

Order below exh no.44

The present application has been moved by the plaintiff for the appointment of Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure.

2) It is a contention of the plaintiff that her father-in-law was a tenant in the suit property and after his demise, she has been in possession of the suit property. She further averred that the defendant claims that at present suit property is not in existence. Therefore, a Court commissioner of the suit property is necessary in order to confirm the actual area occupied by and in possession of the plaintiff as tenant. Hence, she prayed to allow the present application.

3) The defendant has filed his say vides exh no.49 and resisted the present application on the grounds that some part of the suit property has already collapsed and if the plaintiff wants to prove his case, he could produce the structural audit report of the suit property. The plaintiff has neither proved that she has been a tenant in the suit property nor has been in possession of the suit property. Thus, there is no need to appoint a court commission. Moreover, the plaintiff has to prove a case on her own. Hence, he prayed for the rejection of the application.

4) Heard the advocates of both parties. Perused record.

5) The advocate of the plaintiff reiterated the contention of his application in the argument and relied upon the following authorities: **Sri Shadaksharapppa v/s Kumari** (24 January 2023) wherein the Hon'ble High Court reversed the order of the trial Court rejecting the application for the appointment of a court commissioner in a suit for mandatory

injunction for the removal of alleged encroachment being filed before the completion of the trial is premature. In **Singidi Ram Reddy v/s Kotra Gupta** wherein Telangana High Court upheld the order of appointment of the Court Commissioner to identify the subject matter and for removal of encroachment. In **Southeran Command Military Engineering Services Employ Co-Op Credit Society v/s V.K.K Nambiar** wherein Hon'ble Apex Court held that the court commissioner report can be treated as legal evidence and on the basis of the report, inference of subletting of premises can be drawn.

6) The advocate of the defendant also placed his reliance on: **Arella Ram Reddy v/s Arrelda Alivelamma** AIR 2005 NOC,126(A.P) wherein Hon'ble High Court held that set aside the order of appointment of court commission in a suit for a permanent injunction. In **Sanjay Khandare v/s Sahebrao Khandare** 2001 (1) Bom.C.R.800 wherein Hon'ble High Court held that the court commissioner cannot be appointed to gather evidence as to possession.

7) The plaintiff has instituted the present suit for injunction and declaration of adverse possession. The issues were framed at exh no. 35 and the matter is pending for cross-examination of the plaintiff. Now, the plaintiff has been seeking the appointment of a Court Commissioner. It is a settled position of law that a court commissioner cannot be appointed for the collection of evidence. The provision under Order 26 Rule 9 of the Code of Civil Procedure is directory in nature. The court finds that local investigation of the suit property is 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 that mandates the Court to appoint the Court Commissioner.

8) As earlier stated, the plaintiff has filed suit for permanent injunction and for adverse possession. Hence, there is no need for the appointment of a Court Commissioner with respect to the elucidated factual position of the suit property and to bring evidence on the record that who is in actual possession of suit property .The plaintiff come up with case that her father in law was in possession of suit property and after his demise, she has been in possession of suit property. Therefore, considering the nature of the suit, the plaintiff has to prove her case independently or on her self-footing. Moreover, the plaintiff can bring facts regarding the possession or existence of suit property by adducing the evidence on record. It seems that the plaintiff is trying to collect the evidence in respect of possession and obstruction to suit property by appointing a Court Commissioner. Hence, authorities cited by the plaintiff would not be helpful to her as the facts are totally different. However, as per **Arella and Sanjay (Supra)**, the Court commissioner cannot be appointed in the suit for the permanent injunction and for collection of evidence. In the view of above discussion, the present application is liable to be rejected. Hence, I pass the following order:

ORDER

- 1) The application is rejected.
- 2) Cost in cause.

Sd/-

Date: 20.10.2023

Sangli

(Smt.S.A.Londhe)

8th Jt.C.J.J.D,Sangli