

ORDER BELOW EXH. 20 IN R.C.S. NO. 51/2022

1. This application has been filed by the defendants under Order 26 Rule 9 of the CPC for appointment of Court Commissioner .
2. Learned advocate for the defendants has submitted that, plaintiff has filed suit seeking relief of perpetual injunction thereby restraining defendants from disturbing the possession of plaintiff over the suit property i.e. an agricultural land admeasuring 0H-81R out of 4H-25R bearing survey/gut no.86/2 situated at mauje Donad (Bk.). On the contrary, defendants have also filed written statement cum counter claim to the suit. Wherein, relief of declaration and perpetual injunction are sought that the sale deed dated 29-06-2019 is sham and nominal and not binding upon defendants. So also, to restrain plaintiff from disturbing possession of defendants over suit property.
3. It is further submitted that, the plaintiff has averred in the plaint that suit property is possessed by him, and the plaintiff has prepared it for cultivation during the summer. To which, defendants are causing obstruction. On the other hand, defendants in their counter claim have contended that suit property is possessed by them wherein they have cultivated the crops. Under such circumstances, it is necessary to appoint Court Commissioner in order to ascertain exact possession of the parties over the suit property. It is further contended that the plaintiff has filed an application of temporary injunction in the suit which is pending for its adjudication. However, prior to its adjudication the appointment of Court Commissioner is necessary. No prejudice would be caused to the plaintiff if the present application is allowed. Defendants are ready to pay necessary charges towards Court Commissioner appointment. Hence, present application. The application is supported by an affidavit.
4. The application came to be resisted strongly by plaintiff by filing his Say on the backside of the application.

5. Learned advocate for the plaintiff has contended that, the present application has been filed with the only intention to prolong the hearing of application of temporary injunction Exh.5. It is further contended that, at present, there is no crop standing over the suit land. Suit property has been in the possession of the plaintiff. Therefore, no purpose would be achieved by appointing the Court Commissioner. Defendants have filed the instant application in order to cause mental and physical harassment to the plaintiff. Therefore, the instant application itself not maintainable and liable to be rejected with costs.

6. Heard both sides. I have perused the application and Say and gone through the record.

7. Record depicts that, plaintiff has filed the instant suit for the relief of perpetual injunction to which defendants have also filed counter claim as mentioned above. It is further seen that, an application for temporary injunction below Exh.5 is pending in the matter. Thus, trial in this matter has not commenced. And, the matter is in its primary stage.

8. Now, I deem it appropriate to mention here the law regarding appointment of Court Commissioner developed in view of the judgments of Hon'ble Supreme Court and High Court. It is well settled that, when there is boundary dispute then appointment of Court Commissioner is mandatory in order to ascertain the exact area of encroachment. It is equally well settled that the appointment of Court Commissioner cannot be made to collect the evidence for the parties seeking such appointment.

9. Now, coming to the case on hand, in the instant matter even issues are not framed, no evidence by either side has been led before the Court. Under such circumstances, if the Court Commissioner is appointed then it will amount collection of evidence by the Court. It is well settled that who assert has to prove a fact. Therefore, the agency of Court cannot be utilized to collect the evidence. It is also settled that, the appointment of

Court Commissioner can be made when the evidence is part heard and to ascertain a fact the Court deems it necessary the appointment of court commissioner upon the request of any party. Admittedly, in the case on hand, evidence has not been recorded as a part heard. Therefore, in my considered view, the application filed by the plaintiffs does not fulfill any of the criteria mentioned above. On the other hand, it clearly appears to have been filed for collection of evidence by defendants. Thus, in view of my above findings, I am of the considered view that, present application sans merit and liable to be rejected. Hence, I pass following order-

ORDER

1. Application Exh.20 is rejected.
2. Costs in main cause.

Date :- 04/01/2023

(M. H. Haque)
Civil Judge Jr. Division,
Karanja (Lad)

CERTIFICATE

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

Name of Steno. :- R. A. Charthal (Stenographer-3)

Court Name :- Civil Judge (Jr. Dn.) and J.M.F.C.,
Karanja. Dist. Washim.

Date :- 04/01/2023

Order signed by the :- 04/01/2023
presiding officer on

Order uploaded on :- 04/01/2023