



R.C.S. No.444/2013.
Chaitanya Vs. Shivaji

ORDER BELOW EXH. NO.44

1. This application filed by plaintiff for appointment of Court Commissioner.
2. According to plaintiffs, they have filed present suit for demarcation of boundaries in respect of suit property. They have pleaded that, defendants are adjacent land holders. Defendants are trying to commit encroachment. Therefore, it is necessary to appoint T.I.L.R. for measurement of suit property. They lastly prayed for allowing application and to measure suit property.
3. The defendants filed their say at Exh.52. They denied all allegations, pleading and prayer of plaintiffs. According to them, they have not committed any encroachment or not destroyed any dyke. They are adjacent land holders of land of plaintiffs. Plaintiffs wanted to collect the evidence through Court Commissioner. The evidence of plaintiffs is started and one witness was examined. The matter is part-heard. The application is not maintainable. They lastly prayed for rejection of application.
4. Heard Learned advocate Shri S.S. Dhavan for plaintiffs and Shri V.M. Wagdare for defendants.

5. Perused record, plaint, application, say of defendants.

6. On perusing plaint it appears that, the plaintiffs have filed present suit for demarcation of boundaries in respect of suit property. Plaintiffs prayed relief of measurement of suit property and fixation of boundaries. From these pleading it comes on record that, plaintiffs themselves wanted to fix boundaries and to measure the suit property by final decree of suit.

7. By way of present application plaintiffs pleaded that, defendants have committed encroachment over the suit property and for showing the encroachment if any committed by defendants, the Court Commissioner is needs to be appointed. From these pleading of plaintiffs in present application, it appears that, defendants have committed encroachment over the suit property. But, in main suit plaintiffs have not pleaded that, the defendants have committed any encroachment over their land. Their suit is only in respect of demarcation of boundaries. In present application the plaintiffs have pleaded new case that is encroachment in the hands of defendants which is not pleaded in suit.

8. Plaintiffs suit is for demarcation of boundaries. If application is allowed, then it will indirectly the suit will be decreed. Therefore, in my view, for demarcation of boundaries it needs to be adjudicate dispute finally after passing the final decree. The plaintiffs themselves not pleaded that, defendants have committed any encroachment. Therefore, in my view, the present application is in respect of showing encroachment is not maintainable.

9. The advocate for plaintiff relied on ratio decided by the Hon'ble Bombay High Court, Bench at Aurangabad in **Writ Petition No.6562/2015 Kalidas Govind Nanavare Vs. Babruwan @ Babru Dhondiba Surwase** and submitted that, for the demarcation of boundaries it is necessary to appoint T.I.L.R. But, in the case of hand the plaintiff pleaded that, defendants have encroached and wanted to appoint Court Commissioner for showing encroachment. In present application the plaintiffs not pleaded that, for the demarcation of boundaries they have wanted to appoint Court Commissioner.

10. The advocate for plaintiffs further relied on ratio decided by the Hon'ble Bombay High Court in **Dattatray Namdev Kalake Vs. Bapu Bhairu Bhivungade & ors. 2015(1) ALL MR 5 and Shyam Janardan Chaudhary Vs. Asha Ramdas Katkar & Anr. 2015(1) ALL MR 48**. On perusing the facts of ratio decided by the Hon'ble Bombay High Court in **Dattatray Namdev Kalake Vs. Bapu Bhairu Bhivungade & ors.** it appears that, the dispute between parties of that suit is in respect of trees which are situated on the boundary marks. That facts is not in the case of hand. Further the facts of case decided in **Shyam Janardan Chaudhary Vs. Asha Ramdas Katkar & Anr.** is in respect of encroachment over the land. But, in the case of hand there is no case of plaintiffs of encroachment. Considering these all circumstances, the facts of case laws are not applicable in the case of hand. Therefore, the ratios of the Hon'ble Bombay High Court are not helpful to the plaintiffs.

11. Considering all above discussion, I am coming to the conclusion that, the plaintiffs suit is for demarcation of boundaries.

In present application plaintiffs have not pleaded that, for the demarcation of boundaries they have wanted to appoint T.I.L.R. If present application allowed it will indirectly decreed the suit. The encroachment not pleaded by plaintiff in the suit. Therefore, I am not found any substance in the application. The application needs to be rejected. Hence, I pass the following order.

ORDER

1. The application is rejected.
2. No order as to costs.

Date:- 16/03/2020.

(S. P. Jadhav)
Civil Judge,J.D., AUSA.