

Order Below Exh.35 in R.C.S.No. 433/2017

This application is filed by plaintiff under Order XXVI Rule 9 of the Code of Civil Procedure for appointment of court commissioner.

2. It is the contention of the plaintiffs that the suit property is situated towards southern side of Vairag-Ghanegaon boundary. The defendant's land bearing Gat no.761 is adjacent towards northern side to the land of plaintiffs. The farmers of western side are using the boundary of Vairag Ghanegaon as a road. However, during the pendency of this suit the defendants plagued that road and fixed new embankment towards northern side of the suit property. All the defendants with their joining hands changed the structure of the road. Therefore, the previous position and present position is now different. Therefore, in order to elucidate the matter in dispute the local inspection through court commissioner is necessary. Therefore, the present application is filed by the plaintiffs.

3. Defendants no. 1 to 5 have filed their say at Exh.41 and resisted the application. According to them, the matter is pending for hearing of Exh.5. Therefore, at this stage the present application is not maintainable. The suit is filed for perpetual injunction as not to obstruct the peaceful possession of the plaintiffs over the suit property. It is the duty of the plaintiffs to prove the obstruction. By way of this application the plaintiffs want to collect evidence. Therefore, the application is deserves to be rejected. According to them, they have filed counter-claim and also temporary injunction application against the plaintiffs by denying the averments made in the plaint. This application is filed in order to prolong the hearing of temporary injunction application. The

intention of the plaintiffs is *malafide* one. Therefore, they prayed for rejection of the application.

4. Say of defendant no.6 filed at Exh.42 is identical with say of defendants no.1 to 5.

5. Heard both sides at length. Gone through the documents on record. The suit has been instituted for perpetual injunction to restrain the defendants from obstructing peaceful possession of the plaintiffs over the suit property. Defendant no.1 & 6 have filed counter-claim against the plaintiffs. According to them, the plaintiffs are cultivating the boundary road and this fact is suppressed by the plaintiffs. On the contrary, it is contention of the plaintiffs that the defendants have destroyed the boundary road. According to the plaintiffs, they dug pits to install foundation for vineyard near the embankment of boundary road. In short, it is the contention of the plaintiffs that the disputed road is damaged by the defendants and now they are trying to show that the plaintiffs are illegally cultivating the disputed road. Learned Advocate for the plaintiffs vehemently argued that in order to bring the actual position on record the appointment of court commissioner is necessary. He has relied on the following case laws in support of his contentions.

- 1] John Vs. Kamrunissa , reported in (1991) 1,L.J.R,649.
- 2] N.Swamaygauda Vs. Ramegauda and others, reported in 2010 (2) C.LJ,616.
- 3] Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam , reported in (1985)98,LW 112,9(1985)1MLJ 380.

6. No doubt, the parties are bound to prove the contentions which they affirms. On one hand it is assertion of the plaintiffs that the defendants have damaged the disputed road. However, on the other hand, it is assertion of the defendants that the boundary road is cultivating by the plaintiffs illegally. No doubt, the burden to prove that the plaintiffs are cultivating the land including boundary road is on the defendants. If the court commissioner is appointed, it would helpful to adjudicate the dispute between the parties properly.

7. According to the defendants, the matter is pending for hearing of temporary injunction applications. Therefore, at this stage the application for appointment of court commissioner is not tenable. No doubt, this application is filed under Order XXVI Rule 9 of the C.P.C. However, it is not precluded to appoint court commissioner at this stage. On the contrary, Order XXXIX Rule 7 provides that Court can pass order of inspection of any property. Therefore, in order to come on record the actual position of the suit property it is just and proper to appoint court commissioner to inspect the suit property and the adjacent property of the defendants. Therefore, in interest of justice, I proceed to pass the following order :-

ORDER

- 1] Application is allowed.
- 2] Mr.P.S.Sakhare advocate is appointed as court commissioner.
- 3] It is directed to court commissioner that he shall inspect the suit property as prayed by the plaintiffs para no.4 (A) to 4 (L) of this

application, position shown by both parties and prepare a map, if required and submit his detail report on or before 8 23/3/2018.

- 4] The plaintiffs are directed to deposit amount of Rs.1500/- towards commission fee within seven days from the date of this order failure of which application be treated as rejected without further reference of this court.
- 5] Adv. Mr.P.S.Sakhare is present in the court and therefore, the separate written notice is dispensed with. He shall note the order.

Date : 01/03/2018.

(B.S. Sankpal)
3rd Jt. Civil Judge, J.D. Barshi.

Certificate

I affirm that, the contents of this PDF file Order/Judgment are same word to word, as per original Order/Judgment.

Name of Stenographer	:	R.H.Lasane.
Court	:	3rd JtCJJD & JMFC, Barshi.
Date:	:	1/03/2018
Judgment/Order signed by the presiding officer	: :	3/03/2018
Judgment/Order uploaded on	: :	3/03/2018