

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

921 WRIT PETITION NO. 11319 OF 2017

DASHRATH PRALHAD GUMPHEKAR AND OTHERS
VERSUS
GANPAT RAMCHANDRA KESBHAT AND ANOTHER

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Advocate for Petitioners : Mr. Ajit B. Kadethankar

Advocate for Respondents : Mr. Yuvraj V. Kakde

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CORAM : V. K. JADHAV, J.

DATED : 22nd MARCH, 2018

PER COURT:-

1. Heard finally with consent at admission stage.
2. The petitioners/original defendants have challenged the order passed by the trial court dated 17.06.2017 below exhibit 17 in R.C.S. No. 235 of 2016.
3. The respondents/original plaintiffs have instituted R.C.S. No. 235 of 2016 simpliciter for a decree of perpetual injunction. The petitioners/original defendants have strongly resisted the suit by filing written statement. Pending suit, the petitioners

have filed application exhibit 17 under Order 26 Rule 9 of the Code of Civil Procedure, 1908 for appointment of Court Commissioner for measurement of the suit land and the land owned and possessed by the petitioners/defendants and also for fixation of boundaries. The respondents/original plaintiffs have also given no objection to the said application. However, the trial court has rejected the application by the impugned order dated 17.06.2017. Hence this Writ Petition.

4. The learned counsel for the petitioners/original defendants submits that, admittedly, the land gat no. 283 owned and possessed by the petitioners/defendants is adjacent to the suit land. Further, the said land gat no. 283 is on higher level as compared to the suit land. The learned counsel submits that it has been specifically contended in the additional facts of the written statement that some 25 years back, the Government had completed the work of *nala banding* and at that time, towards the southern side of the land of the petitioners/defendants, prepared a trench since, due to the rain water, the soil from the land of the petitioners/defendants swayed in the suit land. The petitioners/defendants have specifically pleaded in the

additional facts of the written statement that even though the said trench is situated within the four boundaries of the land gat no. 283 owned and possessed by the petitioners/defendants, the respondents/plaintiffs have raised a dispute by contending that the said trench is situated within the suit land. The learned counsel submits that the entire dispute revolves around the situation of the trench and if both the lands are measured through the D.I.L.R. and if the boundaries are fixed, the dispute can be resolved finally. However, the trial court has rejected the application exhibit 17 on the ground that a Court Commissioner cannot be appointed for collection of evidence and for directing him to show the extent of possession of the parties. The learned counsel submits that the entire approach of the trial court is erroneous.

5. The learned counsel for the petitioners, in order to substantiate his contention, placed reliance in the following two cases:

1. *Kolhapuri Bandu Lakade vs Yallappa Chinappa Lakade, Decd., Through Pooja @ Poojari Y. Lakade & ors*, reported in *2011 (3) Mh.L.J. 348* and

2. *Shyam Janardan Chaoudary vs Asha Ramdas Katkar (Smt.) & anr.*, reported in **2014 (5) Mh.L.J. 770**.

6. I have also heard the learned counsel for the respondents/original plaintiffs.

7. On careful perusal of the plaint, I do not find that any reference has been given to the location of the trench in the suit land. The respondents/plaintiffs have instituted the suit simpliciter for a decree of perpetual injunction. It further appears that though the petitioners/original defendants have mentioned in detail the additional facts in the written statement, no counter claim has been submitted by them. It appears from the pleadings that there are no allegations about encroachment nor there is any boundary dispute as such. In a suit simpliciter for a decree of perpetual injunction, evidence cannot be collected by appointing a Court Commissioner. It is for the respondents/ plaintiffs to prove their lawful possession over the suit land and failing therein, the suit would be dismissed. In such event, there is no reason for the petitioners/defendants to file an application for

appointment of Court Commissioner. Even if there is no pleading by the respondents/plaintiffs about location of the trench, assuming that there is dispute on account of location of the said trench, the measurement by the D.I.L.R. would not help the parties to resolve their dispute. In any way, I do not find any fault in the impugned order passed by the trial court. There is no substance in the Writ Petition. The Writ Petition is hereby dismissed. No costs.

(V. K. JADHAV, J.)

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