

IN THE COURT OF JT. CIVIL JUDGE, JR. DN., SHIRALA**Regular Civil Suit No. 86/2023**

Mr. Shivtej Sah. Dudh Utpadan
Sanstha & ors. -- Plaintiffs.
V/s.

Mr. Laxmi Patil & Ors. -- Defendant.

ORDER BELOW EXH-22

This is an application moved by the defendants under Order 26, Rule 9 of the Code of Civil Procedure [For short "CPC"] to appoint the court commissioner to inspect the suit property A and B.

2 BRIEF FACTS :-

This is a suit for fixation of boundaries and perpetual injunction. Plaintiffs are owners of the suit property B. They are in possession of the suit property. The plaintiffs have filed application Exh. 5 for temporary injunction to restrain the defendants from disturbing their peaceful possession over the suit property. Plaintiffs have come with specific contention that they are owner of the suit property B and in possession thereof. The defendants tried to obstruct their peaceful possession.

3 The defendants have filed say on temporary injunction application and contended that they are in possession of the suit property. In the result, the defendants have moved this application to appoint advocate as a Court commissioner to measure and inspect the suit property A and B, particularly, to bring on record factual position on the suit property, who is in actual possession in the suit property i.e. plaintiffs or the defendants and to submit the report along with map.

4 Plaintiffs have filed their say [Exh. 24] and strongly resisted the application on the ground that this is an attempt to collect evidence through Court in order to establish the possession. Plaintiffs and the defendants have produced on record documentary evidence in support of their pleadings. Therefore, the application deserves to be rejected.

5 Heard the learned advocates for both the parties at length. The learned advocate for the defendants Mr. H.S.Surle submitted that plaintiffs have not erected any shed on suit property. Rather there is shed of defendants named 'Girija Traders', where the defendants used to keep their construction material. The plaintiffs have not mentioned this factual position in plaint. He further submitted that as issue regarding over the suit property is crux of the suit, therefore in order to bring on record actual position regarding the factual position over the suit property A and B appointment of Advocate as a Court commissioner is essential.

6 Per contra, Mr. A. B. Adsul, the learned advocate for plaintiffs submit that plaintiffs have already produced on record necessary documents to establish their possession. It is for plaintiffs to establish their title and possession. Therefore, there is no need to appoint the Court commissioner. Present application is given at the stage of deciding temporary injunction application. Hence, it cannot be taken into consideration. He has relied upon *Dinanath Supdu Joshi V/s. Shriram Shrikrushna Dautkhane & Ors., Writ Petition No. 9224 of 2022 decided on 07.12.2022, 2023 (1) ALL MR 20*

Civil Procedure Code, 1908 – S.75, O.26 R.9 – Appointment of Court Commissioner – For measurement of plots –

Application filed by defendant during pendency of application filed by plaintiff for temporary injunction to restrain defendant from encroaching upon common road – Defendant wants plots to be measured to disprove that he has not encroached upon road – Application shows real intention of defendant is to establish alleged encroachment on road by plaintiff – Thus defendant wants to collect evidence to establish encroachment by plaintiff – Court Commissioner cannot be appointed to enable party to collect evidence – Appointment of Court Commissioner is not warranted at stage of deciding temporary injunction application – Order allowing application for appointment of Commissioner, set aside.

7 Points arise for determination along with findings and reasons thereon are as under :-

Sr.No.	Points	Findings
1.	Whether the defendants have made out grounds to appoint a Court commissioner ?	No.
2.	What order ?	The application is rejected.

REASONS

POINT NO. 1 :-

8 Having considered the grounds set out in the application and say, it would be proper to have brief resume of the facts pleaded by way of pleadings by both the parties. It is evident from the pleadings that plaintiffs as well as the defendants are claiming possession over the suit property. It is specific contention of both of them that they are in possession. The suit is filed seeking fixation of boundaries and perpetual injunction against the defendants from

disturbing peaceful possession of plaintiffs over the suit property. In other words, a material issue for adjudication in the suit is to adjudicate who is in possession of the suit property.

9 That takes me to material question for adjudication whether in this state of facts a Court commissioner can be appointed. A Court commissioner can be appointed only when the Court is satisfied on the basis of material available on record when a party is not able to produce the desired evidence to assist the Court to record finding on an issue for adjudication. In other words, a court commissioner cannot be appointed to collect the evidence. It is quite settled legal position that Court commissioner cannot be appointed to collect the evidence. It is for a party who asserted a claim of possession to satisfy the Court. Power of appointment of Court commissioner for inspection cannot be exercised by the Court to assist party to collect evidence where it can get evidence itself. In such circumstances, assistance of commissioner is neither necessary nor justified.

10 I am of the view that plaintiffs or defendants can produce the evidence in this regard i.e. possession and it is not necessary to appoint a Court commissioner to bring on record who is in possession of the suit property. It is pertinent to note that the entire burden is upon plaintiffs to establish their ownership and possession. It is needless to state that if plaintiffs failed to establish their title and possession, the suit will be dismissed. There is no burden of proof at all on the defendants. I have gone through the citation relied upon by the plaintiffs. Present application is given at the stage of deciding temporary injunction application. So also the defendants have not filed their Written Statement. The ratio laid down in citation supra is very

well applicable to the case in hand. Therefore, this legal and factual position is quite sufficient to demonstrate that the application is completely devoid of merits. The Commissioner cannot be appointed to examine the state of disputed property. The defendants have not made out grounds to appoint a Court commissioner. The application is liable to be rejected. In turn, I answer point No. 1 in the negative and pass the following order :-

ORDER

- 1] The application [Exh.22] is rejected.
- 2] Costs in cause.

Dt.:- 03/11/2023.
Shirala

Sd/-
[V. A. Desai]
Jt. C.J.J.D., Shirala

CERTIFICATE

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

Name of the Stenographer	:	V. S. Patil
Court	:	Jt. C.J.J.D. & J.M.F.C., Shirala
Date	:	03/11/2023
Judgment signed by the Presiding Officer on	:	03/11/2023
Judgment uploaded on	:	06/11/2023