



Order below Exh.59 in Spl.CS No.5/2016

Vithal Vs. Narayan

This is an application filed by plaintiff for appointment of Court Commissioner on the grounds stated in the application. The contents of application in short are:- that the plaintiff has filed this suit for specific performance of contract and cancellation of decree passed in RCS No.48/2012. That by virtue of agreement to sale, the suit property is in possession of plaintiff and he has constructed a Tin shed and he is cultivating the suit land. That the defendant has denied the possession of plaintiff and also denied the existence of tin shed over it. The defendant has also raised objection regarding the four boundaries of the suit property. In such situation it is necessary to appoint the Court commissioner for inspection of the suit property and he shall submit his report as per the situation existing in the suit property. Hence, the application.

2. Defendant No.1 has filed his say at **Exh.63** and raised strong objection on several grounds. The contents of his say in short are :- that the application filed by plaintiff is misconceived and it is filed to misguide this Court. That RCS No.48/2012 is decreed in favour of defendant No.1 and he has filed execution petition bearing RD No.7/2015 for execution of judgment and decree. That the sale deed of the suit property is executed by the officer of the Court and possession warrant is also issued for handing over the possession of suit property to defendant No.1. That the application is filed to prolong the matter and the Hon'ble Bombay High Court, Bench at Aurangabad in W.PNo.2897/2024 has directed that the possession of the suit property be handed over to defendant No.1. Hence, requested to reject the application.

3. Perused application and say. Heard learned advocate Shri.H.V.Gaikwad for plaintiff and learned advocate Shri S.A. Sabnis for defendant No.1. Learned advocate Shri.H.V.Gaikwad submitted that in view of objections raised by defendant No.1 in his WS regarding the situation of the suit property and dispute

regarding four boundaries, it is necessary to appoint Court commissioner. On the other hand, learned advocate Shri.S.A. Sabnis argued in the line of his say.

4. Record shows that the plaintiff has filed this suit for specific performance of contract claiming to be executed by defendant No.2 in his favour on 23/05/2007. Plaintiff has also prayed for cancellation of decree passed in RCS No.48/2012. Defendant No.1 has contested the suit by filing his WS at **Exh.28**. The suit is proceeding ex-parte against defendant No.2. Issues are framed at **Exh.31** on 04/10/2017 and the cross examination of POA holder of plaintiff at **Exh.38** is in progress.

5. As per contents of this application, it appears that plaintiff is claiming existence of Tin shed over suit property and cultivation of certain crops which are standing in it. So far as these facts are concerned, it is necessary to prove its existence by way of adducing cogent evidence on record. These facts cannot be brought on record by appointment of Court commissioner. Defendant No.1 has filed photo-copy of order dated 15/03/2024 passed by Hon'ble Bombay High Court, Bench at Aurangabad in W.P.No.2897/2024 at list below Exh.65/2. Its perusal shows that the said writ petition was preferred by defendant No.2 against defendant No.1, wherein he has categorically stated that the suit property is not in his possession. Even if for the sake of argument it is held that the suit property is in possession of defendant No.1 still the fact that sale deed of the suit property is already executed in favour of defendant No.1 during the proceedings of RD No.7/2015 cannot be neglected. As the title of the suit property is already transferred in favour of defendant No.1 and that too by legal process, I find no reason to bring on record the actual position or situation that is existing in the suit property. For these reasons, I pass following order:-

ORDER

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

Date :14/02/2025

(Ashish B. Marlecha)
Civil Judge (Sr.Dn.),
Nilanga, Dist. Latur.