

MHBU08001486-2022

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

ORDER BELOW EXH.42
(Passed on 9th day of July 2024)

This is an application filed by plaintiff 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 that, defendant is real brother of plaintiff. 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 interfere with the possession of plaintiff. Anticipating the threat of encroachment, the plaintiff on 22/08/2022 issued notice through his learned advocate requesting 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 to the extent of 10 feet East to West an 15 feet, South to North. Further, the defendant has made encroachment on public road which is situated towards Eastern side of suit property of plaintiff. Hence, it is necessary to demarcate the boundaries of properties of both plaintiff and defendant.

3. Learned advocate of the defendant has filed his say at Exh. 43 and thereby opposed the application. However, in alternative he prayed to passed suitable order.

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

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7. Perused record. This is a suit for mandatory injunction and declaration. As the out said it is desirable to mention here that, in this suit evidence has commenced. So considering stage of the matter, application is maintainable in view of the decision of Hon'ble Bombay High Court in the case of **Sitaram Suklal Patil & Another Vs. Vasudeo Suklal Patil, W.P.No.9626/2016, decided on 31 July, 2017.**

8. It is the case of plaintiff that during pendency of T.I. application defendant has encroachment upon his property by constructing bathroom and toilet on vacant land of plaintiff. Defendant has denied said contention. Perusal of plaint shows that, defendant resides adjacent to the suit property of plaintiff.

9. As per Order XXVI Rule 9 of C.P.C a local investigation can be ordered where it is necessary and required for the purpose of elucidating matter in dispute. The court commissioner can be appointed for proper and just adjudication of the matter.

10. Admittedly the dispute involved in this matter in regarding encroachment allegedly committed by defendant on the property of plaintiff and public road during pendency of temporary injunction application. That application is already decided now. It is also an admitted position that, defendant resides adjacent to the suit property of plaintiff. Record shows that, the evidence of plaintiff has started. It is settled principal of law that, whenever there is boundary dispute especially in respect of encroachment cases, it is better to direct joint measurement of both the properties i.e. one which is alleged have under encroachment and one which is alleged to have committed the encroachment. Plaintiff have come up with a specific case that, towards eastern side of his property there was public road and defendant has committed encroachment both on public road and suit property of plaintiff.

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11. Thus, considering such facts, a joint measurement will serve the purpose and it may bring correct position of the properties on record. Since, the case is based on boundary dispute and issue of encroachment is involved, the proper evidence can only there be on spot and unless a court commissioner is appointed this suit will not be adjudicated properly. Inasmuch as, the fact of the location, boundaries and encroachment only be brought on record by appointing an expert. Since the evidence of the defendant has yet not commenced, there is no question that the defence of the defendants would affect adversely. Still defendant has ample opportunity to adduce evidence either in favour or against the possible report of the court commissioner. Hence, for proper adjudication of the matter in right perspective it would be equitable to appoint to court commissioner with direction to measure property of the plaintiff as well as the defendant.

12. In the result I pass following order.

ORDER

1. Application is allowed.
2. The Cadastral Surveyor of Land Records of Nandura is hereby appointed as Court Commissioner to conduct joint measurement of the land belonging to plaintiff and defendant in Nazul sheet No. 4, plot No. 622 situated at mauje Chandurbiswa, Tq. Nandura, Dist. Buldana and to file report containing map as well as factual position over the suit property regarding encroachment in view of Order XXVI Rule 9 of Code of Civil Procedure, 1908.
3. The learned Court Commissioner is directed to go through the pleadings in the suit and prepare report.

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4. The plaintiff and defendant to remain present on the suit property on the date of joint measurement along with necessary documents.
5. Plaintiff to deposit commissions fees for joint measurement in the office of Land Records, Nandura as per rules.
6. The court commissioner shall file report and map in the court on or before 09/09/2024 without fail.
7. On compliance writ be issued.

Date :- 09.07.2024.

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