

MHLA090020542019



ORDER BELOW EXH.25.

1. This is an application is filed by defendants for making local investigation of the suit property by appointing Court commissioner.

2. It is contended that, the defendant no.1 to 4 have submitted their written-statement at Exh.121/B and denied the claim of the plaintiffs and mentioned the correct four boundaries of the suit land of gat no.121 of village Karadkhel, Tal.Udgir in written-statement para no.2 and specifically described that, on northern side of suit land gat no.121 there is a cart way which is used by the plaintiffs and defendants and other Bhawki which is in width of 6ft and after than the land of defendant no.1 land gat no.122. The plaintiff no.2 have submitted their chief-examination through affidavit which is at Exh.19 and he in his chief-examination produced the four boundaries of land gat no.121 of village Karadkhel, Tal.Udgir which is utterly false.

3. The plaintiffs filed their suit alongwith rough sketch map which is part and parcel of the suit. In that so called map they have not shown the cart way of plaintiffs and defendants and other

Bhawki who used the cart way for there agricultural daily reciprocity. The plaintiff no.1 and 2 by the way of this suit claim want to deny the entity of cart way which is used as easementary right from fore fathers of all the Bhawki. Therefore, in the interest of justice the Hon'ble Court may be pleased to appoint court commission to observe the physical features i.e. the boundary of land gat no.121 specifically on northern side of the suit land and court commission may be directed to inspect the suit land gat no.121 of village Karadkhel, Tal.Udgir and observe that, there is cart way on the northern side of land gat no.121 is in existence within width of 6 ft. and present time the cart way is in used by the daily agricultural reciprocity of the plaintiffs, defendants and all the bhawki that area. Hence, he prayed for appointment of Court commissioner.

4. Plaintiffs have filed their say at Exh.27. It is contended by plaintiffs that, the entire contents of para no.2 of the application are false and baseless and concocted, hence it is specifically denied by the plaintiffs. It is false to say that, the plaintiffs in the present suit shows false area of land gat no.121 of village Karadkhel, Tal.Udgir and shown false boundaries of the suit land. It is submitted that the plaintiffs are absolute owner and possessor of land Block no.121 area adm. 01 H 85 R situated at village Karadkhel, Tal.Udgir for prove this fact they have filed on record their title deed and they have shown the correct boundaries of the suit land as per actual boundaries.

5. The defendant no.1 to 4 have filed a false and concocted written statement, same is mere evasive denial on that basis they have denied the genuine claim of plaintiffs. It is specifically denied that the defendants have mentioned in their written-statement correct four boundaries of the suit land gat no.121 in para no.2. The defendant no.1 to 4 have falsely alleged that on northern side of the suit land gat no.121 there is cart way, which is used by the plaintiffs, defendants and other Bhawki, which is in width of 6 ft and after then the land of defendant no.1 land gat no.22. All these contents are not true correct hence it is denied by the plaintiffs.

6. The defendants have putforth the false story of cart way which is in width of 6 ft. after then the land of defendant no.1 and land gat no.122 without any documentary evidence. The defendants have not pleaded their source of title that how they became user of cart way. The defendants have not filed any title document of cart way and they have failed to establish title of cart way. Hence, the defendant no.1 has no right to sought for claim for appointment of court commissioner. Hence, without any document or title deed of cart way the Hon'ble Court cannot appoint court commissioner. Thus, the story of cart way as per their own pleading is hopeless and which is not subject matter of the case in hand. It is proved fact that the cart way is not relevant to the suit, hence for brought on record irrelevant facts of cart way

which is not subject matter even though the defendant no.1 has sought for appointment of court commissioner. In such circumstances the Hon'ble Court cannot appoint the Court Commissioner for collection of evidence.

