

ORDER BELOW EXH.39

The present application has been moved by the plaintiff seeking appointment of a Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (CPC) for conducting a spot inspection and to file a report along with photographs, map, and *panchanama* in respect of the current state of the suit property bearing Gram Panchayat House No. 207A2. The plaintiff alleges that the defendants Nos. 1 to 3, in *defiance* of an *ad-interim* injunction granted by this Court on 09/05/2025, have continued illegal construction and altered the status of the suit property. It is prayed that a local inspection is necessary for just adjudication of the issues and restoration of the original status as claimed.

2. Heard the learned counsel for the plaintiff at length. He submitted that despite the *ex-parte ad-interim* injunction dated 09/05/2025 restraining the defendants from carrying out any permanent construction on the suit property, the defendants Nos. 1 to 3 have, in blatant disregard of the said order, undertaken illegal construction activities during night hours and changed the nature of the suit property. It was argued that the defendants have erected walls, installed a new door with a lock, covered windows with plastic sheets to prevent visibility from outside, and even laid roofing sheets in certain portions. He further submitted that the plaintiff has no other effective means to bring the current status of the suit property on record except by way of local inspection through a Court Commissioner. The learned counsel pressed that the details of construction such as internal layout, wall height, plastering, presence of flooring, roofing type, etc., can be best ascertained and recorded through an independent local inspection. He emphasized that the commission is essential for just decision in the restoration prayer and that the plaintiff is willing to bear the costs of commissioner.

3. On the other hand, defendant no. 1 to 3 opposed the application and filed say at Exh 57. The learned advocate for the defendants Nos. 1 to 3 argued that, the present application is premature and filed with a mala fide intent to manufacture evidence through the process of the Court. He contended that the plaintiff has neither established his title nor proved the extent of his share in the suit property. It was further submitted that the description of the suit property is vague and insufficient, the alleged portion 207A2 is part of a larger undivided structure bearing House No. 207. The entire property being ancestral and not formally partitioned, the plaintiff has not joined all necessary co-sharers. The counsel argued that in absence of proper pleadings, proper identification of the suit schedule property, and proper implement of all co-owners, no such direction can be given which may result in collection of evidence in aid of an unripe claim.

4. I have carefully considered the submissions of both parties and perused the application, say, and the case record. The application at hand seeks appointment of a Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908. The said provision reads as under:

Order XXVI Rule 9 CPC – “In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.”

5. The above provision clearly indicates that the Court has discretion to issue a commission only in circumstances where such investigation is necessary for elucidating matters in dispute. It is well-

settled that the Court Commissioner cannot be appointed for the purpose of collecting evidence or enabling a party to create evidence.

6. In the instant case, the property in question appears to be a portion of an ancestral house, and the pleadings, as they stand, do not indicate any formal partition. Further, as per defendants all persons who may have a potential interest in the larger property do not appear to have been impleaded as parties at this stage. This aspect may have a bearing on the maintainability of the claim or the scope of relief, and shall be considered at the appropriate stage during trial. The documents filed by the plaintiff does not show any conclusive proof of his exclusive possession over House No. 207A2, and the alleged encroachment or damage remains unsubstantiated through legal evidence. Under such circumstances, allowing a local investigation through a Court Commissioner would not only amount to collecting evidence for the plaintiff but also permit him to establish his case indirectly without discharging his own burden of proof.

7. Moreover, my Learned Predecessor has already granted an *ex-parte ad-interim* injunction on 09/05/2025, restraining the defendants from carrying out any construction activity on the suit property. If contention of the plaintiff is that the said injunction has been breached, then the appropriate remedy is available to the plaintiff under CPC.

8. Therefore, the plaintiff cannot resort to an alternate or indirect route of seeking Court Commissioner appointment to prove violation and to generate corroborative evidence, particularly when such evidence can only be led at trial upon proving title and possession. The application thus appears to be a premature attempt to cure fundamental defects in the pleadings and to lay groundwork for restoration without establishing foundational facts.

9. Further, the contention of the plaintiff regarding the necessity of the report to decide restoration cannot be accepted at this stage. Restoration, as a relief, can be granted only after full trial upon proving wrongful dispossession and the lawful possession of the plaintiff prior to such dispossession. At this preliminary stage, without pleadings being verified and issues framed, appointment of a Commissioner would be prejudicial to the defendants and premature.

10. Another significant aspect that militates against allowing the application is that the plaintiff has proposed appointment of an advocate as the Court Commissioner, even for technical tasks such as measuring construction length, height, plastering, type of roof, etc., which would require expertise. A Court Commissioner must be a suitable person having necessary technical knowledge if the inspection involves civil engineering aspects. An advocate, unless specially qualified, cannot discharge such functions effectively.

11. In light of the above discussion, it is evident that the plaintiff has failed to establish any compelling or lawful necessity for appointment of a Commissioner at this stage. Therefore, I find no merit in the application. Hence, the order

ORDER

1. The application at Exh. 39 stands rejected.
2. No order as to costs.

Kankavli
Date: 08/08/2025

(Shubham G. Laturiya)
Civil Judge J.D., Kankavli
JO Code: - MH03297