

MHNG140002872022

RCS NO.26/2022
RAMRAO VS. FULCHAND



ORDER PASSED BELOW EXH.13
(PASSED ON 11/03/2025)

- 1) The defendant filed this application under Order 26 Rule 9 of Code of Civil Procedure, 1908 for appointment of Court Commissioner the Taluka Inspector of Land Record (T.I.L.R.), Parseoni for joint measurement of the properties of the plaintiffs and defendant.

- 2) The defendant contended that the plaintiff has filed this suit for the declaration and permanent injunction. The plaintiff contended that he is the owner of the suit property and in possession of the field property bearing Survey No.71 area admeasuring 3.01 H.R. and the defendant is the owner and in possession of the agricultural field property bearing No.70 of area admeasuring 0.97 H.R. both land situated at Mouza – Pardi, P.C. No.9, Taluka Parseoni, District Nagpur. The plaintiff further pleaded that the defendant has tried to encroach upon some portion of the suit property. The defendant has denied the said contention.

- 3) The defendant further contended that there is a boundary dispute in between the plaintiff and defendants. Therefore, to decide

the real controversy of boundary dispute, it is necessary to measure both the properties of plaintiff and defendant by appointing Taluka Inspector of Land Record, Parseoni for the measurement of the property. The office of T.I.L.R., Parseoni issued letter dated 28.06.2023 and informed that a correction of record after spot enquiry will not be proper because the suit is sub-judice before this Court. Therefore, the defendant has filed this application and prayed to allow the application and appoint T.I.L.R., Parseoni as Court Commissioner to measure the suit property and property of the defendant.

4) The plaintiff filed his say on Exh.14 and strongly opposed the application with submission that the matter is fixed for hearing on the application for grant of temporary injunction filed by the plaintiff. The defendant has twice measured his property from the T.I.L.R., Parseoni but nothing came from the said measurement against the plaintiff. Further submitted that the measurement was also conducted by the T.I.L.R., Parseoni on the application of the plaintiff. By this application the defendant want to fill-up the lacunae of his defense and want to take assistance of the Court for collection of evidence. The plaintiff further submits that before the completion of evidence of both sides the Court Commissioner cannot be appointed. The instant application is premature hence, liable to be rejected.

5) Heard Learned Advocate for the Defendant Mr. P.S. Sayare and Learned Advocate for the Plaintiff Mr. M.D. Paliwal at length.

6) The Learned advocate for the defendant argued that there is a boundary dispute in between the plaintiff and defendants, therefore, the Report of joint measurement is necessary to decide the real controversy between the parties. Further submitted that some portion of land admeasuring 0.26 R. out of land Survey No.71 acquired for the construction of Pipeline by Irrigation Department. Therefore, the joint measurement of the plaintiff and defendant's land is necessary. The learned advocate for the defendant relied on a Judgment Second Appeal No.875/2016, **Rambhau Daulatrao Mule and Others Vs. Balabhau Pandharinath Kachre and Others**, passed by the Hon'ble High Court of Judicature at Bombay Bench at Aurangabad, in this case the Hon'ble High Court issued direction to the Trial Court to appoint the Court Commissioner and such appointment of the Court Commissioner shall conduct the local inspection in accordance with the provisions of Order XXVI Rule 9 of Civil Procedure Code.

7) The learned advocate for the plaintiff argued that the matter is fixed for the hearing on application for temporary injunction. The plaintiff and defendant both have got measured their field through the T.I.L.R., Parseoni. The copy of "K-Prat" of measurement of suit land and the land of defendant are on record. If application allowed at this stage it will amount to collection of evidence, hence liable to be rejected.

