



ORDER BELOW EXH. 15

The plaintiff has preferred the present application under Order XXVI, Rule 9 of Code of Civil Procedure, 1908 (here-in-after referred to as C.P.C.) to appoint a Court Commissioner.

2. The plaintiff submitted that he is the owner and possessor of land as specified in para no. 1 of the plaint. The defendant filed a proceeding before Ld. Tahasildar and claim a disputed way from the eastern side of Kha. No. 145/1. The Ld. Tahasildar by order dated 19.06.2018 passed an order in favour of the defendant and restrain the plaintiff from obstructing that alleged way. Hence plaintiff instituted the present suit for seeking relief of declaration and injunction against the defendant.

3. The plaintiff also submitted that plaintiff and defendant are coming with a contrary submission about the existence of the disputed way. Hence to ascertain and verify the correct position spot inspection is necessary. If such inspection will be allowed then no party will prejudice. Hence it is prayed to appoint a Deputy Superintendent of Land Record as court commissioner for conducting spot inspection.

4. The defendant failed to file Say though the sufficient opportunity was given. Hence matter proceeded without the Say of the defendant.

5. Since many dates neither plaintiff nor the defendant or their respective counsel are appearing before the court to get adjudicate the present application. Hence I proceed to decide the application on its merit without sharing.

6. At the outset, it is settled law that, under Order XXVI, Rule 9 of the Code of Civil Procedure the Court has the discretion to order the local investigation with the intent to elucidate the matter. However, in the present application, the plaintiff is seeking an appointment for the Court commissioner to ascertain the existence or non-existence of way, which is a disputed issue involved in the suit. Therefore, on that basis, the present application cannot be allowed.

7. On perusal of record. It also appears that the present matter is at the preliminary stage, issues were framed on 31.08.2019 (Ex 14), but still, the plaintiff failed to lead any evidence. Therefore, after leading evidence, a commissioner report is found necessary then provision under Order XXVI, Rule 9 of CPC can be invoked. Hence on that ground present application was found to be preferred at a preliminary stage, therefore appears to be filed as the premature stage of the hearing¹.

¹ *Mahadeo Kondiba Shinde v. Nitin Sakharan Shinde*, 2021(5) AIR Bom. R 98;

8. Hence, on all above ground the application is found devoid of merit, therefore cannot be allowed. Accordingly, I pass the following order.

ORDER

The application is rejected.

Saoner
Date: 10.11.2022

(Santosh R. Bharad)
Jt. C. J. J. D. , Saoner

C E R T I F I C A T E

“I affirm that the contents of this P. D. F. File of order is word to word as per original order.”

Name of Stenographer: N. B. Payade

ENDORSEMENT

Case argued on	:	10.11.2022
Order dictated on	:	10.11.2022
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Order Checked and signed on	:	10.11.2022