

Order Below Exhibit 16.

The plaintiffs filed an application for an appointment of court commissioner. They submitted that the defendants are trying to encroach upon the suit properties. Adjacent to the suit properties, the agricultural properties of the defendants are situated. They are obstructing the possession of the plaintiffs over the suit properties. In such situation, it is necessary to measure the suit properties. If the application allowed then, the controversy will be decided on merit. So, the plaintiffs prayed for measurement of the suit properties. They are ready to bear the expenses. Accordingly, they prayed to appoint Court Commissioner.

2. The defendants have not filed say. Hence, an application is proceeded without the say of the defendants. The learned counsel for the plaintiffs argued as per application.

3. I have considered the argument advanced by the learned counsel for the plaintiffs. I have perused the record. I have read the plaint and the documents annexed with. It is the theory of the plaintiffs that, the defendants are the joint holder in the above said blocks of the suit properties. They submitted that, the defendants are trying to encroach upon the suit properties. However, they have not mentioned that, which steps, they have taken prior to institution of the suit for measurement of their suit properties. Even they have not come with the theory that, the plaintiffs have asked for the joint measurement of the agricultural land of the plaintiffs and defendants to the defendants to which, they refused for joint measurement. The

present suit is for perpetual injunction.

4. The Hon'ble Bombay High Court in the case of Dyandeo cited supra held in para No. 2 that, "admittedly, the suit has been filed for injunction simplicitor and there is no prayer for removal of encroachment. Application (Exhibit 5) seeking temporary injunction against the petitioners – original defendants filed by respondents – original plaintiff was rejected on 29 September 2016 on the ground that the original plaintiff could not establish *prima facie* case in his favour and he could not *prima facie* show which property was in his possession. When the suit has been filed for injunction simplicitor, I do not understand as to how the civil Judge, Jr division could have asked order directing appointment of TILR, with direction to submit his actual report as regards possession and user of the land. This amounts to collection of evidence which is not the object of the provisions regarding appointment of the Court Commissioner, as contained in Order 26 Rule 9 of the Civil Procedure Code. The learned single Judge (as the Hon'ble Judge then) the case of Sanjay Namdeo Kandare versus Saba Kacheru under 2001 (2) 959 has also taken a view that appointing the court commissioner to submit his report regarding actual possession of the suit field would amount to making effort to collect evidence regarding possession and the same is not permissible in the law.

5. It may be proved that the petitioners have considered for appointment of the Court Commissioner, but, such concession firstly was only regarding taking of measurement and not for submitting the

report to a certain actual possession and secondly any concession given by the party would be subject to provision of law and if it goes against the provision of law, such concession would be insignificant and will have to be ignored. This principle has been ignored by the learned trial court.”

6. Moreover, the Hon’ble Bombay High Court held in Sanjay case cited supra that, “the appointment of court commissioner even that of TILR to submit the factual report as regards possession or use of the land is amounting to collection of evidence and it is not permissible in law.”

7. The Hon’ble Bombay High Court in above supra citations gave the guidelines that appointment of court commissioner is not permissible when the suit is simplicitor for injunction. The present suit is simplicitor for injunction. The plaintiffs have not mentioned about the efforts taken by them for measurement of the suit properties prior to institution of the suit. Now the plaintiffs moved this application against the defendants only for collection of evidence against them. Though they have not filed say, it is not proper to appoint Court Commissioner. Hence application Exhibit 16 is rejected.

Barshi.
Dt. 13-03-2023

(S.B.Vijaykar)
Jt. Civil Judge J.D., Barshi.

C E R T I F I C A T E

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

(a)	Name of the Stenographer	:	B.B.Salvade
(b)	Court	:	S.B. Vijaykar, Jt.C.J.J.D.&J.M.F.C. Barshi.
(c)	Judgment /Order signed by P.O. on	:	13/03/2023
(d)	Judgment /Order uploaded on	:	14/03/2023