



Order below Ex.32 in RCS No.436/2019
(Addanki Venkata Vs. Yvonne Weier & Ors.)

1] This is an application filed by the plaintiff under Order XXVI Rule 9 of the Code of Civil Procedure 1908 for appointment of Commissioner for local investigation.

2] It is the contentions of the plaintiff that suit is filed for perpetual injunction against defendants and for not to obstruct the peaceful possession of the plaintiff all the piece and parcel of non agricultural property situated at village Shirdi, Tal. Rahata, Dist. Ahmednagar within the area of Shirdi Nagar Panchayat limits.

Survey No.	Area	Assessment
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Old S.No.54/1A2/2		
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New Out of S.No.54/9	00 H. 02 R.	Rs.42.40 Ps.
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Defendants No.1 to 4 started obstruction to peaceful enjoyment of plaintiff property with the intention to compel the plaintiff to sale the property to defendants and started to pressurize and started to make nuisance by throwing garbage in the suit property. Defendants No.1 to 4 were removed the compound gate of Southern side and one nameplate of plaintiff's from the suit property.

3] Since the sale deed plaintiff is enjoying the suit property which is vacant plot. There is wall compound to four

boundary of the said plot and the gate is towards the Southern side. Therefore, plaintiff prayed for appointment of Court Commissioner to inspect and examine the vacant plot, wall compound to four boundary of the said plot and gate.

4] Defendant No.1 strongly resisted the application by filing his say at Ex.36. It is contended by the defendant No.1 that the application is filed with a view to collect the evidence and it is filed at a premature stage. Therefore, burden of proof showing possession is on plaintiff and he has to prove his possession by producing admissible evidence. Hence, prayed for reject the application.

5] Defendants No.2 to 5 strongly resisted the application vide Ex.37 of their say. They further contended that the application of plaintiff is not tenable and maintainable. There is no cause of action to file the said application. It is not permissible to appoint a commissioner for collecting the evidence. The application at Ex.5 is pending and it is fixed for hearing. Plaintiff is not in actual possession of the suit property. He is not having possession, right, title and ownership over suit property. Lastly, they prayed for rejection of the application.

6] Heard Learned Advocate Shri. S.N. Gore for the plaintiff and Learned Advocate Shri. N.D. Karle and Shri. S.S. Dhorde for defendant No.1 & defendants No.2 to 5 respectively.

7] Following points arise for my determination and my findings are recorded thereon for the reasons ensuing.

<u>Points</u>	<u>Findings</u>
1. Whether the appointment of Commissioner for local inspection is necessary for elucidating the matter in controversy and in the interest of justice ?	In the Affirmative.
2. If yes, who amongst plaintiff and defendants shall borne the expenses for commission ?	Plaintiff
3. What order?	An application is allowed

REASONS

As to Point No.1 :-

8] It is to be noted that a party can not be prevented from adducing the best evidence. If such evidence can be adduced with the help of the commissioner. Refusal of request of the party to appoint a commissioner in a approximate case amount to failure of exercise of jurisdiction vested in Court.

9] Plaintiff has relied on the citation reported in 2014 DGLS (A.P.) 750, K. Dayanand & Another Vs. P. Sampath Kumar; wherein it is held that :-

“ These observations or findings of the Supreme Court clearly mandate that when there is a dispute or issue with regards to identity of a property in a litigation it is necessary to appoint a Commissioner for localizing the property which may be even by taking necessary assistance from a qualified surveyor which will not amount to collecting evidence which is prohibited.”

10] Shri. S.S. Dhorde Learned Advocate for the defendants No.2 to 5 referred to and relied upon the judgment

of our Hon'ble High Court in the case of Dnyandeo Vitthal Shalke & Ors. Vs. Dagdu kadar Inamdar, reported in 2017(5) ALL MR 104 and Syed. Mushtaque Ahmed s/o. Syed. Ismail & Ors. Vs. Syed Ashique Ali Khan s/o. Haidar Ali, reported in 2012(1) ALL MR 80.

Held :- Commissioner cannot be appointed under Order 26, Rule 9 of CPC for collection of evidence.

11] The contention of the defendants are the Court Commissioner cannot be appointed for collecting evidence. No doubt the Court Commissioner cannot be appointed for collecting the evidence. But in case in hand, the prayer of appointment of the commissioner is not for the purpose of finding out as to who is in actual possession of suit property but location and clarity about southern side of suit property.

12] Perusal of record reveals that the layout plan of suit property filed by plaintiff defendants removed the entry gate of south boundary of suit property and nameplate of the plaintiff and started to make nuisance to the plaintiff's property. Moreover, the entire case rests upon the factual position and situation of the suit property as well as surrounding circumstances the issue whether the plaintiff is having alternative way except the suit way has the great relevance with the subject matter which is sought to be inspected by appointment of court commissioner. Therefore, in my view the appointment of commissioner will not cause any prejudice to the defendants and it is necessary for elucidating the matter in

controversy. Hence, I answered the point No.1 in the affirmative.

As to Point No.2 :-

13] In view of Rule 15 of Order XXVI of Code of Civil Procedure the expenses of commissioner are to be paid in the court by the party at whose instance the commission is issued. Therefore, expenses incurred for the commission have to be borne by plaintiff.

As to Point No.3 :-

14] In view of my findings to point No.1 & 2 the application Ex.32 deserve to be allowed. Both the parties have recommended Smt. V.B. Dhiwar Learned Advocate from Rahata Bar Association to be appointed as commissioner. Smt. V.B. Dhiwar is present in the court. On the request made by the court she gives her consent to act as a Court Commissioner for local inspection of suit property. Hence, I proceed to pass following order.

ORDER

- 1] The application Ex.32 is allowed.
- 2] Smt. V.B. Dhiwar, Advocate is appointed as Court Commissioner to make the inspection of the suit property i.e. Survey No. Old S.No.54/1A2/2, New Out of S.No.54/9, Area 00 H. 02 R. Assessment Rs.42.40 Ps. situated in village Shirdi, Tal. Rahata, Dist. Ahmednagar on 29/12/2020. However, commissioner is at liberty to change the date of commission subject to notice in advance to the Advocates of both parties.

- 3] She is further directed to inspect particularly whether there is wall compound to four boundary of the said plot and the gate is towards the southern side of defendants.
- 4] The plaintiff is directed to deposit the amount of Rs.750/- provisionally to meet the fees of commissioner. Plaintiff is further directed to deposit Rs.300/- provisionally towards expenses of defendants in attending the commission on or before 29/12/2020.
- 5] Plaintiff is directed to make available the copies of pleadings in the suit for the kind perusal of the commissioner at the time of local inspection.
- 6] Both parties are directed to remain present on 29/12/2020 before the Commissioner in the suit property.
- 7] The Court Commissioner is directed to submit report with hand map and photocopy of suit property to this court on or before 12/1/2021.
- 8] Costs on plaintiff.
- 9] Issue commission letter accordingly on payment of expenses by the plaintiff.

Date :- 30/11/2020

(Sou. V.B. Lavand-Kokate)
3rd Jt. Civil Judge, J.D. Rahata