



ORDER BELOW EXH. 15

This is an application under Order 26 Rule 09 of C.P.C. by plaintiff for appointment of court commissioner. As per plaintiff there is a road running from east to west and having width of 10 Ft. Plaintiffs have constructed their house in Gat No. 559 and through said road they used to get access to the main road from their house in Gat No. 559. However, defendants have recently obstructed plaintiffs from using the said road by constructing thereon by making an encroachment. Thus, in order to bring on record the factual position of encroachment at the hands of defendants, it is necessary to appoint the court commissioner. Hence, this application.

2. Vide his say the Ld. Advocate for defendants has strongly combated the application contending its content as false and frivolous. As per defendants there is no road in existence as averred by plaintiffs. Hence, there is no need to call for court commissioner. Further, the suit is simplicitor for injunction. Plaintiffs have not sought any relief pertaining to so called encroachment. Though by availing the provisions under order 26 plaintiffs are trying to collect the evidence. Ultimately, defendants have prayed for rejection of the application.

3. Heard both sides. Perused record. At the outset it is necessary to mention here that the suit is not for simplicitor injunction. Vide prayer clause 15(c) plaintiff has sought the relief of mandatory injunction directing defendants to remove the construction caused by

them on the road. That apart plaintiffs have come with the theory that there is a road affording access to the main road from plaintiff's house in Gat No. 559 and the same is obstructed by defendants. Thus, from the pleadings itself it reveals that the plaintiffs have come with the theory of encroachment.

4. Though defendants have denied the existence of road as well as encroachment at their hands, considering peculiar facts and circumstances of this case, it would be very difficult to ascertain the actual factual position in suit property.

5. As per order 26 Rule 9, in any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon.

6. In instant case, as discussed here-in-above unless and until the commission is appointed for local investigation, it would be very difficult to come to a conclusion as to the factum of alleged encroachment. Unless and until the commission is appointed and the properties held by defendants are measured, a firm opinion as to the status of construction caused by defendants can not be formed. Hence, this is a perfect case to adopt the course under order 26 Rule 9 of C.P.C.

7. Ld. Advocate for defendants vehemently argued that the appointment of court commissioner would amount to collection of evidence as to the existence of road. Hence, it can not be appointed.

However, this argument does not survive. Because, plaintiff has filed on record the certified copy of decree in R.C.S. No. 46/2015 wherein the road subject matter of this proceeding was in dispute. In R.C.S. No. 46/2015 this court has concluded that there is a road in Gat No. 559 and it has also restrained the defendants in R.C.S. 46/2015 from disturbing plaintiffs right to use the said road. Nothing is on record to show that the judgment and decree passed in R.C.S. No. 46/2015 is varied or set aside by appropriate forum.

8. From the aforesaid backdrop it is clear that the application deserves to be allowed. However, considering nature of dispute and the peculiar circumstances of the case I am of view that it would be just and proper to appoint the T.I.L.R. as court commissioner in the case. Hence, following order is passed :-

ORDER

1. Application is allowed.
2. The T.I.L.R. is hereby appointed as Court Commissioner.
3. He shall conduct the measurements of Gat No. 559 and the respective shares held by plaintiffs and defendants in Gat No. 559 and prepare the map accordingly showing the actual factual position pertaining to occupation of plaintiffs and defendants and also the encroachment at the hands of defendants, if any.
4. The copies of plaint, written statement and documents filed on record be sent to the T.I.L.R.
5. Plaintiff to bear the expenses of commission work.

Date: 19/03/2019

(M. H. Shitole)
C. J. J. D. Radhanagari
Kolhapur

I Affirm that, the contents of this P.D.F. file Order are same, word to word, as per the original Order.

Name of the Stenographer	U.S.Telang
Name of Court	Civil Judge, Junior Division & Judicial Magistrate, First Class, Radhanagari.
Date of Dictation	19/03/2019
Order signed by the P.O. On	19/03/2019
Order uploaded on	20/03/2019