

Order Below Exh. 79 In R.C.S. No. 31/2001

(Passed on 28-11-2011)

Nature Of The Application

1. This is an application filed by the plaintiff seeking appointment of Taluka Inspector of Land Records (for short **T.I.L.R.**) as Court Commissioner under Order 26 Rule 9 of the Code of Civil Procedure (for short C. P.C.)

Contents In The Application

2. The plaintiff has contended that the defendants are owners of Survey No.1 Hissa No.2 (for short 1/2) admeasuring H.0.18 Are area only. There are marks of foundation of fencing and the distance of said mark is East-West 220 feet and South -North 123 feet. The land which is covered under said marks is about H.0.27 Are. Thus during pendency of this suit they have made encroachment of an area admeasuring H.0.09 Are, and are now claiming to be in possession of said area. Therefore, it is necessary to appoint T.I.L.R. as Court commissioner. On these grounds, the plaintiff has prayed to grant the application.

Contents In the Say Of Defendant Nos. 1 & 2

3. The defendant Nos. 1 and 2 have filed their say

exh. 84 and strongly objected the application. They have contended that this application is not tenable. This application is filed to collect evidence. Since last ten years the plaintiff is prolonging the matter by filing various applications. The defendants have got measured their land. The T.I.L.R. was appointed as per application exh. 38 filed by the plaintiff who measured the land of defendant Nos. 1 & 2 on 17-05-2006 and showed H.0.04 Are encroachment made by the plaintiff on the land of defendant Nos. 1 & 2 and also showed H.0.01 Are encroachment made by the defendant no.2 on the land of plaintiff. After this measurement the defendant Nos 1 & 2 made wire fencing to their land towards Eastern side and handed over possession of H.0.01 Are land to the plaintiff. The plaintiff has filed an application to call T.I.L.R. as his witness on 11-01-2011. Accordingly T.I.L.R. was present on next day but plaintiff has not adduced his evidence. This shows that the plaintiff is interested in delaying the trial. On these grounds, the defendant Nos. 1 and 2 have prayed to reject the application.

The Arguments

4. I have heard Shri. B.B. Kshirsagar, advocate for the plaintiff and Shri. H.R. Patil, advocate for the defendant Nos.1 and 2, at length.

5. They argued in consonance with their contentions in the application and say. I will deal with those arguments while discussing reasons on the points taken for consideration.

Points And Findings

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow :-

<u>Points</u>	<u>Findings</u>
1. Whether the T.I.L.R. can be appointed as Court Commissioner, as prayed for ?	No.
2. Whether the application has the effect of delaying the hearing of the suit ?	Yes.
3. What order ?	Application Rejected. By awarding costs to the defendant Nos. 1 & 2.

Reasons As To Point No.1

7. O.XXVI, R.9 of C.P.C. reads as under. :-

7.1 Commission to make local investigations

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 or of ascertaining the market-value of any property or the amount of any mesne profits of damages of annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that... ..

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiff has filed this suit seeking permanent injunction against the defendants in respect of

land Survey No. 2 Hissa No. 5 (for short 2/5) admeasuring H.1.48 Are situated at village Ahmedpur.

10. The defendants have denied all the allegations made by the plaintiff contending that they have not made any encroachment on the plaintiff's land, Survey No.2/5.

11. The T.I.L.R. was appointed as a Court Commissioner as per order below exh.38 dated-06-07-2005 and accordingly he has filed his report exh. 46 showing H. 0.04 Are encroachment made by the owner of land Survey No. 2/5 on the land Survey No. 1/2 and H.0.01 Are encroachment made by the owner of land Survey No. 1/2 on the land Survey No. 2/5.

