

ORDER BELOW EXH.41
(dt.15/02/2025)

This application is filed by the plaintiff for appointment of Court Commissioner for measurement of the suit property along with the property of defendant for proper adjudication of the matter.

2] Defendant filed say below Exh.44 and resisted the application on the ground that measurement cannot be done by appointing Court Commissioner as regards to check the possession of the property as well as for fixation of the boundaries.

3] Heard Adv. Shri. Armarkar for the plaintiff and none appeared on behalf of defendants when called out repeatedly.

4] I have carefully gone through the record. Plaintiff filed the same application below Exh.17 for appointing Court Commissioner for measurement of the suit property Survey No.31/3. That application was not pressed on 04.12.2024 and this application is filed.

5] The present suit is filed for permanent injunction and injunction against creating the third party interest by the defendants. There is no other relief prayed by the plaintiff in the present suit and therefore this is the suit for simplicitor injunction. But the present suit is only for prohibitory injunction.

6] Adv. Shri. Armarkar submitted that plaintiff and defendants land is adjacent to each other. There is dispute between both of them about the actual possession of the property. He came with the case that defendants are encroaching upon the suit property and therefore he

claimed the permanent injunction against defendants. For taking the actual position of the property along with the property of the defendants, the Deputy Superintendent of Land Records is required to be appointed as Court Commissioner for the measurement of the suit property as well as the property of the defendants and it will elucidated the actual dispute between the parties and therefore he prayed to allow the application.

7] None appeared on behalf of defendants but defendants filed reply to this application. In their reply, defendants resisted the application on the ground that they have filed the counter claim. The present suit is filed for simplicitor injunction. It is not contended in the plaint that defendants are doing any construction work on the suit property and it is only alleged that defendants are obstructing the suit property. Hence plaintiff has no right to measure the suit property along with property of the defendants. It is not the case of the plaintiff that defendants encroached upon the suit property and therefore measurement cannot be done as there is no case of encroachment. He relied upon the judgments of Hon'ble Bombay High Court and Himachal Pradesh High Court and submitted that when there is no case of encroachment put up by the plaintiff, there is no need to appoint Deputy Superintendent of Land Records as Court Commissioner. He relied upon the following judgments -

- (i) 2017 (3) Mh.L.J. 314, *Dnyandeo VS Dagdu Kadar*
- (ii) 2020 (2) Mh.L.J. 145, *Arjun VS Bhanudas*
- (iii) 2011 (2) Mh.L.J. 991, *Nalubai VS Gopinath*
- (iv) 2011 (6) Mh.L.J. 334, *Syed Mushtaque VS Syed Ashique*
- (v) 2009 (2) Mh.L.J. 487, *Pandurang VS Sandip*
- (vi) AIR 2022 HP 132 *Pramod Singh VS Madan Lal*

8] Advocate for the plaintiff relied upon the judgment of Hon'ble Bombay High Court, Bench at Nagpur in *Writ Petition*

No.34/2018 in Keshav Pandurangji Manusmare VS Madhukar Ghanshyam Dhabekar and Writ Petition No.4885/2014 in Ketan Gangadhar Rewatkar VS Indian Oil Corporation Ltd., Mumbai.

9] I have carefully gone through the record of the case. The plaintiff filed the suit for simplicitor injunction and he prayed that defendants be restrained from obstructing the peaceful possession of the plaintiff as well as from making any encroachment over the suit property and creating any third party interest as regards the suit property. Defendants filed counter claim. In the counter claim, defendant specifically came with the case that they are the owner of the counter claim property. It is further claimed that plaintiffs are obstructing their possession over the counter claim property and by way of counter claim, defendant claim the permanent injunction against the plaintiff.

10] Considering the plaint and the counter claim, there seems that there is dispute between the parties as regards the possession. It is further revealed from the pleading of the parties that both are claiming injunction against each other. Now the present suit is pending for the evidence of the plaintiff as *Arjun VS Bhanudas* issues are already framed below Exh.33 on 23.01.2024. Considering the nature of the plaint and the relief claimed, it seems that the plaintiffs coming with the specific case that they are owners in possession of the suit property. They specifically came with the case that defendants are trying to encroach upon the suit property and obstructing their peaceful possession. In such circumstances, as there is no case of encroachment put up by the plaintiff, plaintiff has to prove his own case as regards the possession and the obstruction at the hands of the defendants and acts of the defendants as regards the encroachment upon the suit property.

11] There are two Survey numbers, one is 31/3 and another is 30. Plaintiffs specifically pleaded in their plaint that they are the owner of the Survey No.31/3. It is further pleaded that defendants are the owners of Survey No.30 which is adjacent to Survey No.31/3. It is further pleaded that on 05.01.2005, plaintiff already measured the suit property and C-copy of the map is already filed on record. It is further pleaded that defendants are forcefully trying to enter upon the suit property and trying to encroach it in the suit property.

12] By way of counter claim, the defendant claimed relief of injunction against original plaintiffs for restraining the original plaintiffs from disturbing the peaceful possession of the original defendants, in Survey No.30 i.e. Counter Claim property. It is further submitted in the counter claim that defendants already layout the plots in Survey No.30 and those were already sold to the purchasers. The water connection is also taken. But the original plaintiff is trying to disturb the possession and claim for permanent injunction against plaintiff.

13] After going through the pleadings of both the parties carefully, it seems that it is admitted fact between plaintiff and defendant that plaintiff is the owner of Survey No.31/3 and defendants are the owners of Survey No.30. The area of the property is also admitted by both the parties. Now the question remains while deciding this suit for appreciation is that who proves to be in possession of these two properties. In such circumstances, it cannot be seen or taken on record by way of appointing Court Commissioner that, who is in possession of the disputed area. It is the burden of the plaintiff to prove his own case as alleged in the plaint.

