

Order below Exh.56

01. The plaintiffs have made this application for the appointment of court commissioner as per the provisions of order 26 rule 9 of the Code of Civil Procedure.

02. The brief contentions of the application are as under.

The suit filed for perpetual injunction and mandatory injunction is pending before the court. The deceased spouse of the plaintiff no.1 sold 15.24 meters east-west and 18.28 meters south-north total admeasuring 270.58 sq. meter out of land gat no. 330/1 to the defendant no.3. There area of 33 feet wide acquired by the state is situated towards southern side of gat no.330/1. And the national highway is situated towards the southern side after the acquired 33 feet wide strip. The defendant no.3 has illegally carried out construction of double storied building. Besides that he has constructed stair case in the area remaining after the acquisition. The construction has been carried out during the pendency of the suit. Therefore, the Taluka inspector land records be appointed as court commissioner to carry out measurement of the construction done and adduce detailed report along with the map.

3. The defendants no.1 and 2 resisted the application and claimed its' rejection contending that the plaintiffs want to grab the portion sold by them by making such application.

04. The defendant no.3 has resisted the application by filing his say vide exhibit no.63. The plaintiffs have no right over the land sold to the defendant no.3. He denied the acquisition of 33 feet wide land from northern side of the national highway. He claimed the rejection of application contending that it has been made to cause illegal obstruction to his possession.

05. Heard both the sides at length. The suit for perpetual and mandatory injunction is admittedly pending. The prayer for temporary mandatory injunction was rejected on 20/10/2016 as per order below exhibit no.5. The defendant no.3 or anybody claiming through him was temporarily restrained from making any type of construction in suit property i.e the land having 20 feet width situated towards southern side of the plot of defendant no.3 till the disposal of the suit on 20/10/2016 vide order below exhibit-6.

06. As per the provisions of order 26 rule 9 of the Code of Civil Procedure- “ *in any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court.*

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued the court shall be bound by such rules”.

07. The plaintiffs have come with the specific contention

about the defendant no.3 carrying out illegal construction in the land owned by them. On the contrary, the defendants no.1 and 2 have come with specific defence that they can regulate the access to private properties from Highways as per Control of National Highways (Land and Tariff) Act and can remove encroachment if any over the highways. As per the pleading of the defendant the construction of the building over suit property is completed 13 years ago.

08. As per the Law of Evidence the party which desires the judgment in its' favour has to prove it's case with the help of probable evidence. It is the contention of the plaintiffs that the construction is done during the pendancy of the suit. Therefore, I think the plaintiffs have to prove their own case. The court commission cannot be appointed for collecting evidence. At this juncture, no question of elucidating the matter in dispute is under consideration. The picture or dispute would be clear after the evidence is lead by the parties. Thus, in such circumstances, I am not inclined to grant the application at this juncture. Hence, in the result, the application stands rejected.

10. Parties to note.

Date : 16/03/2022

(S. A. Kanshide)
Jt. Civil Judge, S. D. Omerga.

CERTIFICATE

I affirm that, the contents of this P.D.F.file judgment are same, word to word, as per the original Judgment.

Name of Stenographer :	S.V.Nande
Court Name :	Jt. Civil Judge, S.D. Omerga.
Date :	16.03.2022
Judgment/Order signed by the Presiding Officer on :	16.03.2022
Judgment/Order uploaded on :	17.03.2022