

ORDER BELOW EXH.22 IN R.C.S. NO.819/2021

(Dhondiba Madane Vs. Bapu Madane & Ors;)

[CNR No.MHSO110028732021]

1] The plaintiff has filed present application under O.39 R. 7 of Code of Civil Procedure. It is the contention of plaintiff that, suit property situated at village Piliv bearing old Gat No.977/4 and present Gat No.266/4 ad-measuring 00 H. 28 R more specifically described para 1 of the plaint is the subject matter of the suit. The plaintiff has filed suit for declaration and perpetual injunction against defendants. The present suit is fixed for service of summons and filing of W.S of the defendants. Only defendants No.14 and 26 have filed their W.S in the present suit. It is the contention of plaintiff that there is road situated from the suit property and said road is situated towards the Northern side of Satara-Pandharpur road. Plaintiff has filed rough sketch map of the said road. Towards the Northern side of the suit property the property of defendant No.1 and 3 bearing Gat No.266/3 is situated and towards the Northern side of the property of defendants No.1 and 3 Gat No.260 is situated. Said property is belongs to defendants No.4 to 9. The plaintiff has given specific description and location of the properties situated in the map in the present application. It is the contention of plaintiff that, to ascertain the factual position of the suit property and property of the defendants and specifically the road proceeds from the Northern side of the suit property and the property of defendants the Court Commissioner is required to be appointed for the local inspection of the suit road. Hence, he prayed to allow the application.

2] In the present suit defendant No.1 to 4, 8, 10, 11, 13 and 15 have filed their say below Exh.26 and strongly opposed to the application. Defendants have denied the contents of the application. It is their contention that there is no any bullock cart road is situated as mentioned by the plaintiff in his application. The present application is made by the plaintiff only to collect the evidence. The defendants have also described

the factual positions of their properties. Therefore, the defendants have prayed to reject the application.

3] Considering the rival contentions of both the sides. So also, I have gone through O.39 R.7 of the Code of Civil Procedure. It provides detention, preservation, inspection, etc, of subject matter of suit -

- (1) The Court may, on the application of any party to a suit and on such terms as it thinks fit -
 - (a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such, or as to which any question may arise therein;
 - (b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit; and
 - (c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.
- (2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

4] As per the above provisions, Court can inspect the subject matter of the suit if any circumstances arises before the Court to decide the real controversy between the parties. In the present suit the Ld. Advocate of the plaintiff relied upon following case laws.

- I) **Mr. Bento Antonio Gomes @ Antonio Bento Gomes Vs. Rosario Salvador Carneiro & Ors, 2014 (3) ALL MR 790**, wherein the Hon'ble High Court held that, "Appointment of Court Commissioner -Necessity, even when no application made. Dispute pertaining to boundary line between immovable properties of parties. Evidence of both sides on said aspect, rejected by appellate Court as not believable. Held, as there was no evidence before appellate court on

disputed aspect, even if there was no application for appointment of Court Commissioner, it was necessary for appellate court to remit the matter to trial court appointing a Commissioner for local investigation”.

II) **Dattatray Namdev Kalake Vs. Bapu Bhairu Bhivungade 2014 CJ (Bom) 2462**, In that the Hon’ble High Court held that, “it is well settled that power under O.26 R.9 of CPC can be invoked for appointment of the Court Commissioner to elucidate the matter in controversy”

III) **Madhukar R. Javle Vs. Bhaskar Ramnath Shibad 1995 CJ (Bom) 256**, In that the Hon’ble High Court held that, “empowers Court to order inspection property not needed to be subject matter of suit. But, it can be if necessary to decide controversy before Court.”

5] On the other hand Ld. Advocate of the defendants has relied upon following case laws.

I) **Shri Efigenio Dias & Anr; Vs. Shri.Malaquias D’costa & Ors; 2000 (1) ALL MR 533**, wherein it is held that, “O.39 R.7 Application for appointment of Commissioner. Applicants defendants claiming alternate access through property of plaintiffs. Application by plaintiffs for temporary injunction to restrain defendants from making access already disposed of. Alternate access not subject matter of suit. Held, application in question was nothing but abuse of process of law and had to be dismissed”.

II) **Dhondiram Nivrutti Pawar Vs. Laxman Khashaba Pawar 2018 (3) All MR 696**. Wherein it is held that, “Appointment of Court Commissioner cannot be for purpose of collecting evidence. Machinery of Court cannot be used to enable plaintiffs to prove facts on which basis they are claiming relief”.

- III) **Sukumar Mullic and Ors Vs. Barun Mullic and Ors; C.O. No.2123 of 2010 D/d. 10.12.2012**, wherein it is held that, “Petition prayed for appointment of an advocate commissioner for holding local inspection. Prayer rejected. Application for local inspection is nothing but to fishing out evidence to be used by the plaintiffs afterwards in support of the plaint case. Plaintiffs are required to prove their own case by production of proper evidence. It was apparent that the application has been prepared in such a form so as to collect evidence by holding inspection at the plot. Held, attempt of fishing out evidence from the commission is impermissible in eye of law. Ld. Trial Judge had rightly rejected the application on the basis of material on record for local inspection on the ground that plaintiffs have adopted a separate path to collect materials in the suit”.
- IV) **Dnyandeo Vithal Salke & Ors; Vs. Dagdu Kadar Inamadar 2017 (5) ALL MR 104**, “Appointment of Court Commissioner in suit for injunction simplicitor with direction to submit report as regards possession and user of disputed land not permissible in law. This would amount to making effort to collect evidence regarding possession”.

6] I have gone through the case laws cited by both the sides. In the above cases Hon’ble High Court has held that, Court can appoint the Court Commissioner to decide the real controversy between the parties and Court Commissioner cannot be appointed for collection of evidence. In the present case in hand, the plaintiff has come with the case that, he is using the suit road by easement and he having no any alternate road except the suit road. On the other hand, defendants have contended that, there is no any bullock cart road situated in their property as alleged by the plaintiff in his plaint. Admittedly, the suit is fixed for deciding the temporary

injunction application filed by the plaintiff. To decide the temporary injunction application it is guided principles that, while deciding the temporary injunction application Court should see the prima facie case, balance of convenience and irreparable loss caused to the persons who has made the application. In the present suit, the plaintiff has filed present application at pre-mature stage. The application filed by the plaintiff will be decided at the time of evidence. If, both the parties are failed to produce the reliable evidence in respect of controversy between them and as per the provisions of O.39 R. 7 as well as O.26 R.9 the Court can appoint Court Commissioner to decide the real controversy between the parties and to brought the factual position of the suit property on the record. It is also settled law that, parties to the proceeding proved their case by producing oral as well as documentary evidence but the parties to the suit cannot take assistance of the Court for collecting their evidence. Therefore, considering the stage of suit the application filed by the plaintiff having no any legal force. Hence, following order.

ORDER

- 1] Applications stands rejected.

Malshiras
Date : 30.10.2021

(A.P. Karad)
Jt. C.J.J.D Malshiras

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 : Sandip Sudarshan Mitragotri

Court : Jt. Civil Judge, J.D. Paithan.

Date of Order : 30.10.2021.

Order signed by the
presiding officer on : 08.11.2021.

Order uploaded on : 10.11.2021.