

Order below Exh.31 in R.C.S.No.273/2022
(Padmashri Patil V/s. Vaishali Mohite & Anr.)
(CNR: MHSN020017412022)

This application has been made by plaintiff for appointment of Court Commissioner under Order 29, Rule 9 r/w. Section 151 of Code of Civil Procedure.

2. According to plaintiff, the present suit has been instituted by him for possession of suit property on the basis of title as well as for perpetual injunction. Defendants have contested the suit and denied the fact that they are in illegal possession of suit property. Therefore, to ascertain the suit property and the property possessed by defendants, it is necessary to admeasure the suit property by Cadastral Surveyor. Therefore, plaintiff prayed for appointment of T.I.L.R., Miraj to measure the Survey No.20/4 situated at Bamnoli and to point out the area purchased by her as per sale deed No.5047/2019, as well as to note the area possessed by defendants and to file the report with scaled map.

3. Defendants filed the reply at Exh.34 wherein they contended that, this application is the attempt to collect the evidence and create the evidence which is not in existence. According to defendants, plaintiff had earlier made application of same nature at Exh.21. The said was rejected by this Court. Therefore, for the same reason, the application of same nature cannot be filed again. Hence, application is not maintainable. The property allegedly possessed by plaintiff is having area of 10R and total area of said Survey number is 30R. The property has not been subdivided yet. On the other hand, property possessed by defendants is of Gunthewari nature, and no maps or plans thereof have been formulated by T.I.L.R. In such case, this application is the attempt of plaintiff to create

the evidence not in existence by taking aid of this Court. The property possessed by defendants was purchased by it from one Bhausahab Sutar on 01.12.2011, who purchased it from one Raosaheb Keshav Kacharwal. Therefore, they are not in illegal possession of suit property. Therefore, this application is the attempt to create the evidence which is not in existence. Hence, liable to be rejected.

4. Perused the record. Heard both sides.

5. The first objection is looking to be taken by defendant is about the maintainability of application. According to it, the application of same nature has been rejected by the Court by its order below Exh.21. Upon perusal of record, it occurs that the application at Exh.21 has been rejected by the Court. However, the said application is looking to be made before framing of issues. The issues were framed at Exh.29 on 01.10.2024. Therefore, the said application was rejected being not made at proper stage. Since now, the issues have been framed and matter is put for evidence, it occurs that the circumstances have been changed. Since the points of dispute between parties have been pointed out by the Court by framing issues, it occurs to be a proper stage to make the application for appointment of Court Commissioner. Hence, although the first application at Exh.21 was rejected, but since the matter has reached to the subsequent and proper stage, it cannot be said that the application is not completely maintainable due to change in material circumstances.

6. The plaintiff has submitted that to ascertain the possession over suit property, appointment of Court Commissioner is necessary. However, the possession of the party at same property can be brought on record by the concerned party with the aid of oral and documentary evidence.

However, for that reason there is no need to appoint the Court Commissioner. However, the area of dispute does not end here.

7. The plaintiff has filed the rough sketch showing alleged position of suit property. Wherein a rectangular shaped portion has been mentioned as illegally possessed by defendants. In the pleadings, she has described the suit property as the area of 0.10R out of total area of 0.30R from Survey No.20/4, and out of which defendants have allegedly possessed the area of 278.6 Sq.Mtrs. at eastern side. The defendants have contended that the property has been possessed by them by virtue of sale deed since 1989, the sale deed in favour of plaintiff is bogus and sham. The original owner of the property possession by defendant by Mr. Raosaheb Keshav Kacharawat. He sold the said property to Mr. Bhausaheb Shripad Sutar. The defendants have purchased the said property from Mr. Sutar. Upon apparent perusal of pleadings of defendants, the said fact is also looking to be mentioned there. However, in their pleadings, the defendants have recognized the property possessed by them as Grampanchayat property No.1577.

8. Basically the suit is for recovery of possession on the basis of title. It occurs from the contentions of defendants that, they have not denied the factum of possession anywhere. They have questioned the ownership of plaintiff and validity of concerned sale deed. According to them, the property possessed by them is the Grampanchayat property No.1577. In such case, it occurs that the defendants have indirectly challenged the identification of disputed portion of property. When there is dispute regarding identification of property, the real nature of property and the actual position thereof would not be conveniently brought on record by

the parties. It will be better to have assistance of the authority having expertise to elucidate the matter in dispute and to bring the actual position of suit property on record. Looking at the description of suit property mentioned in the plaint and the hand sketch annexed thereof, it appears that the plaintiff has complied with Order 7, Rule 3 of Code of Civil Procedure. Therefore, in order to ascertain that whether the description of property mentioned by plaintiff corresponds with the property possessed by parties as well as to have actual elucidation regarding whether Grampanchayat property No.1577 is the part of Survey No.20/4, the appointment of Court Commissioner may be necessary.

9. The defendants are pointed out that there is no previous pot-hissa measurement of all the land holders in Survey No.20/4. So also, the property possessed by defendant is of Gunthewari nature. Hence, no separate maps and plans thereof have been formulated yet. Therefore, according to defendants, this application is an attempt to create the evidence which is not in existence. However, the defendants have not shown anywhere that there is absolute bar to measure the pot-hissa. Although, there is no previous measurement between the land holders, it does not prevent the concerned authority to measure the concerned property. The mere measurement and formulation of map thereby will not amount to cause pot-hiss in the said survey number, since, no presumption can be raised regarding a map drawn for a particular purpose under section 83 of Indian Evidence Act. The aforesaid objection of defendant does not look to be tenable.

