


MHGO040006422018 	<u>RCS No. 38/2018</u> <u>Dakshaben Sureshbhai Patel</u> <u>Vs</u> <u>Moh. Mustaq Moh. Isak Ismail</u> <u>Sheikh</u>
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ORDER BELOW EXH. 54

This is an application filed by the plaintiff for appointment of Court commissioner to carry out joint measurement of the suit property and adjacent property.

2. The plaintiff contended that he has purchased suit properties i.e. Plot-A and Plot-B and name of the plaintiff is mutated upon the revenue record. The plaintiff is in the possession of the suit properties. On 08/08/2018 the defendant dig pit hole upon Plot-A with the purpose to construct the structure. The defendant is trying to encroach upon the suit property. When the plaintiff requested the defendant as not to construct any structure, the defendant has refused to do so. The defendant has started to construct cement columns on the suit property. The defendant has illegally encroached upon the suit property and therefore, the plaintiff has amended the plaint and prayed for mandatory injunction for removal of construction of the defendant. It is necessary to make joint measurement for bringing on record the actual facts in the present matter. Hence, prayed to appoint cadastral surveyor for joint measurement with directions to show the specific area of possession in gat no. 596/B/4 admeasuring 5R and gat no. 596/B/6 admeasuring 5R situated at village Amgaon, Dist. Gondia and land of

the defendant accordingly.

3. The defendant has filed his say and contended that the defendant has partly cross-examined the plaintiff and the matter is fixed for further cross-examination. However, the plaintiff has filed the present false and bogus application, which is not tenable. The plaintiff has filed the present suit for perpetual and mandatory injunction and not for the recovery of possession. The plaintiff is trying to collect the evidence by way of Court Commissioner. Hence, prayed to reject the application.

4. Read the application and say. Heard learned advocates for both parties. Perused the record. The plaintiff has originally filed the suit for perpetual injunction. Thereafter, the plaintiff has amended the plaint and prayed for mandatory injunction for removal of construction of the defendant. Now, the plaintiff prayed for the joint measurement of the suit property and property of the defendant.

Order XXVI Rule 9 of the Code of Civil Procedure-

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

5. As per the above mentioned provision if the court deems proper the local investigation for elucidating any matter in dispute then the court may appoint the court commissioner for the same purpose.

Considering the said provision, it is necessary to see as to whether the appointment of Court commissioner is required to determine the matter in dispute.

6. The plaintiff in the present application prayed for the joint measurement of the suit property and the property of the defendant. The plaintiff prayed for the joint measurement as to find out the specific area of possession in gat no. 596/B/4, gat no. 596/B/6 and property of the defendant. From perusal of the prayer clause of the present application, it appears that the plaintiff wants to bring on record specific area of possession over the suit properties. As per the settled principle of law, the Court commissioner cannot be appointed for the collection of the evidence.

7. If the Court commissioner is appointed as prayed by the plaintiff, then the fact regarding the possession over the disputed properties would be come on record. Therefore, the proposed report of the Court commissioner would be used for showing the actual possession over the suit properties. The plaintiff has filed the present suit for the perpetual injunction and for the mandatory injunction, wherein the plaintiff claimed his possession over the suit property. Therefore, if the report of the Court commissioner is called as prayed by the plaintiff, then it would be useful to prove the possession of the parties over the disputed land. Accordingly, the appointment of Court commissioner would be resulted into collection of evidence in present matter. As discussed above, the Court Commission could not be appointed for the collection of evidence. Therefore, it is not proper to appoint the Court Commissioner as prayed by the plaintiff as it may be resulted into collection of evidence. Hence, I pass the following order.

ORDER

1. The application (Exh. 54) is rejected.
2. Both parties to bear own costs.

Date : 01.07.2025
Place : Amgaon

(Sameer Gopal Gunari)
Civil Judge Junior Division,
Amgaon.