14] For adjudication of the matter in dispute, plaintiff has to

prove his possession over the suit property. In such circumstances, appointment of Court Commissioner for measurement of the suit property is not necessary as the question which is required to be decided i.e. matter in dispute is very limited. While considering this limited question of matter in dispute, there requires no elucidation of the matter in dispute at the hands of the Court Commissioner. Because the question of possession is actually kept for trial between this two parties. When the question of possession arises, it has to be proved by the party himself. For that purpose, Court Commissioner can not be appointed.

15] It is the case of both the parties that both the suit properties were divided in plots. In such circumstances, while doing plottings on the suit property, the property must have to be measured at the hands of the expert. It is the case of the plaintiff that they have already measured the suit property in 2005 and the map is already on record. In such circumstances, considering the nature of the suit and the counter claim along with the prayer of both the parties, there requires no elucidation of the actual position of the suit property at the hands of the Court Commissioner.

16] Plaintiff relied upon the judgment of Hon'ble Bombay High Court in *Writ Petition no.4885/2014 in Ketan Gangadhar Rewatkar VS Indian Oil Corporation Ltd., Mumbai*. The facts of the cited case are very much different than the present set of facts. There was boundary dispute between the parties in the cited case. This is not the case of the plaintiff in the present case. Another judgment cited by the plaintiff in *Writ Petition No.34/2018 in Keshav Pandurangji Manusmare VS Madhukar Ghanshyam Dhabekar*, there is also seems to be a boundary dispute as regards the construction of the compound wall and therefore boundaries

are required to be elucidated and this is not the case in the present set of facts. Therefore both the judgment cited by the plaintiff are not helpful to them.

17] Defendants relied upon the judgment of Hon'ble Bombay High Court in 2017 (3) Mh.L.J. 314, it is held that that when the suit for simplicitor injunction is filed, appointment of Taluka Inspector of Land Records to submit report on actual possession is amongst to the collection of evidence and is not permissible in law. Another judgment relied upon by the defendants in 2020 (2) Mh.L.J. 145 in Arjun VS Bhanudas, Hon'ble Bombay High Court held that the suit for mandatory and perpetual injunction and there is no positive case of encroachment at the hands of defendants over definite portion of suit land made out by the plaintiff, there is no need to appoint Court Commissioner. Another judgment relied upon by the defendant in 2011 (2) Mh.L.J. 991, Hon'ble Bombay High Court in Nalubai VS Gopinath held that Court Commissioner cannot be appointed to find out as to who is in possession of the suit field and or suit premises. Another judgment relied upon the by the defendant in 2011 (6) Mh.L.J. 334 in Syed Mushtaque Ahmad VS Syed Ashique Ali Khan, Hon'ble Bombay High Court held that the Court Commissioner can not be appointed to collect the evidence. Defendants relied upon the judgment of Hon'ble Bombay High Court in 2009 (2) Mh.L.J. 487, wherein in the case of Pandurang VS Sandip Hon'ble High Court held that the provisions of Order 26 Rule 9 are directory in nature and only when the trial Court finds a local investigation necessary for the purpose of deciding the matter in dispute, it may exercise the discretion for appointment of Court Commissioner. When the Court does not find it necessary, there is nothing which mandate the Court to appoint the Court Commissioner. In another judgment relied upon by the defendant, AIR

2022 HP 132, Hon'ble Himachal Pradesh High Court held that appointment of Commissioner to elucidate how much and in what matter defendants have occupied the suit land in suit for prohibitory injunction, the plaintiffs should have obtained demarcation from revenue authority to establish his claim. The burden of proof to prove his case is upon the plaintiff. Plaintiff cannot be permitted to gather evidence by using process of Court.

18] Considering the above cited judgment, it is seen from the record that the dispute between the parties is as regards the possession of the suit property and the counter claim property. The suit property and the counter claim property is already being plotted by both the parties. While doing plottings, there must be measurement that to at the hands of the expert as regards the area of Survey No.31/3 and Survey No.30.

19] In such circumstances as alleged by the plaintiff, the Court Commissioner cannot be appointed to see who is in possession of what portion of the area of Survey No.31/3 and 30. It has to be proved by the plaintiff that he is in possession of Survey No.31/3. In such circumstances, the reasons mentioned for appointing the Court Commissioner are not satisfactory.

20] The present suit is only for prohibitory injunction. For deciding the suit completely, the question only requires to be proved by the parties is their possession. Even it is not the case of the plaintiff that defendants have made encroachment over their property. Even it is not the case of the plaintiff that there is encroachment at the hands of the defendants over suit property. In such circumstances, for granting the prohibitory injunction in favour of plaintiff, the burden lies on the

plaintiff to prove his possession over the suit property. In such circumstances, the Court Commissioner cannot be appointed for checking the possession over the suit property. Therefore the application is not tenable in the eyes of law.

21] Hence considering these observation and the judgment cited by both the parties, plaintiff failed to establish that the matter in dispute requires elucidation at the hands of the Court Commissioner as regards the possession. Therefore considering the judgments cited by the defendants and the facts in dispute, there is no need to appoint Court Commissioner. Hence I pass the following order.

- ORDER -

- 1] The application (Exh.41) is rejected.
- 2] No order as to cost.

Kamptee
Date : 15/02/2025.

(Mohan R. Kamat)
Civil Judge, Junior Division,
Kamptee.