

MHBU08001486-2022

R.C.S.No.91-2022
Subhash Vs. Jagannath

ORDER BELOW EXH.16

(Passed on 24th of March 2023)

This is an application under Order XXVI Rule 9 of the Code of Civil Procedure, for appointment of Court Commissioner i.e. Cadastral Surveyor of Land Records, Nandura for the purpose of demarcation of boundaries.

2. It is contended by the applicant/Plaintiff that, defendant is his real brother. Property bearing Nazul Sheet no. 4 Plot no. 622 is having total area of 118.8 Sq. Meters. Out of it, a plot admeasuring 24 feet East-West and 15 feet South-North, which comes under Gram Panchayat Chandur Biswa, is owned and possessed by plaintiff. Since 07/08/2022, the defendant was trying to threaten the possession of plaintiff. Anticipating the threat of encroachment, the plaintiff on 22/08/2022 issued notice through his learned advocate contending therein not to start any illegal construction over plaintiff's property. However, the defendant did not reply the said notice and started construction of bathroom and toilet on vacant land of plaintiff from South-East side.

3. On the said application learned advocate of the defendant has filed his say on back leaf. He did not oppose the application strongly but stated that, without interrupting the natural easement of defendant, measurement can be carried out.

4. I have heard learned advocate Shri. Taori for plaintiff and learned advocate Shri. Nimkarde for the defendant.

MHBU08001486-2022**R.C.S.No.91-2022
Subhash Vs. Jagannath**

5. Shri. Taori argued that, defendant has not specified his area in his written statement. There is no documentary evidence placed on record so as to ascertain area of defendant. Plaintiff has specifically pleaded his area and its measurement. Defendants have not raised any serious objection on this application. As far as stage of suit is concerned, during pendency of this suit the plaintiff has in spite of order of status quo, completed construction over suit land and thereby encroached on the land of plaintiff. The defendant is in breach of order of this Hon'ble Court. There is no straight rule that, commissioner cannot be appointed at pre-trial stage. Plaintiff has filed documents on record in the form of sale-deed, copy of tax assessment and Nazul map. Even the application for Temporary Injunction is pending which they are going to press in near future. Hence, prayed that application be allowed.

6. On the other hand, learned advocate for defendant argued that, perusal of Nazul map will reveal that, apparently there has been one road in between the houses of plaintiff and defendant. In the present case, even issues are yet not settled. Considering stage of the case and considering the settled principals of law, appropriate order be passed.

7. I have perused the record. In present case, defendant filed his written statement on 28/02/2023. The matter ought to have been fixed for settlement of issues, however, the advocate of plaintiff argued that, since defendant has breached the order of status- quo and completed illegal construction over suit land,

MHBU08001486-2022

R.C.S.No.91-2022
Subhash Vs. Jagannath

now he wants to press for Temporary Injunction application filed below Exh.05.

8. Regarding stage at which Court Commissioner can be appointed learned advocate for plaintiff placed his reliance on decision of **Hon'ble Bombay High Court, in the case of Sitaram Suklal Patil and Another vs Vasudeo Suklal Patil**, decided on 31 July, 2017. It was observed that,

*5. The parties have not yet stepped into witness box. The Court commissioner could have been appointed if the Court finds it necessary for the just decision of the case. No doubt, in case of encroachment, dispute with regard to the identity of the property, the assistance of expert such as Cadestral Surveyor to measure the property can be considered by the Court. **However, the stage is too 4 / 6 26_WP962616.odt premature. Even the application for Temporary Injunction is not decided. The report of the T.I.L.R. if disputed by either party, is not admissible in evidence unless the T.I.L.R. is examined.***

(Emphasis added)

9. Further, reliance is also placed by learned advocate of plaintiff on decision of Hon'ble Bombay High Court, in the case of **Mayuresh Sonawane Vs. Yashwant, decided on 15 December 2021**. In this case also, trial court had at the time of deciding temporary injunction application, appointed court commissioner on the ground that there will be some prima facie proof regrading alleged encroachment. The said order was

MHBU08001486-2022

R.C.S.No.91-2022
Subhash Vs. Jagannath

confirmed by Hon'ble Bombay High court holding that trial court shall decide Exh.05 only after hearing the parties on the Court Commissioner Report.

10. Lastly reliance is placed on decision of Hon'ble Karnataka High Court in the case of **Sri. Shadaksharappa Vs. Kumari W.P. No.201274/2022**. In which it was held to the effect that, irrespective of stage of suit, to ascertain matter in dispute court commissioner can be appointed at the discretion of court.

11. Reverting to case in hand, in the case in hand as well, the application for Temporary Injunction is pending. Learned advocate for the plaintiff himself submitted that, now he wishes to press for the temporary injunction application. The facts and circumstances of the present case and the case of **Mayuresh Sonawane (cited supra)** are not identical. In the above-mentioned case, approach road of one of the parties was blocked and the original suit was pending for substantial period and considering the same directions were given by Hon'ble Court to expedite the matter and appoint the court commissioner. Thus, it is clear that, said observations were with respect to peculiar facts and circumstances of that case. Hence, with utmost respects, I hold that, observations laid down in the judgment in the case of **Mayuresh Sonawane (cited supra)** is not applicable to the case in hand and will be of no assistance to plaintiff.

MHBU08001486-2022

R.C.S.No.91-2022
Subhash Vs. Jagannath

12. As per the decision in the case of Sri **Shadaksharappa (cited supra)** appointment of commissioner is left at the discretion of court.

13. In **Sukhlal (cited supra)**, it has explicitly made clear that, if the application for temporary injunction is pending, the application for Appointment of Commissioner has to be considered as pre-mature. It can be seen that, observations so made in aforesaid judgment were on the basis of similar parameters. Here also the evidence is yet not commenced. The parties have yet not stepped into witness box. Instant case also relates to encroachment and dispute with regard to identity of property is there. Thus, I hold that instant case is squarely governed by aforesaid judgment.

14. Considering the facts and circumstances of present case and also considering the stage of the case, no legal ground is available which can warrant the appointment of court commissioner at this pre-trial stage. As far as argument with regard to pressing of temporary injunction application is concerned, it is for the plaintiff to prove his own case by establishing factors viz *prima-facie* case, balance of convenience and irreparable loss. This court is of firm opinion that before deciding the Exh.5, an application for appointment of Court Commissioner being premature is not tenable. If after the evidence is commenced, it is found that, appointment of court commissioner is necessitated, plaintiff can be granted liberty to file fresh application at appropriate stage and it can be decided on its own merit. If this application is allowed at this stage, there

MHBU08001486-2022

R.C.S.No.91-2022
Subhash Vs. Jagannath

is every possibility that it will hamper the progress of main case as on the Report of Court commissioner

14. Therefore, having considering material on record and considering the judicial pronouncements, in background of above noted facts and circumstances, I am not inclined to allow the application. Hence the following order.

ORDER

1. Application is rejected with liberty to file it afresh at appropriate stage.
2. Cost in cause.

Date :- 24/03/2023.

[Megha D. Dajjuka]
Joint Civil Judge Junior Division, Nandura.