7. The defendant no.1 has no right to say without any documentary evidence or title deed of cart way that in rough sketch map the plaintiffs have not shown the cart way of plaintiff and defendants and other bhawki, who used the cart way for their agricultural daily routine reciprocity. The defendants have to prove this fact by their own reliable documentary evidence and not through by appointment of Court Commissioner for collection of evidence in their favour. The question whether to observe the boundary of land gat no.121 on northern side and cart way is in existence width of 6 ft., the defendants could be proved by leading their evidence and not through the local commissioner. It is specifically denied that, plaintiffs are by way of this suit claim wants to deny the entity of cart way which is used as easementary right from forefather of all the bhawki.

8. On the perusal of the averments of written-statement, it appears that, the defendants have not complained about the cart way against the plaintiffs. The persons from bhawki also not complained about the cart way before competent authority. Hence, there is no serious dispute of cart way therefore there is no necessity for appointment of court commissioner. The defendants

have raised the subject of cart way before Hon'ble Court which is barred by jurisdiction. The defendants have any complaint against the plaintiffs about they are denied the entity of cart way which is used as easementary right them the defendants have approach before the Mamlatdar Court and ought to filed their claim in respect of cart way and also they have right to approach to the Tahsildar for their claim of cart way. Unless and until they have availed this remedy till then they have no right to raise the claim of cart way before this Hon'ble Court by way of their written-statement and this application.

9. That, as a matter of fact, as per the title deed of the plaintiff's father, thereafter plaintiffs are in actual possession over the suit land. The defendants have encroached over the suit land of plaintiffs. Then the plaintiffs have sought for measurement of their land from Deputy Superintendent of Land Reforms, Udgir. The Cadastral Surveyor of the said office measured the land of plaintiffs by following due process of law, in which it is revealed that the defendant no.1 has encroached over the suit land of the plaintiff's area adm. 0.33 R and illegally occupied the said portion from northern side of suit land. Hence, the plaintiffs have filed this suit for recovery of possession to the extent of area adm.33 R from the defendant no.1., thus the defendant no.1 has filed this application as a only counter blast to the suit of the plaintiffs.

10. On the perusal of application at Exh.25 shows that the

defendant no.1 wants to create and bringing the certain evidence on record, which shows in his favour that there is cart way from the northern side of land gat no.121 and after then land of defendant no.1 and land gat no.122. The defendant no.1 has made encroachment over the suit land of plaintiffs. The plaintiffs have filed sketch map of Cadastral Surveyor on record for prove this fact. The foundation of the boundary and cart way of the defendants itself is totally erroneous and no concern with the subject matter. The object of the court commissioner is not to collect the evidence, which can be taken in court. It is settled legal position that for collection of evidence the court cannot appoint to court commissioner. It is not business of the court to collect evidence in favour of one party. The court commissioner cannot be appointed to observe the boundary of land gat no.121 on northern side of the suit land.

11. As a matter of fact, at the time of making encroachment by the defendant no.1 over the suit land, he has destroyed common bandh of 6 ft. in width and entered and occupied northern side of suit land area adm.33 R, more particularly the defendant no.1 is entered till another middle east west bandh which is situated in the suit land owned and possessed by the plaintiffs. Now the defendant no.1 is falsely claiming said bandh as a common bandh and after them his land gat no.122. The fact is that after the said bandh there is land adm.33 R of the plaintiffs from and out of land gat no.121, which is encroached and occupied by the defendant

no.1 after then the land of defendant no.1 land gat no.122. The defendant no.1 is no concern with the said bandh. The plaintiffs are using the said bandh for their way as a daily routine reciprocity. Hence, the defendant no.1 is falsely claiming to the said bandh as a cart way which is exclusively owned and possessed by the plaintiffs, which is situated in the suit land of the plaintiffs. The plaintiffs humbly say and submit that parties to the suit ought to have first adduced their evidence as per their title deed, thereafter rather party sought for local investigation for the purpose of elucidating matter in dispute. On the perusal of the application filed by the parties to the suit then the court deems fit appointment of court commissioner in that situation the court can use discretionary power for taking assistance of court commissioner for adjudication of the subject matter as per title deed.

