

MHBU13001440-2021**Vitthal vs. Keshav & others****Order Below Exh. 25 in R.C.S.No. 97/2021.****(Order passed on 29/03/2022)**

Present application has been filed by defendants under Order XXVI Rule 9 of the C.P.C.,1908 thereby praying for appointing Court Commissioner to conduct local investigation of defendants' land in Gut No.153, situated at mouza village Shelodi, Tq. Chikhli, Dist. Buldana and directing him to file factual report on record regarding how many underground water pipelines have been laid by plaintiff in Gut No.153 and how many pipelines have leakages.

2) Perused application, say of plaintiff at Exh.26 and documents filed by rival parties on record. Also heard learned Advocates appearing for the defendants and plaintiff.

3) Learned Advocate for defendants has submitted that plaintiff has filed instant suit for perpetual injunction and for mandatory injunction against the defendants along with an application for temporary injunction. It is further submitted that on the basis of illegal order dated 13/4/2010 passed by Naib Tahsildar in Revenue Case No. i.e. L.N.D.38/1/2009-2010, plaintiff is illegally trying to show that he has laid underground water pipelines from the agricultural land of defendants and now plaintiff is trying to repair leakages of said water pipelines thereby intending to cause damage to standing crop in defendants' field out of Gut No.153, situated at village Shelodi, Tq. Chikhli, Dist. Buldana.

4) It is further submitted that in fact, these defendants were not party in said revenue case before Naib Tahsildar, Chikhli. Even, no notices were issued to these defendants before passing said order dated 13/4/2010. By taking illegal advantage of said order dated 13/4/2010, plaintiff has illegally laid three water pipelines from the Gut No.153 of defendants. There are no leakages in said water pipelines but plaintiff is unnecessarily trying to repair said water pipelines only to cause damage to standing crops in defendants' field.

5) It is further submitted that plaintiff has also filed false application for temporary injunction in the present suit thereby seeking injunction order against these defendants thereby restraining them from causing obstruction in repair or replacement of said underground water pipelines. In fact, there is no need of either repair or replacement of said water pipelines as alleged by plaintiff in the suit. Therefore, it is necessary to appoint Court Commissioner to conduct local investigation of defendants' land in Gut No.153, situated at mouza village Shelodi, Tq. Chikhli, Dist. Buldana and directing him to file factual report on record regarding how many underground water pipelines have been laid by plaintiff in Gut No.153 and how many pipelines have leakages. Hence, learned Advocate for defendants has prayed for grant of this application. In support of his contentions, learned Advocate for defendants has relied upon the following judgments of the Hon'ble Bombay High Court.

1. *Shri Bhupendra s/o. Bhagwat Turkar vs. Shri Homraj s/o. Zituji Meshram, 2014(3) ALL MR 635.*

2. *Malhar s/o. Ganpat Bokephod & Ors. vs. Shivaji s/o. Vishwanath Pawal, 2014(3) ALL MR 698.*

3. *Mr. Bento Antonio Gomes alias Antonio Bento Gomes vs. Rosario Salvador Carneiro & Ors., 2014(3) ALL MR 790.*

6) On the contrary, learned Advocate for plaintiff has strongly opposed this application on the ground that this application came to be filed only with a view to prolong the matter as plaintiff is also seeking temporary injunction against the defendants. It is further submitted that this application is nothing but an attempt on the part of defendants to collect evidence which is not permissible in the eyes of law. The plaintiff has not illegally laid any underground water pipelines in the field of defendants as alleged by defendants. Whatever the plaintiff has done that was done on the basis of order passed by Naib Tahsildar, Chikhli in aforesaid revenue case.

7) It is further submitted that by the present application, defendants intend to collect evidence with the help of Court Commissioner in order to defeat the claim of plaintiff as to temporary injunction on the basis of said evidence which is not permissible in the eyes of law. Application for temporary injunction is yet to be decided and same is pending for final hearing. Therefore, at such initial stage of trial, Court Commissioner can not be appointed to report factual position on record. This court is having discretion to appoint Court Commissioner only when the court itself finds ambiguity considering the facts and circumstances of particular case. Present application deserves to be rejected on the facts and circumstances of the present case. Hence, learned Advocate for plaintiff has prayed for rejection of this application with cost. In support of his contentions, learned Advocate for plaintiff has relied upon the judgments of the Hon'ble Bombay High Court.

1. *Mahadeo Sitaram Sinai Kakodkar (since deceased) through LRs. Atrey Shitalkumar S. Kakodkar and others vs. Conservator of Forest, Government of Goa and others, 2021 (5) Mh.LJ 600.*

2. *Dnyandeo Vitthal Salke & others vs. Dagdu Kadar Inamdar, reported in 2017 (3) Mh.LJ 314.*

8) Following points arise for my determination, I have recorded my findings thereon for the reasons discussed below.

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1)	Whether it is necessary to appoint Court Commissioner as prayed by defendants ?	In the Negative.
2)	What order ?	Application is rejected.

REASONS

As to point No. 1 :-

9) I have perused record of the matter and also taken into consideration the submissions of learned Advocates of defendants and plaintiff. It is pertinent to note here that plaintiff has filed instant suit for perpetual injunction and mandatory injunction. There is no dispute in between the parties regarding boundary marks, encroachment and identification of their lands.

10) It is further pertinent to note here that an application for temporary injunction as filed by plaintiff is yet to be decided and same is pending for final hearing. Here, I find substance in the argument of learned

Advocate for plaintiff that at such initial stage of trial, it will not be just and proper to appoint Court Commissioner for reporting factual position more particularly when application for temporary injunction is pending for final hearing. Defendants, by this application, only intend to collect material evidence as to factual aspect which is not permissible under Order XXVI Rule 9 of the C.P.C., 1908. Here, I would like to refer the judgment of the Hon'ble Bombay High Court, in the case of ***Balu Uddhav Khalse vs. Vijay Rajaram Kharat (Writ Petition No.4180/2011, D.D. 3rd October, 2011)***. Said judgment of the Hon'ble Bombay High Court is squarely applicable to the facts and circumstances of the present case as the Hon'ble Bombay High Court has observed in said judgment that the object of appointment of the Court Commissioner is not for collecting the evidence and is for elucidating the matter in dispute. Moreover, it is a well settled position of law that the appointment of Court Commissioner can not be made at the time of deciding the application for temporary injunction as the same needs to be decided on the basis of documents tendered by the parties.

11) I have also gone through the judgments as cited above by learned Advocate for defendants. However, the said judgments, with due respect are not helpful to the defendants because in said judgments application for appointing Court Commissioner was allowed as there was dispute as to boundary marks and identification of lands. However, same is not the case in the present case as the facts and circumstances of present case are different. However, in the present case, considering the facts and circumstances, I do not find it expedient at such initial stage to appoint Court Commissioner as prayed by defendants by exercising discretionary power. Thus, I think it just and proper to reject this application at this stage. Hence, I answer to point No.1 in the negative.

As to point No. 2 :-

12) Considering all these aspects, I am of the opinion that, the application deserves to be rejected. Therefore, I proceed to pass following order.

O R D E R

1. Application is hereby rejected.
2. No order as to costs.

Date: 29/03/2022

(S.W. Thombre)
Civil Judge, Junior Division,
Chikhli.

Certificate

I B.B.Theng, Stenographer to J.M.F.C. Chikhli affirm that, the content of this PDF judgment file is the same as per the original judgment.