

Order below Exh.33 in R.C.S.No.116/2014 :
(Passed on 17.08.2015)

1. This application is filed by defendant for appointment of Court Commissioner.

2. It is contended by the defendant that the suit is for permanent injunction and defendants resisted the suit by filing counter claim. Both plaintiff and defendants filed application for temporary injunction. Approach road has been existed according to the map filed with written statement. It is falsely contended by the plaintiff that defendants have available approach road by the route which passes through on the boundary of Survey No.28/1, 27/1, 27/2-A, 27/2-B. Plaintiff dugged pit-hole on the common boundary of the lands of plaintiff and defendants.

Under these circumstances, true position of the road and agricultural field is required to be bring on record through the report of Court Commissioner. Therefore, defendants prayed for the appointment of Court Commissioner.

3. Plaintiff resisted the application on the ground that Court Commissioner cannot be appointed for collection of evidence.

4. I have read plaint and written statement carefully. The crux of the dispute is connected to the approach roads, which respectively reached to the field of plaintiff and defendants. According to the plaintiff there is approach road available for the defendants which passes through the boundary of Survey No. 28/1, 27/1, 27/2-A, 27/2-B. On the contrary, according to the defendants the approach road available to them which is at eastern side of boundary of Survey No.26/2/2.

Thus, both the parties contended existence of approach road in different manner. Now, defendants filed this application for Court Commissioner to ascertain exact position of road and agricultural field. Defendants relied upon the case law reported in 2015(1) Mh.L.J.892 to 896, Dattatrey Kalake V/s. Bapu Bhivungade. It

has been held by their Lordship that :

“ Civil Procedure Code, O.26, R.1 – Appointment of Court Commissioner – Suit for temporary injunction – Plaintiff apprehending that defendants No.1 to 5 would cut trees on his property without his permission – No dispute over ownership of land of parties– 7/12 extract and measurement maps not showing existence of trees – However, photographs produced by plaintiff showing existence of trees – In circumstances, Court Commissioner is required to be appointed. ”

On the contrary, plaintiff has relied on the case law, Sanjay Khandare V/s. Sahebrao Khandare, reported in Mh.L.J. 2001(2) 959, as held by Their Lordship :

“ This revision application takes exception to the order passed by the Civil Judge, Junior Division, Mahagaon, dated July 24, 1998, directing appointment of Court Commissioner. On going through the said order, it would appear that the Court has appointed Court Commissioner empowering him to visit and inspect the spot being suit field and to submit report regarding actual possession of the suit field. This would tantamount to appointing Court Commissioner for collecting evidence regarding possession. It is well settled law that the Court Commissioner cannot be appointed for collecting evidence. ”

5. I have carefully considered both the case laws. The facts of the case law relied by the defendants and the facts in the present case are different. In the case law relied by the defendants, the facts are -

(a) Plaintiff seek injunction from restraining the defendant No.1 to 5 from cutting 100 years old age trees belonging to the plaintiff and also seek injunction erasing the boundary marks between Gat No.1464 and 1465.

(b) The Trial Court considered the application at Exh.5 and observed that **the existence of trees cannot be denied, but some**

clarity in that respect is required. Hon'ble High Court observed that Order-26 Rule-9 can be invoked for appointment of Court Commissioner to **elucidate the matter in controversy.**

(c) In that case, it is observed by the Hon'ble High Court that there is no dispute about the ownership of plaintiff but the material found to be insufficient by the Trial Court in deciding the application at Exh.5 and therefore Lordship held that Court Commissioner can be appointed.

But, in the present case plaintiff and defendants respectively claimed entirely different approach road, which reached to the field of defendants. Therefore, to appoint Court Commissioner would definitely result in collection of evidence. **In the above case law, existence of trees are not in dispute,** but only to elucidate the matter in controversy i.e. whether it is located on the boundary or not, Hon'ble High Court appointed Court Commissioner. Plaintiffs are not agree to the existence of approach road as claimed by defendants. In the present case both parties claimed existence of road differently. Plaintiffs have produced sale deed on record to ascertain the existence and position of approach road available to the defendants. To appoint Court Commissioner to ascertain the existence of road would directly amount to collection of evidence. Defendants are at liberty to produce other available evidence on record to prove their averments in their written statement about existence of road. Therefore, the case law relied by the plaintiffs is attracted to the present fact of the case.

To sum up, I pass following order :

ORDER

Application is hereby rejected.

Place: Shirpur.
Date: 17.08.2015.

Sd/-xxx
(V.V.Kulkarni)
Jt.Civil Judge, Junior Division,
Shirpur.

CERTIFICATE

I certify that the contents of this P.D.F. file are word to word as per Original order.

Name of the Stenographer : Jain Jitendra Shashikant
Name of the Court : Court of Jt.C.J.J.D. & J.M.F.C., Shirpur.
P.D.F. Uploading Date : 17.08.2015.

Sd/-xxx
(J.S.Jain)
Stenographer (L.G.)