10. According to defendant, the portion of area mentioned in plaint as well as hand sketch is difference from the area purchased by

defendant Nos.1 and 2 as well as other share holders in the said property. Therefore, the application to measure the area as per sale deed of plaintiff will amount to make fragmentation in the Gunthewari property possessed by defendant along with land holders. However, the object behind appointment of Court Commissioner is only to elucidate the matter in dispute when the actual position is not clear before the Court. Therefore, even if, the Court Commissioner is appointed he will only measure the property which will not amount to making fragmentation in the said property.

11. Therefore, in my view, as defendants have claimed that the property possessed by them is Gunthewari property and it is different than which is mentioned in the pleadings of plaintiff. In such case, the appointment of Court Commissioner is only with the purpose to identify the suit property sufficiently which will not amount to making fragmentation or aiding plaintiff to make out his case. In support of his submissions, the plaintiff has relied on two citations of Hon'ble High Court. The first of which is of Hon'ble Bombay High Court Panaji Bench in **Shri. Saunsthan Gokarn Partagal Jivottam Mutt V/s. Shri. Narayan Raghunath Dessi and Ors. reported in 2019, All M.R. 588**. Wherein the headnote highlighted by plaintiff says that, 'dispute as to identification of property in suit for injunction restraining defendants from cutting or transporting trees from suit property. It would be appropriate for Court to take assistance of Survey authorities who are best equipped in matter. Matter remitted for taking assistance of Commissioner from office of Inspector of Survey and Land Records.'

12. Looking at the said citation it occurs that although the dispute in that suit was also regarding identification of property, however, the said suit i.e. R.C.S.No.81/1988 was instituted for injunction restraining the respondents from cutting or transporting any trees from the suit property and from interfering with the same in any manner. Even if, defendant denied the description of property therein. However, the nature of suit was limited only to that of perpetual injunction. However, in the present suit the plaintiff has sought possession of suit property from the defendants on the basis of title. Therefore, the nature of this suit is substantially different from the nature of suit described in said citation. In such case, although Hon'ble High Court has laid down that the Courts below ought to have appointed Commissioner having regard to the fact that there was a genuine and bonafide dispute about identification of property, but the entire citation cannot be said to be binding for disposal of this application.

13. The second citation is of Hon'ble Karnataka High Court in **Sri. Manjunatha S.C. V/s. Smt. Gangamma (Writ Petition No.17853 of 2023)** wherein the Hon'ble High Court has held that this Court has considered view that merely appointing of Court Commissioner to measure the alleged encroachment by respondent/defendant would not amount to decreeing the suit in favour of petitioner/plaintiff and not amount to collection of evidence in favour of party to the suit. However, it would definitely aid the Trial Court to decide the controversy between the parties.

14. From the aforesaid ratio it gets clear that the petitioner/plaintiff in the said suit was seeking to ascertain the correct

portion of encroachment by the respondent/defendant. However, in the present suit the plaintiff is seeking possession of suit property on the basis of title. The factum of encroachment and seeking possession on the basis of title are totally different in the eyes of law. Both cannot be equated together even if the basis of both is about recovery of possession. In such case, in my humble opinion, the said authority also cannot be said to be squarely applicable to the present set of facts.

15. Therefore, to summarize the discussion, it can be said that, the defendants have not specifically denied their possession, but they have recognized the area possessed by them as a different property. In such case, it will be proper to appoint the Court Commissioner having regard to the fact that there is dispute about identification of property. Accordingly, I pass following order.

ORDER

1. Application is hereby allowed.
2. Taluka Inspector of Land Records, Miraj is appointed as Court commissioner under Order 26, Rule 9 of C.P.C.
3. The commissioner shall take the measurement of Survey No.20/4 situated at Bamnoli, Tal:-Miraj by following due procedure and taking into account the sale deed of plaintiff bearing registration No.5047/2019 and the north-south portion of 278.6 Sq. Mtrs. situated at eastern side of Survey No.20/4 allegedly possessed by defendants, after giving notice in writing to the parties and their advocates regarding date and time of his visit for measurement.
4. Both the parties are directed to appear before Commissioner with their respective documents.
5. The commissioner shall prepare the measurement map showing therein measurement in length & width of actual area in possession of

plaintiff and also mentioned the boundaries of area as per his sale deed and the area in said survey number if, actually in possession of defendants.

6. The commissioner is directed to submit his map along with his report within a period of two months from the date of this order.
7. Plaintiff is directed to deposit requisite Court commissioner fees at the office of T.I.L.R. Miraj/Sangli, on or before next date.
8. Issue commission letter accordingly.

Sangli.
Date:-04.02.2025

(Onkar S. Shastri)
11th Jt. Civil Judge Junior Division,
Sangli.

CERTIFICATE

I affirm that the contents of this PDF file are same as per original.

Name of Stenographer :- R. B. Samalewale

Name of the Court :- Shri. O. S. Shastri.
11th Jt. Civil Judge Jr. Dn., Sangli.

Date of decision :- 08.11.2024

Order signed by P.O. on:- 08.11.2024

Order uploaded on :- 08.11.2024