

**CNR NO. MHSI70002432021****Order passed below Exh. No.10
(I.A. No. 3/2021) in R.C.S. No.55/2021**

This is an application preferred by the plaintiff for appointment of Court Commissioner.

2. The plaintiff has contended that the plaintiff has filed the present suit for declaration of easementary right, perpetual and mandatory injunction. The plaintiff has purchased house property no.1 shown in the plaint. The plaintiff is residing in the said house alongwith her family members. A road is situated 45 feet away from the plaintiff's house known as Phatak road. The plaintiff was using the said road to ingress and outgress. It is further contended that the defendants no.1 and 2 have purchased suit property no.2 shown in the plaint. The defendants no.1 and 2 have started constructing compound over 5 feet road proceeded towards plaintiff's house. Due to erection of compound, 5 feet road is divided into two parts i.e. one is 4 feet wide and second is 1 feet wide. The defendants no.1 and 2 are intending to carry out construction on the said road, therefore, it is necessary to appoint Court Commissioner to ascertain compound gate, plaintiff's easementary way, compound wall erected by the plaintiff and location of Phatak road. Therefore, it is prayed that any advocate from the Malvan Bar Association be appointed as Court Commissioner.

3. The defendants no.1 to 3 have resisted the application by filing say at Exh.43. The defendants have contended that the present application is filed to collect the evidence. The Court Commissioner cannot be appointed for collection of evidence, therefore, the application filed by the plaintiff is liable to be rejected. It is further contended that the present suit is filed for declaration of easementary right over suit property no.2. The Court Commissioner cannot be state existence or non-existence of easementary way. It is further contended that the plaintiff has obtained ex-parte ad-interim injunction against the defendants. In order to extent the said order, the present application is filed. Therefore, prayed to reject the application.

4. The application filed by the plaintiff does not disclose provision of law. Therefore, my learned predecessor was having opinion that the application filed under section 75 r.w. O.26 R.9 of the Code of Civil Procedure could also fall within the scope of the provision of O.39 R.7 of the Code of Civil Procedure. Therefore, my learned predecessor by passing an order below Exh.10, put on notice to both parties that the application could be considered in light section 75 r.w. O.26 R.9 of the Code of Civil Procedure and O.39 R.7 of the Code of Civil Procedure.

5. Heard learned advocate Shri.V.G. Topale for the plaintiff and learned advocate Shri.S.V.Dhampurkar for the defendants. The learned advocate for the plaintiff has filed written notes of arguments at Exh.57 and learned advocate for

the defendants has filed written notes of arguments at Exh.54. The learned advocate for the defendants has relied upon judgment of the Hon'ble Bombay High Court in case of Vij Kamgar Sahakari Patsanstha Limited vs Ramkrushna Dhondiram Thorat reported in 2008 LawSuit(BOM) 2682, Dhondiram Nivrutti Pawar vs Laxman Pawar and ors reported in 2018 LawSuit(Bom)122, Sanjay Kisan Thorat and ors vs Ramchandra Thorat and ors reported in 2018 LawSuit(Bom)121 and Syed Mushtaque Ahmad and ors vs Syed. Ashique Ali Khan and ors reported in 2011 LawSuit(Bom)1316.

6. In light of arguments advanced by both the parties and the authorities cited by them, I have gone through the record. On perusal of the application at Exh.10, it appears that the plaintiff has not specifically stated the provision of law under which she has filed the present application. The Hon'ble High Court of Bombay in case of Vij kamgar cited supra has observed that the mofussil pleadings have to consider liberally. Sections or provisions quoted by the party in the application cannot control the application filed by the party. The court seized with the matter may consider the substance stated by the party in the application. In light of the said observations, it has to be examined that whether the application is fall and tenable under O.26 R.9 or O.39 R.7 of the Code of Civil Procedure.

7. In light of arguments advanced by the both the parties, the moot question before this Court is that inspection report made under O.39 R.7 of the Code of Civil Procedure does

tantamount to an evidence. It is pertinent to note that O.39 Code of Civil Procedure does not have a provision similar to the provision of O.26 R.10 of the Code of Civil Procedure, but it does not mean that an inspection report under O.39 R.7 of the Code of Civil Procedure would not amount to an evidence. After all the inspection report would have to be taken on record by the court, after all it would have to be marked as an exhibit, after all it would be relied upon by the one of the parties to the suit, after all the party disagreeing with the said inspection report would have the right to cross-examine the person who have submitted the inspection report. Thus, the inspection report would tantamount to evidence.

8. In my view, issue or the material of fact, which has been stated by plaintiff in the present application cannot be said to be a matter, which requires explanation or inspection by the person appointed by the Court as Commissioner. Issue, therefore, requires to be substantiated by the plaintiff as well as defendants. What is a position of compound wall and compound gate and plaintiff's easementary right over the path way, cannot be said to be a matter for elucidation or inspection by the Court Commissioner. The parties concerned are at liberty to adduce appropriate evidence substantiate their contentions according to law. In other words, it is a matter of evidence, for which, aid of the civil court under the pretext of inspection through appointment of Court Commissioner cannot be resorted to. The plaintiff by way of the present application tried to collect the evidence by appointing the Court Commissioner in respect of

situation of compound wall, compound gate and plaintiff's easementary right. Therefore, I am of considered view that, there is no necessity to appoint the Court commissioner. Hence, the application filed by the plaintiff is liable to be rejected. Accordingly I pass following order.

ORDER

1. The application at **Exh.10** is hereby rejected.
2. Costs on cause.

(Pronounced and dictated in open Court.)

Place : Malvan
Date : 06/12/2023

sd/-
Mahesh R. Devkate
Jt. Civil Judge Jr.Dn., Malvan.