

Order below Exh.46 in R.C.S. No. 97 of 2011.

1. This is an application forwarded by plaintiffs for appointment of T.I.L.R. as Court Commissioner for measurement of suit properties as per Order 26, Rule 10 of C.P.C.

2. Plaintiff's case in short, is as under :-

That this suit has been instituted for relief of permanent injunction and for specific performance of contract against defendants. It is contention of plaintiffs that plaintiff no.1 had purchased 0.80 R from defendant no.1 on 25-05-1990, plaintiff no.2 had purchased 0.20 R from defendant no.1 on 06-10-1991, also plaintiff no.2 had purchased 0.20 R from defendant no.1 on 22-01-1992, plaintiff no.2 had purchased 0.40 R from defendant no.1 on 30-07-1992, plaintiff no.3 had purchased 0.60 R from defendant no.2 on 20-11-2007. It is contention of plaintiffs that in all they had purchased 2H 20 R land and since their purchase they are in continuous possession of the aforesaid properties.

3. It is further contended that defendant no.2 has executed an agreement to sell of disputed properties mentioned in plaint para no.1-C in favour of plaintiff no.2 on 17-05-2007 and immediately handed over its possession. It is contention of plaintiffs that they have forwarded this application for measurement of the entire purchased land and of property regarding which an agreement to sell has been executed. It is contended by plaintiffs that if measurement of disputed properties is done, the real picture on the spot is going to come on record. Therefore, plaintiffs have prayed for appointment of

T.I.L.R. as court commissioner for measurement of suit properties.

3. Defendants have resisted this application contending that appointment of court commission cannot be sought for confirming possession. It is further contended by defendants that there are several rulings of Hon'ble Apex Court and Hon'ble High Court wherein appointment of court commissioner for ascertaining possession has been deprecated. Therefore, defendants have lastly prayed for rejection of this application.

4. Heard learned advocate Shri. Bramhe for plaintiffs and learned advocate Shri. Bora for defendants.

5. After considering the rival contentions made by both parties following points arise for my determination on which findings are recorded with reasons to follow.

<u>Sr. No.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1)	Whether appointment of court commissioner as per O.26 R.10 is essential to decide real controversy between the parties ?	... In negative.
2)	What order ?	...Application is rejected.

: REASONS :

AS TO POINTS NO. 1 & 2 :

6. At the outset, it is important to note that plaintiffs have sought relief of permanent injunction and also specific performance of contract. The question relating to possession is of

a fact and to prove the said fact, plaintiffs cannot take assistance of this Court. Plaintiffs are required to bring on record independent evidence showing their possession over disputed properties. So far as relief of specific performance of contract is concerned, it is the case of plaintiffs that possession of disputed properties was immediately handed over on the day of agreement to sell. This fact can be proved by plaintiffs by leading evidence of witnesses who were signatories to the agreement to sell. There is no need to appoint T.I.L.R. as court commissioner to ascertain possession of plaintiffs over suit properties. Appointment of court commissioner for ascertaining possession may appear like collection of evidence by plaintiffs through court machinery. Definitely by such appointment of court commissioner defendants are going to suffer prejudice.

7. Counsel for defendants Shri. Bora has relied upon following rulings.

- 1) **Syed Mushtaque vs. Syed Ashique Ali**, reported in **[2011(6) Mh.L.J] 344.**
- 2) **Nalubai vs. Gopinath**, reported in **[2011(2) Mh.L.J.] 991.**

8. I have gone through both these rulings. The gist of these rulings is that appointment of court commissioner cannot be made collect evidence. Court commissioner cannot be appointed for ascertainment of possession. The ratio laid down by Hon'ble Bombay High Court in both these rulings is squarely applicable to case in hand.

9. No purpose is going to be served by appointment court

commissioner for measurement of suit properties as there is no dispute regarding boundaries, encroachment etc. In such situation, there being no merit in the application of plaintiffs it is hereby rejected. No order as to costs.

Sd/-

(A.M. Mujawar)

Civil Judge, J.D., Jamkhed.

Date: 28-04-2017.