

**Order passed below Exh.49 in R.C.S.No.463/2018**  
( Manmath vs. Bhimashankar and other )

This is an application filed by defendants for appointment of court commissioner under Order XXVI Rule 9 of C.P.C.

2. According to defendants they and plaintiff's are adjoining land holders. For showing situation of their property, they prayed to appoint court commissioner. Therefore, defendant has filed this application. They lastly prayed for allowing the application.

3. The plaintiff filed say. According to plaintiff application is not maintainable. They prayed for rejection of application.

4. Heard learned Advocate Shri. S.T. Shinde for defendants and Shri. S. H. Patel for plaintiff.

5. Perused record, application.

6. On perusing record it appears that the plaintiff has filed this suit for perpetual injunction in respect of their property. It is pertinent to note that it is duty of the plaintiff to prove his ownership and possession over the suit property. The defendants have filed written statement alongwith counter claim for perpetual injunction. It is pertinent to note that it is duty of the defendant to prove their possession over their property.

7. The **Honorable Bombay High Court in case of Dnyanedeo Vithal Salke vs. Dagdu Kadar Inamdar (2017(3) Mh.L.J. page No.314** held as under;

*“2. Admittedly, the suit has been filed for injunction simplicitor and there is no prayer for removal of encroachment. Application (Exh.5) seeking temporary injunction against the petitioners-original defendants filed by respondent- original plaintiff was rejected on 29-9-2016 on the ground that the original plaintiff could not establish prima facie case in*

*his favour and he could not prima facie show which property was in his possession. When the suit has been filed for injunction simplicitor, I do not understand as to how the Civil Judge, Junior Division could have passed order directing appointment of T.I.L.R., with direction to submit his factual report as regards possession and user of the land. This amounts to collection of evidence which is not the object of the provisions regarding appointment of the Court Commissioner, as contained in Order 26, Rule 9 of the Civil Procedure Code. The learned Single Judge (As the Hon'ble Judge then) in the case of Sanjay namdeo Khandare vs. Sahebrao Kachru Khandare and ors., 2001(2) Mh.L.J. 959 has also taken a view that appointing the Court Commissioner to submit his report regarding actual possession of the suit field would amount to making effort to collect evidence regarding possession and the same is not permissible in the law.*

8. Considering above situation it comes on record that the plaintiff's suit and defendants counter claim are for perpetual injunction. The case is for hearing. It is the duty of defendant to prove their ownership over the property. The Hon'ble Bombay High Court held that appointing the Court Commissioner to submit his report regarding actual possession of the suit field would amount to making effort to collect evidence regarding possession and the same is not permissible in the law. The Hon'ble Bombay High Court held that the application is not maintainable. The ratio of Hon'ble Bombay Court is binding on this Court. The burden of issue of counter claim is on defendant and not on plaintiff. Therefore, the application is for collecting of evidence in respect of possession. Considering these all situation I am not found any substance in the application. Therefore, it is necessary to reject this application. Hence, I passed following order.

**Order**

1. The application is rejected.
2. No order of costs.

( S. P. Jadhav )

Date : 06/11/2019

Jt. Civil Judge J.D., Ausa.