


<p>MHKO050014652022</p> 	<p><b><u>Order below Exh.35 in R.C.S. No.136/2022</u></b></p> <p><b><u>Sou. Jayshri Dilip Veer and 1 other Vs.</u></b> <b><u>Suresh Marutrao Jadhav and 7 other</u></b></p> <p><b><u>CNR No.MHKO050014652022</u></b></p>
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The instant application is filed by the plaintiffs praying for appointment of commissioner for the purpose of fixing boundaries of the suit properties by way of measurement through Office of T.I.L.R., Hatkanangale, Kolhapur.

2. Perused the application and reply filed below the same. Heard learned counsel Mr. Y. S. Kesarkar appearing for the plaintiffs and Mr. Jamadar learned counsel appearing for the defendants.

**Brief facts to leading to filing of the instant application are as follows :-**

3. It is the contention of the plaintiffs that the suit has been filed for permanent as well as mandatory injunction. According to them, suit property 1A is the property of plaintiffs whereas the suit property 1B is the property of defendants. According to the plaintiff, they have acquired by way of registered sale deed dated 12/04/199 and defendant no.4 illegally without having any legal right, title and interest by way of encroachment is trying to construct upon suit property 1A.

4. According to the plaintiffs, the defendants did not agree mutually to the Government measurement proposed to be done and therefore the plaintiffs were constrained to file instant application. The

plaintiffs further submits that no prejudice would be caused to the defendants and report of Court Commissioner would assist the Court in determining the exact controversy involved in the suit. Accordingly, in the interest of justice and for avoiding multiplicity of proceeding, the plaintiffs pray for appointment of Court Commissioner.

5. Defendants have vehemently opposed the instant application by filing reply below Exh.37 on the ground that Court Commissioner cannot be granted for collection of evidence. According to them, the plaint as well as application is completely silent on the aspect of encroachment and therefore no relief can be granted. They accordingly pray for rejection of the instant application.

6. Learned counsel Mr. Kesarkar submitted in consonance with his application. He submitted that the defendants have illegally encroached upon the suit property 1A and are trying to construct over the same. He submits that an irreparable loss would be caused to the plaintiffs if the application is not allowed. He submits that no prejudice would be caused to the defendants and the same would prevent multiplicity of proceedings. He has placed his reliance upon following judgments :-

- A] **Payani Achuthan Vs. Chamballikundu Harijan Fisheries Development Co-Operative Society & Ors. reported in AIR 1996 Kerala 276.**
- B] **Rajesh Madhukar Kanhed Vs. Municipal Council, Washim reported in AIRonline 2021 BOM 3117.**
- C] **Shri. Dattatraya Sampat Jadhav & Anr. Vs. Indu 2 Indrabai Jyotiram Jadhav(Deceased) Through her Lrs 1A] Mohan**

**Jyotiram Jadhav & Ors. in Writ Petition No.4 of 2020 before the Hon'ble Bombay High Court.**

7. Per contra, learned counsel Mr. Jamadar opposed the instant application on the ground that for collection of evidence no order for appointment of commissioner for measurement of land can be granted. He submits that the application is totally silent on the aspect of encroachment and therefore no relief can be granted. He lastly submits that Court Commissioner can be appointed only after evidence led by the parties. He has placed his reliance upon following judgments :-

A] **Mahadeo Kondiba Shinde Vs. Nitin Sakharam Shinde & Anr. reported in 2022(2) ALL MR 593.**

B] **Jagruti Foundation Vs. State of Maharashtra & Ors. reported in 2022(2) ALL MR 598.**

8. Perused the record. Careful perusal of the record shows that the suit has been filed by plaintiffs against the defendants for the relief of permanent and mandatory injunction. It is the contention of the plaintiffs that the defendants are trying to raise construction by way of encroachment. However, there is absolutely no material on record or any pleadings as to how, when, where and in what matter the defendants encroached the suit property. In my considered view, appointment of Commissioner at this stage would amount to collection of evidence which is not at all permissible in the eyes of law.

9. Furthermore, the Hon'ble Bombay High Court in case of **Mahadeo Kondiba Shinde** (cited *supra*) has categorically held that Court Commissioner can be appointed only after evidence led down by the

parties. The Hon'ble High Court in paragraph no.17 has held that if the parties have not stepped into the witness box the order of appointment of Commissioner would be a premature one. Further, it has been held that the Court Commissioner can be appointed at a later stage if the same appears to be necessary to elucidate the matter in dispute. In sum and substance, Court Commissioner cannot be appointed before the stage of evidence. In the instant case admittedly the plaintiffs evidence has yet not commenced. The ruling cited *supra* is squarely applicable to the case at hand. Even otherwise, as discussed above appointment of Commissioner at this stage cannot be granted as the same amounts to collection of evidence. Accordingly, I proceed to pass following order :-

**ORDER**

The application stands rejected.

( Dictated and Pronounced in Open Court)

Date 09/08/2023  
Ichalkaranji

(S. A. Ingley)  
2<sup>nd</sup> Jt. Civil Judge Junior Division  
Ichalkaranji

## CERTIFICATE

I affirm that the contents of this P.D.F. file Judgment/Order are same, word to word, as per the original Judgment/Order.

Name of stenographer	R. D. Jadhav.
Name of Court	S. A. Ingley. 2 <sup>nd</sup> Jt. Civil Judge, Jr. Dn. & Judicial Magistrate F.C. Ichalkaranji.
Date of Dictation	09/08/2023
Judgment/order signed by P.O. on	09/08/2023
Judgment/order uploaded on	11/08/2023