

Order Below Exh. 58 in R.C.S. no. 30/2021

(CNR No. MHRT080004552021)

By the present application, defendant no. 1 has prayed for issuing commission to know the exact position at the suit site. It is contended that, the plaintiff is claiming easementary right of way. It is the case of plaintiff that, he has easementary right of way to reach his land through the land belonging to defendant no. 1. Further, according to plaintiff himself, another way from the land of other defendants is also available. On 19/07/2022, the plaintiff has damaged and destructed the compound wall made in stones. As such, the plaintiff has damaged the compound wall belonging to defendant no. 1. Thus, defendant no. 1 has made counter claim, claiming injunction against the plaintiff. To know the exact position about the available path ways and about destruction of compound wall, it is necessary to issue Court Commission, according to the defendant no. 1.

02. The plaintiff has filed reply below Exh. 72 and opposed the application. The plaintiff contends that, yet the evidence is not begun. As such, present application is premature. Moreover, the commission cannot be issued for the purpose of collecting evidence. By the present application, the defendant no. 1 is trying to collect evidence. As such, in any view of the matter, application is liable to be rejected, according to the plaintiff.

03. Perused the record. Heard learned advocate Shri. A. A. Kadam for the plaintiff and learned advocate Shri. Dhaval for the defendant no. 1.

04. Learned advocate Shri. Dhaval has submitted that, present application is made just to bring on record factual position

at the suit site. Moreover, if the commission is issued, it would help to plaintiff who contends availability of path ways through the lands of defendants. He submits that, he cannot understand as to why the plaintiff is opposing the application. According to him, the plaintiff is so opposing as some other facts may come to light. Hence, in the given circumstances, commission need to be issued, he submitted. To substantiate his contentions, he has relied on the judgment of Hon'ble Bombay High Court in the case of **Sarjerao Nathu Bangar and ors. Vs. Kundlik Keru Bangar and ors. (WP No. 4811/2020 judgment dated 23/07/2020).**

05. On the other hand, learned advocate Shri. A. A. Kadam has argued that, the parties have not stepped in to witness box. Even the issues are not yet framed. Hence, the application is premature. To substantiate the contention, he has relied on the judgment of Hon'ble Bombay High Court in the case of **Mahadeo Kondiba Shinde Vs. Nitin Sakharam Shinde and anr. [2022 (2) All MR 593]**. Further, the commission cannot be issued to collect evidence. When the parties are able to establish the facts in any other manner, commission cannot be issued, he submitted. He placed reliance on the judgments of Hon'ble Bombay High Court in the cases of **Syed Mushtaque Ahmad and ors. Vs. Syed Ashique Ali Khan (WP No. 2071/2011 judgment dated 12/07/2011)** and in **Dhanaji Dhondiba Pawar and ors. Vs. Laxman Kashaba Pawar and ors. (WP No. 1196/2017 judgment dated 23/01/2018).**

06. Pertinently, in the case of **Sarjerao Bagar (supra)** relied by learned advocate for defendant no. 1, an application for local inspection was made as per Order XXVI Rule 9 of C.P.C. Trial

Court has rejected the application. Writ Petition was made to challenge the order. The suit was for declaration of title and possession. It was contended that, issuance of commission was necessary to know factual scenario. Rejecting the contention it was held by the Hon'ble High Court that, the commission could not be issued in the given circumstances.

07. In the case of **Mahadeo Shinde (supra)** it was held by the Hon'ble Bombay High Court that, an application under Order XXVI Rule 9 of CPC is tenable for the purpose of elucidating matters in controversy. It was held that, 'to elucidate' means 'to clear' or 'to clarify'. It was further held that, such application was not tenable when the parties have not stepped in the witness box. The application was rejected with liberty to make it at appropriate stage.

08. In the cases of **Syed Mushtaque Ahmad (supra)** and in **Dhanaji Dhondiba Pawar (supra)** it was held that, the commission cannot be issued for the purpose of collecting evidence.

09. Ratio of the aforesaid judgments thus show that, the commission cannot be issued for the purpose of collecting evidence. Further, it says that, the commission cannot be issued when the parties have not yet stepped in witness box to adduce the evidence. The commission can be issued only for the purpose of elucidating matter in controversy. It means clarification of the facts brought on record through some oral or other evidence. In the present case, issues are not yet framed. As such, present application is premature as held in the case of **Mahadeo Kondiba Shinde (supra)**. It being a premature application, it is liable to be rejected. Liberty to make a fresh application, if needed, at appropriate stage can be granted.

Hence, following order-

ORDER

Application is rejected with liberty to make the same at appropriate stage, if needed.

Date : 17.11.2022

(B. D. Tare)
Civil Judge (J.D.), Deorukh

- : C E R T I F I C A T E : -

Judgment/order in (Order below Exh. 58 in R.C.S No.30/2021)

I affirm that the contents of this Pdf file order are same words as per original order.

Name of Stenographer	:- S. S. Thaware (Jr. Clerk)
Court Name	:- The Court of Civil Judge (J.D.) & Judicial Magistrate F.C., Deorukh
Date of decision	:- 17/11/2022
Order signed by PO. on	:- 17/11/2022
Order uploaded on	:- 17/11/2022