

Special Civil Suit No. 49/2016

Order Below Exh. 26

This is an application under Order 26 Rule 9 of Code of Civil Procedure by the plaintiff.

Brief contents of the application are as under :-

02. It is contended that, the plaintiff has filed present suit for specific performance of unregistered agreement to sell dt. 29.08.2011. The plaintiff is in peaceful possession and enjoyment of the entire suit property since 04.07.2003. However only with ill intention to misguide the court the defendants are claiming to be in possession of the suit property. Therefore, to bring this factual position of the suit property or the actual possession over the suit property on record appointment of court commissioner is necessary. On all these grounds the plaintiff prayed for allowing the application.

03. The defendant resisted the application under consideration by filing say Exh. 27 in which they have denied all the contentions of the application under consideration. It is their contention that, the suit is based on forged document. Therefore, it is necessary to conduct inquiry in that regard. Still application Exh. 5 is pending. The plaintiffs are trying to collect evidence with the help of court by appointment of the court commissioner which cannot be allowed. Hence, he prayed for rejection of application.

04. Heard both learned advocate and gone through record of proceeding. Admittedly as pointed out by both learned advocates, present suit is for specific performance of contract and injunction. The plaintiff is claiming to be in possession of suit property. Accordingly, he claimed injunction against the defendant. By this application the defendants wants to order the Court Commissioner to inspect the suit premises and to give finding regarding possession over it. As rightly

pointed out by learned advocate for the defendant, there is no dispute in respect of boundaries or identity of suit property nor the suit is for encroachment. The plaintiff himself is claiming to be in possession of the suit property. Then the burden of proving his possession over it lies upon him.

05. The suit in question does not contain boundary dispute or any dispute as regards any encroachment wherein a report of the Court Commissioner would facilities the Civil Court in arriving at decision. The said suit is for specific performance. If Commissioner is directed to report on the aspect of possession. It would amount to the collection of evidence, which is not permissible in respect of a Commissioner appointed under Order 26, Rule 9 of the Civil Procedure Code. Hence, appointing Court Commissioner as prayed for, will amount to collection of evidence with the aid of Court and will exceed the jurisdiction. Hence, in view of this discussion I pass following order.

ORDER

1. The application (Exh. 26) is hereby rejected.
2. Costs in cause.

Date:- 15/06/2017

[Sou. V. P. Gaikwad]
Jt. Civil Judge, Sr.Division, Karad.