

ORDER PASSED BELOW EXH. 122

This application has been filed by the plaintiff for appointment of Court commissioner under Order XXVI rule 9 of the Civil Procedure Code.

2. It is the contention of the plaintiff that they have filed suit for Permanent injunction. Their application for grant of temporary injunction has been allowed by the court and directed defendants not to obstruct the peaceful possession of the plaintiff's over the suit property. The plaintiff has chance of success hence defendants tried to encroach upon the land of plaintiffs from north side of the suit land and on 09/02/2021 at about 8.00 to 9.00 a.m. they had taken efforts and tried to encroach upon the suit land. The appointment of court commissioner is necessary to know the encroached portion of land. They also threatened that they shall encroach upon the land. There is no purpose to collect the evidence by way of this application and only purpose is to brought real facts on record. Lastly prayed to allow the application.

3. Defendants have resisted the application by filing their say below Exh. 124 and contended that application is incorrect. It is their further contention that the suit is filed in the year 2014, temporary injunction order is in favour of the plaintiff and by taking undue advantage of said order they are prolonging the suit. The evidence of the plaintiff was started on 01/08/2015 and it was closed on 14/08/2019 which shows that the evidence of the plaintiff was going on for the period of 4 years. The plaintiff has not filed present application at the time of their evidence. The evidence of defendants was started on 21/08/2019 and they closed it on 10/06/2020 and since then suit is pending for final argument. The purpose of the plaintiff to file present application is to prolong the suit. The plaintiff have other remedy for encroachment. This application is filed to collect the evidence and to fill up the lacuna. The appointment of court commissioner cannot be ordered to see who are in possession of the suit property. Lastly prayed to reject the application.

4. Heard both the parties. The defendants have placed their

reliance upon the judgment of Hon'ble Bombay High Court in 1. **Dnyandeo Vitthal Salke ..V/s.. Dagadu Kadar Inamdar 2017 C.J. (Bom.) 696**, 2. **Syed Mushtaque Ahmad s/o. Syed Ismail and Ors. V/s. Syed Ashique Alikhan s/o. Haidarali and Ors. 2011 C.J. (Bom.) 340**, 3. **Sanjay s/o. Namdeo Khandare ..V/s. Sahebrao s/o. Kachru Khandare and Ors. 2000 C.J. (Bom.) 708** in all above cited judgment it has been observed that 'no appointment of Court commissioner should be for collection of evidence'.

5. The plaintiff has placed their reliance upon the judgment of Hon'ble Uttarakhand High Court in **Rajeshkumar Goutam ..V/s.. Maha Mandaleshwar Vedabayasanad Geeta Ashram 2004 A.I.R. (Uttch.) 30**, judgment of Hon'ble Bombay High Court in **Sukhadeo Parashramji Bhugul (Dr.) ..V/s.. Wamanrao Nagorao Charhat 2004 (3) All M.R. 645**, judgment of Hon'ble Bombay High Court in **Chandramani Marotrao Pantavne ..V/s.. Shashikala Birjlal Bisen 2016 (3) All M.R. 139**, judgment of Hon'ble Bombay High Court in **Kashinath Chindhuji Shastri ..V/s.. Haribhau Nathuji Bawanthade 2004 (2) All M.R. 40**. In all the judgment it has been observed that 'if there is any dispute between the parties in regard to measurement then appointment of Court commissioner is necessary and also observed that for the purpose of elucidating the area on which encroachment has been done then appointment of Court commissioner is necessary and without their report Court cannot come to conclusion about the encroachment.

5. I have gone through all the records, submissions and citations relied upon by both parties. It is admitted that without map of surveyor or his report Court cannot come to conclusion about the encroachment and for the purpose of knowing the area of encroachment appointment of Court commissioner is necessary, but the facts and circumstances of the judgment which are placed by the plaintiff in support of their contention is totally different from the case in my hand. Defendants have also filed one letter of TILR which shows that measurement can not be done on the reason of difference in the area appearing on record. I just want to discuss what is the contention of both parties in regard to the suit land. On perusal of the record it is seen that the contention of the plaintiff is that he owns and possess 01 H. 74 R land in Gat No. 138/5 and plaintiff wants measurement of said property.

But defendants denied the possession of the plaintiff in whole Gat No. 138/5. It is the contention of defendants that plaintiff owns 01 H 74 R land but it is situated in two parts/division and he has only 87 R land in Gat No. 138/5 and given four boundaries of only 87 R out of Gat No. 138/5. This fact and dispute of both parties do not allow me and inclined me to come to the conclusion that this application is nothing but only to collect the evidence. Under such circumstances, I do not found substance in the contention of the plaintiff and I pass the following order -

ORDER

Application is rejected.

Date : 01/03/2021.

(Smt. J.R. Raut)
Civil Judge J.D. Lohara.

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	..	---
Court	..	Civil Court J.D. Lohara
Date	..	01/03/2021
Order signed by the Presiding Officer on	..	01/03/2021
Order uploaded on	..	03/03/2021