

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.14981 OF 2019

SANTOSHKUMAR GHISULAL JAJU AND OTHERS

VERSUS

DATTATRAYA GAHININATH LATURKAR

...

Advocate for Petitioners : Mr.Vinod Y. Bhide

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CORAM : RAVINDRA V. GHUGE, J.

DATE : 12th December, 2019.

PER COURT :-

1. The petitioners, original plaintiffs in Regular Civil Suit No.408/2011, are aggrieved by the order dated 19/09/2019 by which, application Exhibit-104 has been rejected. The petitioners are also aggrieved by the orders dated 06/08/2019 by which the recording of oral evidence was closed and the matter proceeded to the next stage and 19/08/2019, by which, the petitioners were directed to advance their oral submissions.

2. I have considered the strenuous submissions of the learned Advocate for the petitioners. He has placed on record a service affidavit dated 12/12/2019 along with the receipt of sending the communication to the respondent and the copy of the tracking report dated 12/12/2019 obtained from the site of the Department of Posts, Ministry of Communications, Government of India, which indicates that the Advocate's notice to the respondent has been delivered on 11/12/2019.

3. I find from the record that the Court Commissioner was appointed on the request of the petitioners. The Court Commissioner submitted his report after complying with the order. The petitioners found that the report does not indicate the area and extent of the encroachment as is alleged by the plaintiffs. The petitioners, therefore, filed applications, which are referred to hereinabove stating that the Court Commissioner has not traced out the encroachment and he should be directed to refer to the

available revenue records and trace out the encroachment.

4. In my view, it is not the Court Commissioner's job to trace out encroachment as it amounts to collecting evidence. If the Court Commissioner has not performed his duty in the perception of a particular litigating side, liberty is always available to examine the Court Commissioner so as to prove through the evidence that the report of the Court Commissioner is unreliable and not dependable. The Trial Court can consider the said position and then discard the report and pass consequential orders.

5. In the instant case, the respondent, who is the defendant, has not appeared before the Court and the suit has proceeded ex-parte. The record also reveals that the Court Commissioner has been examined by the plaintiffs, inasmuch as, the Court Commissioner's communication to the Court setting out the reasons why he could not trace out the

encroachment, have also been exhibited.

6. Grievance of the plaintiffs is that the layout plan, which is at page 24 in the petition paper book, is a properly drawn-up map and that would indicate the layout of the entire plots in Survey No.124/1 having plot numbers 1 to 95. The learned Advocate for the plaintiffs points out that by order dated 06/08/2019, the evidence has been closed. Thereafter, the plaintiff had approached this Court as the Trial Court directed the plaintiffs to set out their oral final submissions vide order dated 19/08/2019.

7. I find that the plaintiffs should have moved the Trial Court with regard to the order dated 06/08/2019 so as to lead evidence as they have yet to tender their evidence closing *purshis*. The learned Advocate for the plaintiffs submits that the plaintiffs would withdraw this petition and proceed to file such an application and would record their remainder oral evidence within four weeks and on such conditions as

the Trial Court may impose.

8. In view of the above, the petitioners are permitted to withdraw this petition so as to file an application as regards the order dated 06/08/2019 and for leading further evidence. If such application is filed, the Trial Court would consider the same on it's own merits.

9. The writ petition is disposed off accordingly.

(RAVINDRA V. GHUGE, J.)

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