

**CNR NO. MHSI70000622022****Order passed below Exh. No.40
(I.A. No. 4/2022) in R.C.S. No.15/2022**

This is an application under Section 75(b) r.w. O.26 R.9 and O.39 R.7 of the Code of Civil Procedure preferred by the plaintiff.

2. The plaintiff has contended that the defendants have filed extract of House no.3414 and bill of submersible pump. The defendants are trying to show that the House No.3414 is allotted to mangar (a room use for keeping agricultural tools) and electricity supply is given to submersible pump from mangar. In fact, no house number was allotted to the said mangar. The electricity supply is given to submersible pump from the house of plaintiff. The plaintiff is using said submersible pump to supply water to his house. The defendants with intent to create evidence have obtained submersible electricity connection from MSEB. In fact, no such connection is given in to the submersible pump installed in pump shed. In order to brought on record all above factual situation before the Court appointment of Court Commissioner is necessary. Therefore, prayed to appoint any advocate from Malvan Taluka Bar Association to ascertain factual position of pump shed and electricity meter. Therefore, prayed to allow the application.

3. The defendants have resisted the application by

filing say on overleaf of the application. It is contended that the application is preferred to collect the evidence. The plaintiff is having opportunity to produce aforesaid evidence by other way. The Court Commissioner cannot be appointed for collection of evidence. Therefore, prayed to reject the application.

4. The learned advocate for the plaintiff submitted that in order to find out factual position of pump shed and electricity connection appointment of Court Commissioner is necessary. The appointment of Court Commissioner will assist the Court to find out true version raised between plaintiff and defendants. It is further submitted that under O.39 R.7 of Code of Civil Procedure, the Court can appoint Court Commissioner for inspection of the suit property and same will not be tantamount to an evidence. The application filed by the plaintiff is tenable under O.39 R.7 of the Code of Civil Procedure. Therefore, prayed to allow the application.

5. The learned advocate for the defendants have submitted that the appointment of Court Commissioner is not necessary. The plaintiff may collect the aforesaid evidence through other way. The Court commissioner cannot be appointed for collection of evidence. Therefore, prayed to reject the application.

6. 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 an evidence.

7. In my view, issue or the material of fact, which has been stated by plaintiff in application Exh.40 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 premises, 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 the disputed premises. 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.40** is hereby rejected.
2. Costs on cause.

(Pronounced and dictated in open Court.)

Place : Malvan
Date : 16/12/2022

Mahesh R. Devkate
Jt. Civil Judge Jr.Dn., Malvan.