

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

WRIT PETITION NO.845 OF 2018

**SUMATILAL SHANTILAL BALDOTA AND OTHERS
VERSUS
DEEPAK CHANDMAL WARMA AND ANOTHER**

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Advocate for the Petitioners : Shri Thombre S.S.

Advocate for Respondent 1 : Shri D.K.Kulkarni.

Advocate for Respondent 2 : Shri K.N.Lokhande.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 08th April, 2019

Per Court:

1 On 24.01.2018, I had passed the following order :-

- "1. The petitioners are aggrieved by the order dated 2.12.2017, by which, the trial Court has allowed application Exhibit 140 filed by the plaintiffs in RCS No. 113 of 2011 and has directed the appointment of the Court Commissioner for the joint measurement of the suit property of the petitioners / defendants as well as the plaintiffs.
2. Issue notice to the respondents, returnable on 9.3.2018.
3. Copies of the petition paper book shall be furnished for issuance of notice on/or before 2.2.2018, failing which this petition shall stand dismissed without reference to the Court on 3.2.2018.
4. Until the returnable date in this matter, the Court Commissioner may proceed with the measurement of the property as directed vide the impugned order and the report of the Court Commissioner shall be preserved in a sealed envelope before the trial Court. Needless to state, the trial Court shall

5. *not divulge the report to any of the litigating sides. No equities will be created in favour of any of the litigating sides pursuant to the report of the Court Commissioner, until further orders."*

2 It is informed by the litigating sides that Respondent No.1/Plaintiff has recently deposited the amount of Rs.5000/- as the charges for the appointment of the court commissioner, pursuant to the impugned order of the Trial Court dated 02.12.2017. However, there has been no progress pursuant to the impugned order.

3 This Court has consistently held that the court commissioner cannot be appointed until the recording of oral evidence is concluded, except in exceptional and peculiar circumstances. Some of the orders passed by this Court are as under :-

(a) Syed Mushtaque Ahmad Syed Ismail and others vs. Syed Ashique Ali Khan Haidar Ali, 2012 (1) ALL MR 80 : 2011 (6) Mh.L.J. 334.

(b) Gangaram Baban Tagad and others Vs. Sarubai Yashwant Tagad and others (WP No.6700/2011 dated 12/06/2013).

(c) Chandrakant Kashinath Dike and others vs. Smt. Satyabhama Vishwanath Dike and another, Writ Petition No.8877/2013 (Aurangabad Bench) decided on 17.01.2014.

(d) Dhondiba Bapu Zaware vs. Santosh Paraji Zaware and others, Writ Petition No.4756/2014

(Aurangabad Bench) decided on 08.12.2014.

(e) Dnyandeo Vithal Salke and others vs. Dagdu Kadar Inamdar, 2017 (3) Mh.L.J. 314.

(f) Shantabai Pralhad Anantwad Vs. Tahsildar, Tahsil Office Latur and others (WP No.1096/2018 dated 31/01/2018).

(g) Baburao Jairam Borade vs. Fakira Tukaram Lanekar, Writ Petition No.1743/2018 decided on 28.08.2018 (Aurangabad Bench).

4 It is informed that the Plaintiff has stepped into the witness box and has also been cross examined.

5 Nevertheless, I deem it appropriate, while allowing this petition, to permit either of the litigating sides to make an application for appointment of the court commissioner after recording of oral evidence is concluded.

6 As such, this Writ Petition is partly allowed. The impugned order dated 02.12.2017 is quashed and set aside and the application Exhibit 140 filed by the Plaintiff in RCS No.113/2011, is rejected.

7 As noted above, after the recording of oral evidence is concluded before the Trial Court, either of the parties would be at liberty to prefer an application for seeking an appointment of the court commissioner. Such application shall then be considered on it's own

merits. For the present, the amount of Rs.5000/- deposited by the Respondent No.1/ Plaintiff shall be returned to him.

kps

(RAVINDRA V. GHUGE, J.)