



ORDER BELOW EXH. 24

The instant application is preferred by plaintiff under Order XXXIX Rule 7 of the Code of Civil Procedure seeking appointment of TILR as a Court Commissioner before the Court proceeds to hear the defendant No.1 on the plaintiff's pending application at Exh.5.

2. The defendants have resisted the application by filing their say below Exh. 25.

3. It is the contention of the plaintiff that the suit property is in her possession and that she has constructed shops thereon, which have been let out to tenants. According to the plaintiff, though defendant No.1 has admitted the existence of the shops, a dispute has been raised regarding the exact location thereof. The plaintiff contends that defendant No.1 is alleging that the shops are situated on Survey No.91 and not on Survey No.92. It is further contended that defendant No.1 has claimed possession over the suit property. Therefore, according to the plaintiff, appointment of a Court Commissioner under Order XXXIX Rule 7 Code of Civil Procedure, 1908 is necessary for proper adjudication of the interim injunction application at Exh.5 and therefore the application for appointment of court commissioner shall be heard first.

4. Per contra, the defendants contended that the application is false, frivolous and devoid of merit. According to

them, the plaintiff is fully aware that possession of the suit property is with defendant No.1 and the said stand has already been specifically taken in the written statement. It is further contended that the plaintiff has already concluded her arguments on Exh.5 and when defendants are ready to advance arguments on the said application, the present application has been filed at the belated stage only with a view to fill up lacunae and delay adjudication of Exh.5. Defendant No.1, therefore, prayed for rejection of the application.

5. In view of the rival submissions, the question which falls for determination is whether appointment of a Court Commissioner at this stage is necessary for the purpose of deciding the application at Exh.5.

6. Order XXXIX Rule 7 Code of Civil Procedure, 1908 empowers the Court, for the purpose of detention, preservation or inspection of the subject matter of a suit, to make an appropriate order and to authorise a person to enter upon any land or building in possession of another party for the purposes contemplated therein. The provision is enabling and discretionary. Mere existence of a dispute concerning the physical condition or location of the property does not confer upon a party an absolute right to appointment of a Commissioner. The Court has to be satisfied that such inspection is genuinely necessary for deciding the matter before it.

7. It is equally well settled that a Commissioner cannot be appointed merely for collecting evidence on behalf of a party or for enabling a party to establish through the Court Commissioner a fact

which such party is otherwise required to prove by admissible evidence. The process of the Court cannot be employed to create evidence or to fill up deficiencies in the case of either side.

8. In the suit at hands, the principal dispute sought to be resolved through the proposed commission concerns the location of the shops and the rival assertions regarding Survey Nos.91 and 92 alongwith the dispute as to possession. These are substantive disputed questions between the parties. The respective parties have already disclosed their rival cases in the pleadings. Whether the shops relied upon by the plaintiff actually fall within the suit property and whether the plaintiff or defendant is in lawful possession are matters which have to be determined on the basis of pleadings, documentary evidence, revenue records, maps or measurement records.

9. Moreover, TILR being Commissioner cannot determine legal possession or title. A Commissioner may report the physical features existing at the spot on the date of inspection, but such report cannot decide the disputed rights of the parties. Appointment of a Commissioner as suggested by the plaintiff would run the risk of converting the commission into a means for collection of evidence concerning the very disputed fact which the plaintiff is required to establish.

10. The stage at which the present application has been moved is also material. It appears from record that the plaintiff has already advanced arguments on the interim injunction application at Exh.5 on last date and the matter is now at the stage of hearing defendants.. At this stage, the plaintiff seeks appointment of a

Commissioner before hearing arguments of defendants. No satisfactory circumstance is demonstrated showing why such commission became indispensable only after the plaintiff had advanced arguments on Exh.5. The plaintiff was having ample opportunity to go through record what sort of defence has been taken by defendants in their written statement before advancing argument by plaintiff.

11. The contention of the plaintiff that the commission is necessary because defendant No.1 disputes whether the shops stand on Survey No.91 or Survey No.92 does not persuade this Court to take a different view. Identification and demarcation of survey property, where seriously disputed, ordinarily require consideration of legally admissible survey and revenue records and, where necessary at an appropriate stage, technical measurement through the competent authority. A general local inspection under Order XXXIX Rule 7 cannot be used as a substitute for proof of the identity, boundaries or title of immovable property.

12. This Court is conscious that the power under Order XXXIX Rule 7 Code of Civil Procedure must be exercised whenever inspection is genuinely necessary for effective adjudication. At the same time, such discretion must be exercised judicially and not merely because appointment of a Commissioner may be convenient to one of the parties. On the facts presently appearing, the Court finds sufficient material available to hear both sides and decide Exh.5 in accordance with law. The apprehension expressed by defendants that the application is intended to fill up lacunae holds water.

13. Considering the nature of the relief sought, the rival pleadings, the stage of the proceedings and the scope of Order XXXIX Rule 7 Code of Civil Procedure, this Court finds that appointment of a Court Commissioner before hearing defendants is not necessary and justified. Hence, following order:-

ORDER

- 1) The instant application (Exh. 24) is rejected.
- 2) Defendants to advance their arguments on Exh. 5 injunction application on next date.
- 3) No order as to Costs.

Sd/-

(Amitsingh R. Mohane)

Date- 10/08/2026

Jt. Civil Judge. Sr. Division, Vasai