



ORDER BELOW EXH.32 (IN R.C.S No. 168/2021)

This is an application filed by plaintiffs for appointment of Court Commissioner under Order 26 Rule 9 of Code of Civil Procedure 1908 (In short CPC).

2. The plaintiffs have prayed for appointment of T.I.L.R. as Court Commissioner for measurement of suit land to fix the boundaries.

3. Suit was proceeded without written statement against defendant no. 2. Suit was proceeded Ex-parte against defendant no. 1, 3 to 11 and 14 hence, present application was decided without say of these defendants. Defendant no. 12 and 13 have resisted present application by filing say at Exh. 35. It is stated that the contents of the application are not true and correct. The description of the suit property cannot be ascertained by reading the plaint. Hence, the contention of the encroachment by the defendant are totally false and imaginary. The pleading of the plaintiffs shows that suit property has not been properly described. Defendant further contended that plaintiffs have alternative remedy to measure the suit property as per section 134, 135, 136 and 138 of Maharashtra Land Revenue Code. Further, plaintiffs have not attempted the alternative relief and only for the collection of evidence this application was filed. There is no cause of action to file suit and present application. Plaintiffs is trying to collect the evidence by appointment of Court Commissioner. Grounds mentioned in the

application are false and vague. Hence, he prayed for rejection of the application and alternately prayed for cost of Rs. 25,000/-

4. Read the application and say. Heard Learned Advocated Shri. M. A. Jadhav for the plaintiffs and Learned Advocated Shri. L. H. Lande for the defendants.

5. Learned Advocate for the plaintiff submitted that defendants are attempting to encroach upon suit property by demolishing boundaries of the suit land. Therefore, fixation of boundaries is necessary. He further submitted that measurement of suit property does not amount to collection of evidence as there are boundaries dispute between the parties. Hence, prayed for allowing the application. Per contra Learned advocated for the defendants submitted that there is no necessity for the appointment of Court Commissioner. He further submitted that appointment of Court Commissioner will result in to collection of the evidence. It is impermissible in law. Further he submitted that plaintiff has alternative remedy under Maharashtra Land Revenue Code to measure the suit land. Learned Advocate for the defendant further submitted that pleadings of the plaintiffs shows that defendants have not made encroachment over the suit property. Hence, present application is not maintainable in the eyes of law. Hence the application is liable to be rejected.

6. The first contention of the defendants is that plaintiffs have alternative relief to measure the suit land provision of Maharashtra Land Revenue Code but plaintiff failed to do so. On the background of this submissions of Ld. Advocate for defendants I have perused the provision of Section 132 to Section 146 of the Maharashtra Land Revenue Code. It shows that measurement under this provision is not mandatory or

condition precedent for filing a suit. Therefore, I do not find force in the said submission.

7. Further, I have perused file and record of the proceeding. This suit for perpetual Injunction to restrain the defendant from encroaching upon suit property. It is settled principle of law that Court Commissioner cannot be appointed to ascertain the possession. It is also settled that if the appointment of Court Commissioner resulting collection of evidence through Commissioner then Court Commissioner need not to be allowed. In the present case plaintiffs have prayed for permanent injunction to restrain the defendants for encroaching upon suit property. It is also important to note that after perusal of plaint it appears that plaintiffs have made averments in para 3 it has mentioned that defendants attempted to encroach upon suit property. Therefore, it shows that there is boundary dispute between plaintiffs and defendants. Even though the suit is for permanent injunction there is no hurdle to appoint Court Commissioner even there is boundary dispute between the parties.

8. In this context Judgment of Hon'ble Bombay High Court in ***Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade 2011(3) ALL MR 599 and Habib Khan Vs. Vaman Rathod 2012(1) ALL MR 883*** assumes “importance where in it is held that dispute regarding boundaries can be best adjudicated by taking the assistance of the expert. Hence, T.I.L.R who on measurement can express his opinion.” Therefore, considering the nature of dispute between the parties it would be appropriate to allow application and appoint Court Commissioner for fixation of boundaries. In view reasons discussed above I pass the following order.

ORDER

- 1) Application (Exh.32) is allowed.
- 2) The Taluka Inspector Land Record, Shevgoan is hereby appointed as Court Commissioner to measure and fix boundaries of the suit property i.e. measurement of Gat No. 459 of village Bhatkudgaon, Tal Shevgaon, Dist: Ahmednagar.
- 3) The plaintiffs is directed to deposit necessary charges for the said measurement in the T.I. L.R. Office within 15 days from the date of this order.
- 4) The Court Commissioner shall measure the land after giving prior notice to plaintiffs and defendants. He shall file his report along with measurement map on or before 9th January 2021.
- 5) After payment of necessary charges plaintiffs to file the receipt of it on record.
- 6) Issue commission writ accordingly.

Place: Shevgaon

Date: 09.11.2023

sd/-

(Monali A. Bendre)

2nd Jt. Civil Judge Jr. Division,
Shevgoan