



**ORDER BELOW EXH.28 IN R.C.S. NO. 164/2023**

**Shri. Parashram Dattu Ardalkar**

**Vs.**

**Shri. Bajirao Dattu Ardalkar.**

This is the suit for declaration and permanent injunction. By application filed at Exh.28, vide Rule 7, Order XXXIX of the Code of Civil Procedure, 1908 (*hereinafter referred to as the 'Code'*), the plaintiff has prayed for appointment of Court Commissioner to visit the suit property and submit his report alongwith photograph after observing factual situation of it and after measuring the same. In the application it is contended that, despite an order of Court defendant have made preparation for making construction and at any point of time he will complete the construction. If defendant succeed to complete work of construction sole right of way of the plaintiff will permanently obstructed. In order to bring factual position of the said construction in the suit property, Court commissioner is required to be appointed to inspect the same. If, the factual position of construction comes before the Court, it will become helpful to the Court to decide the suit on merit. It is argued that, matter is pending for decision on temporary injunction application. Hence, the present application is not made with intend to collect the evidence. Thus, the plaintiff prayed to appoint a Court Commissioner to visit the suit property and to measure it. The application is supported with the affidavit of the plaintiff.

2. By filing say at Exh. 29 the defendant has strongly contested the application. It is contended that, the plaintiff have not produced any evidence which shows that, he has right of way in existence since last 20 years. The defendant started construction from last two month and the said construction is now at the slab level. The application is made with intend to delay the construction. Right of way existed to the plaintiff from western

side. The defendant has invested huge amount for making construction. It is argued that, the application is made with intend to collect the evidence. Lastly, he prayed to reject the application.

3. Heard, Adv. Shri. A.B.Desai for the plaintiff and Adv. Adv. Shri. N.G. Ajarekar, for the defendant.

4. This is a suit for declaration and perpetual injunction. It is the case of plaintiff that, defendant started construction and thereby affected and obstructed right of way available to the plaintiff. Prima-facie the plaintiff has to show existence of right of way. Further, it is not disputed that, the alleged construction is now at the slab level. Hence, by appointing Court Commissioner at this stage will not be fruitful and help to decide the matter. I, have gone through the ratio laid down by Hon'ble Rajasthan High Court in Onkar Singh Vs. Raghunath Singh (2019 (4)DNJ 1306). The facts of the case law cited supra and the case in hand are different from each other. Hence, With utmost respect to the ratio laid down in the case law cited supra, I am of the view that, same is not applicable in the present case in favour of plaintiff. In the present suit the plaintiff, has not asked relief for removal of an encroachment. In order to decide the suit on merit in terms of prayer made in the plaint, Court Commissioner need not be appointed as no such relief is prayed in the suit. Therefore, the application is devoid of merits and deserves to be rejected. Hence, following order.

**ORDER**

The application at Exh.28 stands rejected.

**Chandgad**

Date. 12/01/2024.

**(C.U. Shipkule)**

Civil Judge Junior Division, Chandgad.

**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 the Stenographer	Shri. P.W. Ghodekar, L. G. Stenographer.
Name of Court	Shri. C.U. Shipkule, Civil Judge, Junior Division and Judicial Magistrate, First Class, Chandgad.
Date of Dictation	12/01/2024
order signed by the P. O. on	12/01/2024
order uploaded on	12/01/2024