

MHKO110007212021



Reg. Civil Suit No. 85/2021.
(CNR No. **MHKO110007212021**)

ORDER BELOW EXH.31

01. The plaintiff made the instant application, vide Order XXVI, Rule 09 of The Code of Civil Procedure (in short 'C.P.C.').

02. It is the contention of the plaintiff that, he instituted the present suit for seeking the relief of perpetual injunction. He further submitted that, the land property situated in Bhumapan Gat no.342, is the ancestral property of the defendant no.3 and he himself. In the year 2000, as per the rule of *Panchvidhya* partition of the said land was took place between, defendant no.3 and himself. As per the said partition $\frac{1}{2}$ share towards northern side was allotted to defendant no.3 and remaining $\frac{1}{2}$ share towards southern side was allotted to him, i.e. to plaintiff. In the Bhumapan Gat no.342, defendant no.3 and he himself left a portion which is running in South-West direction. They, jointly using the said portion as a road for having access to their respective field and for transporting the necessary material, products to and from their field. He further submitted that, defendants no.1 and 2, are possessor of the land situated in Gat no.422, which is towards south-west, to the Bhumapan Gat no.342. Defendants no. 1 and 2 are not concern with the suit property. However, they keeping some wooden poles, erected fence and dumping water on the road, which is created by plaintiff and defendant no.3, in the Bhumapan Gat no.342. Defendants no.1 and 2, intentionally obstructed to him, i.e. to plaintiff to use the said road. Hence, to bring on record the factual aspect of the road, it is necessary to appoint T.I.L.R.

Hatkanangale, as a Court Commissioner. Hence, he made the present application.

03. Defendant no.1 filed their say on the leaf of the application and he denied all the contentions of the application. He further submitted that, the boundaries of plaintiff and defendants field were already fixed. He further submitted that, on 10/10/2022, measurement of the land situated in Gat no.422, was carried out by the concern T.I.L.R. and thereby boundaries of the said Gat were fixed. The work of T.I.L.R. and fixation of boundaries marks of Gat no.422, was done in the presence of plaintiff. Now, plaintiff made the present application only with the ill intention to drag the proceeding of the present suit. He further submitted that, he i.e. defendant no.1 is ready to produce on record the “C” copy of the measurement report. He finally submitted to reject the application by imposing compensatory costs.

04. On perusing rival pleadings following points are arising for my consideration. I am recording my findings along with reasons thereon as follows,

Sr. No.	Points	Findings
1.	Whether the appointment of Court Commissioner is necessary to elucidating any matter in dispute ?	In the negative.
2.	What Order.	As Per Final Order.

As to point No.1 and 2 -

05. Before proceeding to deal with the present application it is necessary to have section 75 of the C.P.C. On bare perusal section 75 of the C.P.C. it is seen that, for the following presupposes Court commissioner

shall be appointed -

- i. *to examine witness;*
- ii. *to make local investigation;*
- iii. *To adjust accounts;*
- iv. *to make partition;*
- v. *to hold investigation;*
- vi. *to conduct sale; or*
- vii. *To perform ministerial act.*

06. Before, dealing with the present application it is necessary to consider here the relief claimed by the plaintiff in the present suit. On plain reading the plaint, it is seen that, plaintiff claiming himself as a possessor of the land admeasuring 0H-32R., situated in Bhumapan Gat no.342, at Mouje Hingangaon, Tal. Hatkanangale, Dist. Kolhapur. It is also seen from the plaint that, defendant no.3, is the brother of plaintiff. Plaintiff and defendant no.3, for their common use left some land portion, in Gat no.342. They commonly using the said left portion as a road, which is running in west-south direction. Now, it is story of the plaintiff that, defendant no.1 and 2, are putting some wooden poles, erected fence and dumping water on the said road and thereby preventing them to peacefully enjoy the said road.

07. By making the present application, plaintiff praying to issue Court Commissioner, to conduct the measurement of the land situated in Gat no.342. It is pertinent to note here that, as per the submission of the plaintiff to finally adjudicate the boundary dispute, existed between parties to the suit. It is necessary to appoint T.I.L.R., Hatkanangale to conduct the measurement of the land situated in Gat no.342. But, on this point it is necessary to consider here that, the present suit is only for perpetual injunction. In the present suit, it is not the case of the plaintiff that, either of the defendants committed the encroachment over the suit property. So, the

boundary dispute is not in question, in the present suit. Considering this fact, I am of the candid opinion that, as the boundary dispute is not a fact in issue or the relevant fact in the present suit, it is not warranted the appointment of the Court Commissioner to bring on record the disputed boundaries, i.e. too the same is not involved in the present suit. So, appointment of a Court Commissioner for that purpose is useless.

08. It is also pertinent to note here that, it is seen from the pleading of plaintiff that, he and defendant no.3, i.e. his brother, had left some portion in the Bhumapan Gat no.342, and now a days they are using the said left portion as a road, which is running in west-south direction. Now, the defendants no.1 and 2, kept some wooden poles on the said road, they also erected fence compound and dumping water on the said road, and thereby causing obstruction to the plaintiff to enjoy the said road. Considering this fact it is seen that, by appointing the Court Commissioner plaintiff intending to bring on record, the factual circumstances of the road. If, in such scenario the present application allowed and Court Commissioner was appointed, then, it will amount to collection of the evidence, for the plaintiff, by Court Commissioner. Because, as per the story of the plaintiff, the act of keeping wooden poles, erecting fence compound and dumping water at the hands of defendants no.1 and 2, on the road, is an obstruction for enjoying the said road by him. In such situation, the present obstruction at the hands of defendant no.1 and 2, has to be proved by considering the evidence adduced by the plaintiff himself. In other words, plaintiff on his own footing has to prove the alleged obstruction to his enjoyment of the road, at the hands of defendants no.1 and 2, and for that purpose he shall not be allow to take the help of Court. Hence, considering the nature of the suit and the relief claimed by the plaintiff in the suit, I am of the candid opinion that, by appoint a Court Commissioner, plaintiff intending to collect evidence for his case, which is not permissible.

09. Learned advocate appearing for the plaintiff relied upon the judgment of **Ramchandra Bhikaji Jagtap Vs. Dudharam Padvekar (2004 (1) Mh.L.J. 278) and Kisanlal Rathi Vs. Dinkar Patil (2004 (1) Mh.L.J.138).**

10. On perusing supra cited judgments it is seen that, the fact and circumstances of the supra cited judgment is different from the fact and circumstances of the present case on my hand. So, it's my humble opinion that, supra cited judgment are not applicable to the present case on my hand. Hence, considering above discussion, I answered point no.1 in negative and to answer point no.2, I proceed to pass the following order -

ORDER

1. Application at **Exh.31** stands rejected.
2. Application at **Exh.31**, disposed off accordingly.

Date : 19/07/2023.

(L. M. Pathan)
Civil Judge Junior Division,
Peth-Vadgaon