTHERS
VERSUS
SANTRAM KHANDU MORE

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Advocate for the Petitioners : Shri Manale Satish S.
Advocate for the Respondent : Shri A.A.Khande h/f Shri Sukale G.V.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 28th September, 2017

Per Court:

1 The Petitioners are aggrieved by the order dated 31.08.2016 rejecting application Exhibit-115 seeking appointment of a court commissioner under Order 26 Rule 9 of the Code of Civil Procedure. The Petitioners are further aggrieved by the order dated 24.10.2016 by which the evidence of the Petitioners/ Defendants has been closed.

2 I have considered the strenuous submissions of the learned Advocates for the respective sides and have gone through the petition paper book with their assistance.

3 Insofar as the order refusing the appointment of a court commissioner is concerned, the learned Advocate for the Respondent/ Plaintiff submits that the suit is for injunction simplicitor. No claim as

regards the encroachment or removal of encroachment or recovery of possession has been put forth by the Plaintiff. It is further submitted that the Defendants have not filed the counter claim and as such, the suit has to proceed on the prayers put forth by the Plaintiff. Unless there is a boundary dispute and the Trial Court comes to a conclusion that the boundaries need to be identified and fixed, the appointment of a court commissioner is without any purpose.

4 It is obvious that Exhibit-115 was not with regard to the joint measurement of the properties of the litigating sides and not for fixation of boundaries. The application preferred was for finding out the prevailing situation on the eastern side of Plot No.61 and the suit property admeasuring 33x33 feet. The Trial Court, in my view, has, therefore, rightly rejected application Exhibit-115 because it would have amounted to permitting the collection of evidence.

5 Nevertheless, if either of the litigating sides make an application for appointment of a court commissioner for joint measurement of the properties of the litigating sides or for fixation of boundaries, the Trial Court could consider the same on it's own merits.

6 Insofar as the closing of evidence of the Defendants is concerned, it is obvious that the Defendants have taken a long time for leading their evidence. Adjournments sought and time taken is evident from the Roznama and the observations of the Trial Court.

7 Nevertheless, it is always an endeavour of the court to ensure that ends of justice are met and an opportunity to lead evidence is not taken away. If laches are attributable to the conduct of any of the parties, appropriate costs could be imposed.

8 In the light of the above, this Writ Petition is partly allowed. The order dated 24.10.2016 closing evidence of those Defendants, who have still not stepped into the witness box, is set aside and liberty is granted to those Defendants, who have not led evidence, to do so expeditiously subject to the Defendants jointly depositing Rs.15,000/- before the Trial Court in RCS No.468/2010 on or before 13.10.2017.

9 The learned Advocate for the Respondent/ Plaintiff graciously submits, on instructions, that out of Rs.15,000/-, Rs.5000/- may be donated to the Advocates Association's Bar Library, High Court, Aurangabad and Rs.10,000/- may be deposited before the Trial Court.

10 As such, the Petitioners/ Defendants shall deposit Rs.5000/- (Rupees Five Thousand) with the Advocates Association's Bar Library, High Court, Aurangabad and Rs.10,000/- (Rupees Ten Thousand) before the Trial Court on or before 13.10.2017, failing which this order shall stand recalled and the order dated 24.10.2016 shall then stand restored.

11 After costs of Rs.10,000/-, as directed above, are deposited before the Trial Court, the Respondent/ Plaintiff will be at liberty to withdraw the said amount without conditions.

12 In the event, the Defendants resort to delaying tactics and seek adjournments on unreasonable and trivial grounds, the Trial Court would be at liberty to reject the applications for adjournments and/or impose costs.

kps

(RAVINDRA V. GHUGE, J.)