

ORDER BELOW EXH. 33.

CNR No. MHAK070002802021
(Delivered On 20th of April, 2021)

1. This is an application filed by plaintiff for appointment of court commissioner. No provision is cited in application. However, plaintiff filed pursis Exh. 40 and stated that present application be treated as one under Order 39 Rule 7 of the Civil Procedure Code. Hence, in view of pursis, tenor and prayer in application, it is being decided as one under Order 39, Rule 7 of Civil Procedure Code.

2. Plaintiff has instituted suit for permanent and mandatory injunction against defendants. It is contended that suit property bearing Malmatta No. 409, admeasuring 900 sq. feet is owned by plaintiff. She got said plot under 'Indira Awas Yojna' in the year 2009. She constructed house and kept open space of 5 X 30 feet on southern side. Said house collapsed 2 – 3 years before and only one side wall is standing on the plot (Said plot and remains of house are collectively referred as '*suit property*' in short). She further contended that defendants were also allotted a similar dimensional plot situated towards south of suit property. Nazul survey has not been carried out in the village. Defendants started illegal construction without permission on their plot and on southern side of suit property by encroaching to the extent of 5 X 30 feet. Hence, it is prayed for removal of encroachment, permanent injunction and declaration that defendants have no right, title or intact over suit property. Further, by way of interim injunction, she prayed that defendants be restricted from committing encroachment over the suit property and for removal of construction.

3. She further contends that defendants have stated in their written statement that after the one wall standing on suit property,

plaintiff is having more than five feet extra space, but neighbourer of plot may encroach the property but there is no proper boundary mark of dimension of the plot. Further, defendants have contended that report of commissioner by measuring all five plots be called. Therefore, in view of pleadings, it is necessary to fix boundary marks and area of illegal construction on suit property by appointing court commissioner. Thus, considering the pleadings and nature of dispute, to decide the application for temporary injunction, to ascertain the area of construction and to resolve controversy, it is necessary to appoint Dy.S.L.R, Balapur to measure suit property. Hence, the application.

4. On the other hand, defendants filed their say on Exh. 37. They denied contents of the application and all the adverse allegations advanced by plaintiff. It is further contended that suit and present application are not tenable and maintainable. Plaintiff has not come before the court with clean hands. Plots were disbursed under said Yojna prior to 30 years. However, grampanchayat firstly on the paper measurement mention then as per list of beneficiary prepared the plot which the land was available in the control of grampanchayat. Grampanchayat measured plots and all beneficiaries having plot each admeasuring 25 X 30 i.e. 750 sq. ft. Documents of other beneficiaries also show same measurement. As the portion available for plaintiff is 25 X 30 sq. ft., therefore no encroachment is made by defendants on suit property. However, if necessary measurement be directed from plot bearing Sr. No. 1 shown in the map submitted by defendants. Although, all plots are measuring 750 sq. ft. each, plaintiff is claiming 900 sq. ft., which is illegal.

5. It is further contended by defendants that they have demolished old house and are residing in Teen-Zhopdi temporarily.

Thus, it is necessary to complete construction in short period. Claim of plaintiff is illegal. Application is illegal and it be rejected.

6. Perused the application, say and record. Heard oral arguments advanced by both parties.

7. Present suit is instituted for permanent and mandatory injunction. Mandatory injunction is for direction to defendants to remove their illegal and unauthorized encroachment. Plaintiff has filed copies of Namuna-8 of Malmatta No. 355 and 409. While former is measuring 900 sq. ft., latter is measuring 30 X 25 sq. ft. It is the contention of Ld. Adv. for plaintiff that both properties are one and the same and Malmatta No. 355 is old number. Although, there is no document on record to show such connection, considering the facts and circumstances, at this juncture, it cannot be ultimately ascertained about the exact area. During the arguments, Ld. Adv. for defendants stated that commissioner in the form of an Advocate can be appointed. On the other hand, Ld. Adv. for plaintiff stated that in view of such statement of defendants, necessary order may be passed. Considering the nature of pleadings of both parties and pending application for interim injunction as well as statements of both Ld. Advocates during the arguments, it appears that to decide interim injunction application it is necessary to appoint an Advocate commissioner instead of Dy.S.L.R. Further, considering the nature of application, which is under Order 39 Rule 7 of C.P.C. and also considering that it is the statement of plaintiff that Nazul survey has not been carried out in the village, it would not be appropriate to appoint Dy.S.L.R. Further, it would be time consuming exercise. In such case, if a senior advocate is appointed, it would serve the purpose. With consent of both parties, Ld. Adv. Shri B. S. Bhajipale is

to be appointed as court commissioner. Therefore, present application is allowed as per following order.

ORDER

1. Application is hereby allowed as follows.
 - (a) Ld. Adv. Shri B. S. Bhajipale is hereby appointed as court commissioner.
 - (b) Court Commissioner is directed to inspect Malmatta Nos. 409 and 410 situated at Mauje Bharatpur, Tq. Balapur District Akola. The Court commissioner shall inspect the above properties and construction thereon, if any and its nature and extent, if any on the above said properties. He shall issue prior notices to both sides.
2. The Court commissioner is directed to file his detail report alongwith map with measurements as directed above.
3. The Court Commissioner to comply within 10 days from receipt of order.
4. Plaintiff is directed to deposit court commission fee, quantified at Rs. 3000/- in the court, within next date.
5. Issue commission letter accordingly.
6. Costs on plaintiff.

Place : Balapur
Date : 20.04.2021.

(C. P. Raghuvanshi)
Civil Judge, J.D., Balapur.

CERTIFICATE

I affirm that the contents of this P.D.F. file are same word for word as per original order.

Name of Steno : Shaikh Rafique Shaikh Rasheed
Court Name : C.J.J.D. & J.M.F.C., Balapur.
Date of Order : 20/04/2021.
Signed by Presiding Officer on : 20/04/2021.
Uploaded on : 20/04/2021.