12. It is important to note that, inspite of the report of T.I.L.R. Exh. 46 dt. 18-07-2006, the plaintiff has not taken any steps till filing of this application on 07-10-2011. The plaintiff has not produced any evidence, prima facie, about any encroachment made by the defendant Nos. 1 & 2 to the extent of H. 0.09 Are, to get an order of Court Commissioner. To my mind unless the plaintiff come before this Court with firm stand either by way of evidence, at least prima facie, his prayer for an appointment of Court commissioner cannot be accepted.

13. This makes crystal clear that merely contention of the plaintiff in respect of alleged encroachment made by the defendants is of no use for the plaintiff in order to get an order of appointment of T.I.L.R. as court commissioner, as prayed by him, as no confusion or complication or ambiguity is created due to map exh.46. Therefore, the application is devoid of merits and is liable to be rejected.

14. The issues are Exh. 32 dt. 08-06-2004. The point in dispute between plaintiff and defendant Nos. 1 & 2 is in respect of their possession on land Survey Nos. 1/2 and 2/5 as is clear from their pleadings and issues exh.32. There is no question involved in this suit in respect of any encroachment or in respect of the situation of the lands Survey Nos. 1/2 and 2/5 and so on. It is not necessary at all to bring on record any situation in respect of these lands as prayed by the plaintiff in this application. Therefore, keeping in mind the scope and object of Order 26 Rule 9, I am not inclined to grant this application.

15. The plaintiff is claiming to be owner of land Survey No. 1/2 as is clear from his pleadings. This suit is filed on 12-01-2001. The defendant Nos. 1 and 2 have

filed their written statement exh. 14 on 31-01-2001. The defendant Nos. 1 and 2 have denied the plaintiff's claim in toto. Thereafter, the plaintiff has filed application exh. 38 on 06-07-2005. The T.I.L.R. filed his report exh. 45, 46 on 17-05-2006 making clear the encroachment made by the defendants No. 2. However, the plaintiff has not sought amendment in the prayer clause seeking possession of the alleged encroached portion, at that time. Thus, it is clear that the plaintiff instead of taking proper legal steps has filed this application. There is no explanation coming from the side of plaintiff as to why he waited for such a long time and has not sought possession of H. 0.01 Are. Then, again he has filed this application alleging encroachment made by the defendant nos. 1 & 2. In my view, this application is not filed bonafidely. This conduct of the plaintiff shows that the plaintiff want to collect evidence with the help of the Court and is not diligent about his rights and any how intending to delay the trial. Therefore, the application is liable to be rejected.

16. It is well settled principle in law that the commission cannot be appointed for collecting evidence. The plaintiff by way of filing this application is definitely

collecting evidence through the machinery of Court and by getting order from the Court. In view of this legal position also the application is not tenable. Therefore, the application is liable to be rejected.

17. The plaintiff has not produced any documentary evidence on record showing any prima facie case in his favour as alleged by him in his pleadings and in this application about the alleged encroachment made by the defendant Nos. 1 and 2, of which elucidation (emphasis supplied) as contemplated u/o 26, rule 9 of C.P.C. is necessary and encroachment is required to be fixed as contended by the plaintiff, as such this application will not come within the purview of u/o 26, rule 9 of C.P.C. Therefore, it is liable to be rejected.

18. Furthermore, if facts pleaded by the plaintiff and defendant Nos. 1 & 2 are considered along with all documents on record it transpires that local inspection u/o 26, rule 9 of C.P.C. is not necessary in respect of the dispute in this suit. Therefore, the application is liable to be rejected.

19. The plaintiff is owner of land Survey No. 2/5, I am of the view that there is no hurdle before the plaintiff

to approach the competent authority i.e. Survey Office, to measure his land Survey No. 2/5. Nothing is on record which will show that the plaintiff has made any such attempt to get measure his land through the competent authority and the said attempt failed. Therefore, on this sole ground the application is liable to be rejected.