8) The learned advocate for the defendant relied upon the judgment passed by the Hon'ble High Court in **Dhondiram Nivrutti Pawar Vs. Laxman Khashaba Pawar in Writ Petition No.1196/2017**, the Hon'ble High Court has held that *“when oral evidence cannot help the Court, when it is the form of words against words by rival parties in case of encroachment on the land, such an appointment of T.I.L.R., may be useful”* and in para No.13 it is held that *“the respondents have not raised any boundary dispute. It is also not their case that the petitioners have made encroachment over their land. Conversely, they want appointment of ‘Court Commissioner’ to bring on record the factual position of the suit land, to prove the fact that the plots are already made and there are separate water chambers for each of the plots.”* Hence, machinery of the Court cannot be used for the purpose of collecting evidence.

9) Defendant further relied on the judgment of Hon'ble High Court in **Ramesh Shivrajirao Sutar and Others Vs. Vitthal Ramchandra Potdar and Others** in Writ Petition No.7937/2021 wherein the Hon'ble High Court held that the *“Court Commissioner cannot be granted for the sake of mere asking. The Court Commissioner cannot be appointed only for carrying out the measurement of the disputed suit property, particularly when the defendants have objected the same. The impugned order for the appointment of the Court Commissioner is quashed and set-aside.”*

10) In the case in hand the plaintiff seeking relief for declaration and permanent injunction against the defendants and the plaintiff came with a theory that on 31.03.2021 the plaintiff had legally got measured the suit property from the office of T.I.L.R. Parseoni. The defendant is the owner of the field Survey No.70 which is adjacent to the suit property. The Land Acquisition Department acquired the half portion of the Survey No.70 in the year 2007-09 for the construction of pipelines. The defendant trying to dismantle the 'Dhura' between the suit property and field of the defendant. Therefore, the plaintiff is seeking relief of permanent injunction against the defendant, not to disturb the peaceful possession of the plaintiff over the suit property. Also filed an application for temporary injunction to restrain the defendant temporarily from disturbing the peaceful possession of the plaintiff over the suit property. The defendant appeared and denied the rival contentions of the plaintiff and submitted that the plaintiff is not the owner of the area mentioned in the suit and suppress the material facts.

11) The case is fixed for hearing on temporary injunction. At this stage the instant application filed by the defendant. It is admitted that if there is a boundary dispute and both the parties have stated about common boundary and the encroachment stated from both side, the appointment of Court Commissioner is necessary because the oral evidence cannot help the Court in respect of the encroachment over the suit property. Now in the present matter prior to filing the suit, the

plaintiff and defendant both have got measured their respective fields. The matter is fixed for hearing on application for temporary injunction Exh.05, the plaintiffs seeking injunction to restrain the defendants from creating obstruction in the peaceful possession over the suit property. It is not the case of the plaintiff that the defendant has made encroachment over the suit property. Neither it is the defence of the defendant that the plaintiff has made encroachment over the suit property.

12) However, the defendant wants to appoint the Court Commissioner to ascertain the boundaries and find out the encroachment if any exist over the suit property as well as the property of the defendant. Moreover, both the parties got measured their field. It appears that the defendant wants to ascertain the physical status of land. As considering the ratio of above cited authorities filed by both the sides this Court can appoint the Court Commissioner for the measurement of land or fixation of boundaries. But considering the facts and circumstances in the case in hand, it is necessary to examine whether the appointment of the Court Commissioner at this stage is warranted or not.

13) The plaintiff got measured their suit property, thereafter, he filed this suit. Prior to institution of this suit the defendant two times had got measured his field. To decide the application for temporary injunction at this stage, the report of joint measurement by the T.I.L.R.

is not necessary. The trial is yet to be commenced. Therefore, in my view considering the facts and circumstances of the present case, the appointment of Court Commissioner for the joint measurement of the suit property and field of defendant at this stage before plaintiff and defendant adduce their evidence is not warranted. However, the defendant will be at liberty to file appropriate application for appointment of Court Commissioner for the joint measurement of suit property and field if so, desired after the conclusion of evidence of the parties. Hence, I pass the following Order.

ORDER

1. Application Exh.13 is hereby rejected.

Parseoni
Dated :- 11/03/2025

(G.O. Wankhade)
Civil Judge Junior Division, Parseoni