

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

WRIT PETITION NO. 510 OF 2018

VIJAYA AMRUTRAO BORSE THROUGH GPA HOLDER AMRUTRAO
PANDURANG BORSE
VERSUS
PRAKASH SUKHDEO BORSE

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Advocate for the Petitioner : Shri Tambe Rahul A.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 17th January, 2018

Per Court:

1 The Petitioner/ original Plaintiff is aggrieved by the order dated 04.01.2018 passed by the Trial Court, by which, the application Exhibit-82 seeking appointment of a Court Commissioner filed by the Plaintiff has been rejected.

2 The learned Advocate for the Petitioner has strenuously criticized the impugned order. He has specifically drawn my attention to an earlier order passed by this Court on 16.06.2017 in Civil Application Nos.109 and 110 of 2016. It is contended that after the additional documents were filed by the Petitioner, the application Exhibit-82 was moved for seeking a joint measurement of the properties of the Plaintiff and the Defendant. By the impugned order, the Trial Court has rejected

the application without application of mind. He submits that if the boundary marks are fixed, it would assist the parties as well as the Trial Court in proper adjudication of the dispute. It is pleaded by the Defendant that the boundary marks and boundaries are disputed.

3 I find from the record and in the light of the submissions of the learned Advocate for the Petitioner that the Petitioner has specifically admitted the boundaries and boundary marks in the plaint. The suit has been filed for seeking injunction and declaration against the Defendant. In view of the suit having been remanded to the Trial Court to be decided afresh, the parties are now expected to lead the evidence. When the Plaintiff has admitted the boundaries and when the Defendant contends that the boundaries are disputed, it would be the Defendant, who would have to prove his case by leading evidence. The Defendant is yet to pray for a joint measurement and as such, the contentions put forth in the Written Statement will have to be established by the Defendant himself.

4 It is settled law that the joint measurement of the boundaries would become necessary if the boundaries are disputed and the boundary marks are not found and/or disputed. The Trial Court has held, in the impugned order, that after the parties lead their evidence, if it so appears that local inspection would become necessary for clearing any doubt, the litigating sides may request for a joint measurement.

5 Considering the above, I do not find that the impugned order

could be termed as being perverse or erroneous keeping in view the contentions of the Plaintiff and in the light of Section 75(b) r/w Order 26 Rule 9 of the Code of Civil Procedure. After the parties lead their oral evidence and in the event of any party being desirous of a joint measurement, he could move an application in the light of the settled law and the Trial Court would then consider the said application on its own merits.

6 As such, this Writ Petition being devoid of any merit is, therefore, dismissed.

kps

(RAVINDRA V. GHUGE, J.)