20. Moreover, the person who will measure the land either on the application of the plaintiffs filed independently to Survey Officer or by appointment of an order of the Court, is a person who is an expert from the Survey Office. The discretion is given to the applicant applying to get measure his property to file application for simple measurement, for urgent measurement and for most urgent measurement and accordingly as per the order issued by the settlement commissioner, Director land records Maharashtra State dated 30-10-2001 the different fee is charged. So far as the commission appointed by the order of the Court the applicant is required to pay fee as for urgent measurement. These facts also show that there is no difference from getting measurement by filing separate application to Survey officer and through the order of the Court. Therefore, I

am of the considered view that this is not the case where an order for commissioner can be made. Therefore, the application is liable to be rejected.

21. Above all, this is a suit seeking simplicitor relief of permanent injunction. If any encroachment is made by the defendant Nos. 1 & 2 then the plaintiff is at liberty to get measure his land Survey No. 2/5 and to file suit seeking possession of said encroached portion. The application filed in this suit does not fall in its ambit or within the scope of this suit. There is a separate cause of action, as contended by the plaintiff, to file separate suit and for this purpose appointment of [T.I.L.R.](#) is not necessary or the hearing of this suit is not required to be withheld. Hence, on this ground also the application is devoid of merits and is liable to be rejected.

22. To sum up, the plaintiff has not come with clean hands. No bonafides are seen in this application. I am of the considered view that only to prolong the hearing of the suit and in order to collect evidence present application is filed. In view of this, I am not inclined to grant this application. Accordingly, I answer point No. 1 in the negative.

Reasons as to Point No. 2

23. The suit is filed in the year 2001. The application exh. 38 seeking appointment of T.I.L.R. as Court commissioner was filed on 30-04-2005. The report was filed by T.I.L.R. on 18-07-2006 showing encroachment made by the defendant No.2 on the land of plaintiff. Since then instead of taking any legal steps the plaintiff proceeded with hearing of this suit by leading evidence exh. 55 dt. 23-03-2010, exh. 59 dt. 06-07-2010, exh. 61 and 62 dt. 17-08-2010. Then he prayed for witness summons vide exh. 67 dt. 11-01-2011. Accordingly T.I.L.R. was served but without leading his evidence the plaintiff filed application exh. 71 seeking amendment in the plaint and thereafter again filed this application on 24-03-2011. This itself shows that the plaintiff though was aware about the report of T.I.L.R. Exh. 46 has not done anything and now by filing this application again sought appointment of T.I.L.R. as Court commissioner. Thus, the record and proceeding shows positively that the plaintiff has delayed the hearing of proceeding by not taking legal steps at earlier stage. In my firm opinion this conduct of the plaintiff is self

speaking that any how he is interested in prolonging the hearing of this suit and has not come with clean hands before the court. 24. Thus, before parting with the order, at the cost of repetition, I cannot refrain myself from observing that the overall conduct of the plaintiff in this suit and more specifically filing of this application without taking legal steps in view of T.I.L.R.'s report exh. 46 has caused delay in the proceeding. The hearing of the suit is adjourned at the behest of the plaintiff due to filing of application exh. 71 and due to filing of this application, therefore, this is a fit case in which the defendant Nos. 1 & 2 are required to be reimbursed reasonably by awarding suitable costs which I assess at Rs. 500/-. Accordingly, I answer Point No. 2 in the affirmative and proceed to pass the following order.

ORDER

1) The application exh. 79 filed by the plaintiff seeking appointment of Taluka Inspector Land Records is rejected as here-in-below : -

- i. The plaintiff is directed to pay costs to the defendant Nos. 1 and 2 for causing delay in the proceeding which is quantified at

Rs.500/- (Rs. Five Hundred only) to be deposited in the Court on or before 05/12/2011. The deposit of costs shall be condition precedent for taking part by the plaintiff in this proceeding.

- ii. The defendant Nos. 1 & 2 are at liberty to withdraw the cost in equal proportion.

(Pronounced in the open Court).

Date : 28/11/2011.

(M. B. Lambe),
Jt. Civil Judge Senior Division,
Ahmedpur.