

ORDER

It is to be noted that the plaintiff has filed IA No.I U/O XXXIX Rule 1 & 2 R/w Section 151 CPC with prayer to grant temporary injunction by restraining defendant his agents and servants from causing obstruction to the plaintiff peaceful possession and enjoyment of the suit road till disposal of suit.

2. Whereas the plaintiff has also filed IA No.5 under Order XXVI Rule 9 of CPC, with prayer to appoint the ADLR/Talukka surveyor as Court Commissioner to conduct local inspection of the suit schedule property situated in Survey No. 20/15. For ascertaining the existence of 60 feet layout/CDP road alleged to be formed therein, with notings of physical features and measure the same with reference to relevant revenue and survey records and submit detailed report along with the sketch in the interest of justice.

3. It is pertinent to note that the learned counsel for plaintiff has submitted to dispose of IA No.5 before disposal of the interim application No.1. Whereas learned counsel for defendant has strongly objected for disposal of IA No.5 prior to disposal of interim application no.1.

4. Learned counsel for defendant has relied on the judgment of ***Hon'ble Bombay High Court, Bench at Aurangabad bearing W.P no.6700/2011 judgment dated 12.06.2013 in the case of Gangaram Baban Tagad and others vs. Sarubai Yashwant Tagad and others*** and has referred the following findings:

Exh.5 i.e Temporary injunction application is not yet decided and said application has to be decided on the basis of prima facie case. Whereas the defendant has moved the application for appointment of court commissioner, it is for the plaintiff to prove his own case. If after the evidence is recorded, the court finds it is necessary to appoint commissioner for proper disposal of the case, the court at the stage can consider the application for appointment of court commissioner. It would be premature to consider the application under Order XXVI Rule 9 of CPC., at this stage i.e. prior to decision on Exh.5, it is for the plaintiff to prove prima facie case, balance of convenience, and irreparable loss.

5. Whereas learned counsel for plaintiff has also relied a judgment of **Hon'ble High Court of Karnataka Kalaburagi Bench in the case of Sri. Shadaksharappa S/o. Veeranna and Kumari Vijayalaxmi D/o Pampanna and others bearing WP No.201274/2022 (GM/CPC)** vide judgment dated 24.01.2023 and submitted that the stage is immaterial for consideration of appointment of court commissioner. Hence the IA no.5 may be considered prior to IA no.1.

6. It is relevant to note that the Hon'ble Bombay High Court has held in the aforesaid Judgement of Gangaram (Supra) that the plaintiff has to prove his own case and it is premature to consider the application filed under Order XXVI of CPC prior to decision on Exh.5 and it is plaintiff to prove prima facie case, balance of convenience and irreparable loss. Whereas as per the judgment of Hon'ble High Court of Karnataka referred above it has held that the stage of the suit is immaterial for consideration of application for appointment of Court Commissioner. The judgment of Hon'ble Bombay High Court has been delivered in the year 2013. Whereas the judgment of Hon'ble High Court of Karnataka has been delivered in the year 2023. Whereas the Hon'ble High Court of Karnataka has extensively dealt with the

appointing court commissioner and has issued the guidelines for appointment of court commissioner. Therefore, it is no doubt that it is burden on the plaintiff to establish prima-facie case, balance of convenience and irreparable loss.

7. Even at this stage, it is relevant to refer the judgment of ***Honble Apex court in the case of Sepco Electric Power Construction Corporation Vs Power Mech Projects Ltd. reported in 2022 SCC Online SC 1243*** wherein it has held as below:

21. There is no hard and fast rule that an application made earlier in point of time must be heard before an application made later in point of time.

8. From the aforesaid ratio of Hon'ble Apex Court, it is evident that the court can decide the application filed at later point on time in spite of the application filed at earlier one. Hence in the present case also this Court is of the opinion that the IA No. 5 for appointment of court Commissioner has to be decided prior to the deciding the IA No.1. Thus, this Court proceeds to pass following:

ORDER

Interim application no.5 shall
be taken up first for disposal on
merits.

Prl. Civil Judge & JMFC,
Dharwad.