

ORDER BELOW EXH.69 IN R.C.S.No.70/2014**(Ashok Charpe Vs. Mukunda Naik & Others.)**

1] Defendant Nos.1 to 3 have filed present application under Order 26 Rule 9 and 10 of Civil Procedure Code for appointment of D.Y.S.L.R., Saoner as Court Commissioner.

2] It is contention of the defendants that, plaintiff has filed suit for simplicitor injunction without seeking declaration. Hence, the suit is not tenable. The suit is barred by Order 2 Rule 2 of the Civil Procedure Code. Defendants have filed their written statement on record along with counter claim and sought cancellation of sale-deed dated 16.05.2011. The plaintiff further sought permanent injunction from making any illegal construction over suit land of defendant. The counter claim be treated as part and parcel of this application.

3] The suit land is measuring 144 Sq.ft. It is kept reserved for common use of family members. Deceased Shamrao Naik was having ancestral plot of 468 Sq.ft. which was not partitioned but entire house property was partitioned except this plot. Defendant No.4 and 5 had no right to deal with this particular vacant land, so far as suit land 144 sq.ft. is concerned, the plaintiff by taking undue advantage is trying to make encroachment over the said suit land without any right, title or interest. The present suit is concerned with the proposed encroachment which is likely to be made by plaintiff, in such facts and circumstances it is necessary to appoint commissioner as per settled principle of law. It is settled law that, in case controversy about the encroachment would arise, it would be essential to appoint commissioner for physical verification of the plot. Hence, considering all these facts the defendants prayed to allow the application.

4] The plaintiff has filed say on the application and resisted the same. It is contention of the plaintiff that, the application is strongly apposed. The application is not tenable, hence it may be rejected.

5] Advocate for the plaintiff Shri. V. D. Mule submitted that, suit is for simplicitor injunction and counter claim is filed by defendant No.5. The identification of the properties are not disputed. Plaintiff has filed his affidavit examination-in-chief below Exh.68 on 13.08.2018 and later on the present application is filed. The application is filed to collect the evidence. Defendant No.5 should measure land by DY.S.L.R. office. The identification and the location of suit property is not disputed. In these circumstances the application deserves to be rejected. On the other hand, the advocate Shri. M.C.Khangare for defendant No.1 to 3 is submitted that, the counter claim is filed to cancel the sale-deed and prayer of permanent injunction is also sought. The ancestral plot was admeasuring 468 Sq.ft. out of that 144 Sq.ft. is reserved for common use. The partitioned was not affected in regard of 144 Sq.ft. Defendant No.4 and 5 sold that property and the original plaintiff is likely to make encroachment over 144 Sq.ft. So as to resolve the controversy and as directed by the Bombay High Court in suit for encroachment it is necessary to appoint Court Commissioner. Hence, considering all these facts and circumstances prayed to allow the application.

Sr.No.	Points	Findings
1]	Whether it is necessary to appoint Court Commissioner for elucidating the matter in dispute?	Negative.
2]	What order ?	As per final order...

REASONS

6] I have gone through pleadings of both the parties and the arguments advanced by both the advocates. It is pertinent to note here that, the original plaintiff Ashok has filed simplicitor injunction suit against the defendant. The plaintiff is claiming injunction on the Title Deed which is purchased from defendant No.5. On the other hand, defendant Nos.1 to 3 have totally denied the contentions and has challenged the sale-deed executed by defendant No.5 in favour of the plaintiff. It is contention of defendant Nos.1 to 3 that, defendant No.5 was not having right to sale that property to the plaintiff as there was no partition affected between the brothers. The property was in common use of all the brothers. It is contention of defendant Nos.1 to 3 that, they have filed counter claim and sought relief of declaration in regard of the sale-deed as illegal to cancel the same and for permanent injunction that the original plaintiff Ashok shall not make any illegal construction over suit property i.e. 144 Sq.ft.

7] It is pertinent to note here that, the present application is filed by defendant Nos.1 to 3. On perusal of pleadings in counter claim there is absolutely no averments in regard of encroachment by original plaintiff over the suit property. Moreover, on perusal of present application more particularly in para.2 it has specifically contended that, plaintiff is trying to make encroachment. The plaintiff has not sought any relief of possession in the counter claim. There is no case in the counter claim in regard of encroachment and it's possession. The present application is filed contrary to the pleadings in the counter claim. No doubt the Hon'ble High Court has laid a law that, whenever there is dispute in regard of location of property it is preferred to get measured the land by appointment of commissioner i.e. DY.S.L.R. In the present case in hand there is absolutely no dispute in regard of location and identification of the property. On the other hand the defendant Nos.1 to 3 have specifically challenged the title

of the plaintiff. In these circumstances the burden is upon the defendant to prove that, sale-deed is void and it is liable to be cancelled. Admittedly the plaintiff is in possession of suit property i.e. 144 Sq.ft. In these circumstances in case measurement is carried out by DY.S.L.R. obviously it would show that plaintiff is in possession of 144 Sq.ft. and in that case whether it is encroachment or not it would be decided on the fact in issue in regard of title of original plaintiff. So it would be a futile exercise to appoint DY.S.L.R. in these peculiar circumstances.

8] In case the application is allowed it will certainly amounts to collection of evidence by defendant No.1 to 3 which is absolutely not permissible under the provisions of Order 26 Rule 9 of the Code of Civil Procedure. Hence, considering all these facts and circumstances as well as the legal aspects I do not find any merits in the application and accordingly I answer point No.1 in negative and for point No.2 I pass following order.

:: ORDER ::

1. Application Exh.69 stands rejected.
2. Cost in cause.

[Dictated and pronounced in the open Court.]

Date: 27.09.2022.

(R. B. Kulkarni)
2nd Jt. Civil Judge Jr. Division,
Saoner.

Endorsement

Case argued on	:	25.02.2022
Order dictated on	:	27.09.2022
Transcription ready on	:	28.09.2022
Order checked and signed on	:	29.09.2022

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Certificate

I affirm that the contents of this PDF order are same word to word,
as per the original order.

Name of Stenographer :- A. S. Mahurkar