

Order below Exh. 16 in RCS.No. 1/2018

Satish Shivrudra Shete V/s. Eknath Sakharam Metil.

1. The plaintiff has filed application under order 26 Rule 9 of CPC. Plaintiff's averred that defendants have started illegal activities over the suit property. The defendants have brought bricks and sand over the suit property. They have installed metallic bracket over suit property and defendants are trying to change the nature of the suit property. The defendants are trying to start the illegal construction over the suit property. Hence, prayed to appoint court commissioner to inspect the suit property.

2. The say filed by the defendant vide Exh.19. They averred that defendants never trying to construct over the property of the plaintiff's. Moreover, they never put the building material in the suit property. The plaintiff's suit is in respect perpetual injunction. The plaintiff is trying to collect the evidence by appointment of court commissioner. Hence, prayed to reject the application.

3. In the present case the adv. for plaintiff argued that it is the admission position that defendants property situated towards western side of the suit property. The defendants failed to file their sale deed on record. Moreover, it is specifically mentioned by the plaintiff's about encroachment over the suit property. The adv. for the defendant argued that plaintiff's suit is for just for perpetual injunction. On perusal of the photos it appears that defendants never encroached over the share of plaintiff's. Hence, there is no necessity to appoint a court commissioner.

4. In the present case I perused plaint. It is no doubt that plaintiff's have admitted that the defendants property is situated towards the western side

of the suit property. It is specific averment of the plaintiff's at para 3 that defendants with the help of sale deeds trying to encroach over the share of plaintiff's. On perusal of the w.s of the defendants and specifically para 5 and 6 it appears that it is allegation of the defendants also that plaintiff is trying to grab the excess area of the defendants. The relevant portion of the w.s is as below.

वादीने केलेला दावा हा केवळ ज्यादा क्षेत्र हडप करणेच्या उद्देशाने केलेला असलेचे स्पष्ट होते. अशा खोट्या कारणाच्या आधारे वादीचा दावा व मनाई अर्ज कायदयाने चालणेस पात्र नाही. प्रतिवादी हे त्यांच्या मिळकतीमध्ये बांधकाम करीत असून त्यांचे बांधकाम साहित्य हे प्रतिवादीच्या मिळकतीमध्ये असून प्रतिवादी हे बांधकाम करीत आहेत.

5. On perusal of the above averments in the plaint and w.s it appears that there is a boundary dispute between the parties. Moreover, on perusal of the argument of the both side it appears that there is boundary dispute and both parties claiming encroachment over the other party. Hence, it is necessary to appoint the court commissioner to resolve the disputes.

6. In the case of **Manohar Mahadeorao Pagrut vs. Sau. Sunanda Ramdas Tharkar, reported at MANU/MH/0418/2008 : [2008]3 Bom.C.R. 4** in which this Court had considered the principle in such cases in paragraph Nos. 7 and 8, as quoted below, thus:

7-Normally, if the measurement is done by a cadastral surveyor for ascertaining the encroachment and at that time only both the lands are measured on the basis of permanent boundary marks or admitted boundary marks, any question of further evidence would not arise.

8-The Hon'ble High Court further held that to have a correct approach for ascertaining the area of actual possession and then finding whether

there was an encroachment, it is necessary that both the lands should be measured, exact dividing boundary line should be located and it can be found out whether the party, against whom encroachment is alleged, has excess land in possession. If the finding could be otherwise, the story of encroachment would not be proved may be that the plaintiff has lost her land and the said loss could be due to encroachment by any person owning land surrounding the plaintiff's land.

7. On perusal of the above citation it is necessary to appoint the court commissioner even in the suit for perpetual injunction. It is difficult for any parties to ascertain the area of the encroachment without court commissioner report. Hence, plaintiff or any party can not file the suit for recovery of possession as there is no ascertain of encroached area. Hence, it is proper to appoint the court commissioner. Hence, I pass the following order.

Order

1. The application is allowed.
2. The Commissioner is directed to make local investigation of Gat no. 1505 situated at Dindnerli Tal. Karvir Distirct Kolhapur by issuing notices to the Plaintiff and defendants.
3. The T.I.L.R., Karvir is appointed as a Commissioner. The entire commissioner's fees is to be paid by the plaintiff's only in the TILR Office at Karvir as per rules.
4. The Commissioner to make local investigation along with measurement and prepare map along with panchnama within 30 days from depositing fees in the office.
5. Plaintiff's are directed to deposit commissioner fees in the said office till 09.02.2018. If failed then it deems to be that plaintiff's do not want to make the local investigation through TILR.
6. Issue commission writ accordingly.

Date: 25.01.2018.

sd/-
(P. K. Kharate)
Jt. Civil Judge J. D., Kolhapur.

Certificate

I affirm that the contents of this P.D.F. file order is same word to word, as per the original order.

Name of the Stenographer	:	A.S.Patil
Court Name	:	Court of C.J.J.D., Kolhapur.
Date	:	25/01/2018
Judgment signed by the		
Presiding Officer on	:	25/01/2018.
Judgment uploaded on	:	29/01/2018.

XXXX