12. On 03/09/2021, the plaintiff no.2 has adduced his evidence by filing his affidavit in lieu of examination-in-chief on behalf of himself and plaintiff no.1 at Exh.19. Thereafter, the defendants have with an intention to prolong the matter avoided to cross-examination to the plaintiff no.2 one or other pretext. The defendants have filed adjournment application at Exh.22, same is granted by the Hon'ble Court. Thereafter, again the defendants have filed adjournment application at Exh.23. The said application is also granted by the Hon'ble Court subject to cost of Rs.200/-. On 19/08/2022 the matter was fixed for cross-examination of the plaintiff no.2. On behalf of the defendants on that day also the

defendants have failed to cross-examination to the plaintiff no.2. Thereafter, the Hon'ble Court has pleased to pass an order of "No Cross" against the defendants. After knowing this fact, on the very same day the defendant no.2 has filed an application for setting aside 'No Cross Order' at Exh.24. The said application allowed by the Hon'ble Court. After that the defendants instead of cross-examination to the plaintiff no.2, the defendant no.1 has filed afterthought, false and baseless an application at Exh.25 for appointment of court commissioner with an intention to prolong the matter. The said application at Exh.25 is filed by the defendant no.1 at very initial stage of the suit, without cross-examination to the plaintiff no.2, without shaken the evidence of plaintiff no.2 and elucidate something from the plaintiff no.2 during examination in his favour. Thus, it is crystal clear that, the defendant no.1 has filed an application at Exh.25, with an intention to collect the evidence without adducing evidence to prove his case, which is not permissible by law, hence application filed by the defendant no.1 at Exh.25 is not maintainable in the eye of law or on facts of the subject matter. Therefore, by considering above facts and circumstances the application filed by the defendant no.1 at Exh.25 may kindly be dismissed other it will prejudice the interest of the plaintiff. Hence, prayed for rejection of application.

13. Perused application, say and record of the suit. Heard both the advocates.

14. From record of the suit, it seems that present suit is filed for recovery of possession of the encroached portion out of Gat no.121 and for perpetual injunction. It is the itself contention of the plaintiff that he was and is in possession of the suit property i.e. area ad-measuring 1 Hector 85 R of Gat No.121. It is also mentioned in his suit that, defendant no.1 to 4 are encroached over the suit property.

15. From perusal of written statement of defendants, it seems that they have challenged the plaintiff and defendants and other Bhawki use Cart way width of 6 ft. which is situated land Gat no.122. Thus, the real dispute between the parties is about area and possession as per plaint and written-statement. Plaintiff has filed below Exh.21/7 the measurement report of Deputy Superintendent of land in which red mark shows that, some of the property of Gat no.121 encroached by Gat no.122. On the other hand, as per the written-statement of defendants Cart way situated northern side of Gat no.121 i.e. Gat no.122. Hence, if real position of the suit properties come on record, it will helpful to decide the suit. Moreover, plaintiff will not be prejudice by appointment of Court Commissioner. Hence, to decide the real controversy between the parties and to bring on record real fact of the present position on record, it is necessary that commission should be issued to inspect the land Gat no.121 and observe that there is Cart way on the northern side of Gat no.121 width of 6 ft. Hence, considering all above discussion and perusing record of the case,

this application deserves to be allowed. Hence, I proceed to pass following order.

ORDER

1. Application is allowed.
2. The T.I.L.R. Udgir is hereby appointed as Court Commissioner to inspect land Gat No.121 situated at village Karadkhel, Tal. Udgir, Dist. Latur and observe the exact position in view of prayer of this application and file his report within three months from the date of receipt of writ of commission.
3. Defendants are directed to provide copy of plaint, written statement, application at Exh.25 and say at Exh.27 and other necessary document required by T.I.L.R.
4. Defendants shall bear the cost of commissioner and deposit the required fee in the office of T.I.L.R, Udgir as per their rules.

Place: Udgir
Date: 09.06.2023.

(Smt.J.C.Gupta)
Jt.Civil Judge Jr. Dn.,Udgir.