

ORDER BELOW EXH.43 IN R.C.S. NO.44/2021

(Dinkar Babar Vs. Rangrao Babar)

(CNR NO.MHSN05- 000253-2021)

1. By the present application, defendant has prayed for appointment of Taluka Inspector of Land Record as Court Commissioner Under Order 26 Rule 9 of Civil Procedure Code, 1908 (Hereinafter referred as CPC, for short) for carrying out joint measurement of the property bearing Gat no.2655 and 2654.

2. Plaintiff filed his say at Exh.44. He has denied the contents of application stating that plaintiff is trying to create evidence. It is further contended that suit is being for perpetual injunction Court cannot help either party to collect the evidence.

3. Perused application along with record. Heard learned advocate for plaintiff. Learned advocate for defendant is absent when called out.

4. In view of the pleading following points arise for my determination to which I record my finding with the reasons stated below;

Sr.No	Points for determination	Findings
1.	Whether appointment of T.I.L.R. as Court commissioner for measurement of suit property is desirable ?	In affirmative
2.	What order?	Application is allowed.

REASONS

AS TO POINT NO.1 AND 2 :

PROVISION IN LAW IN RESPECT OF APPOINTMENT OF COURT COMMISSIONER

5. Though in the application defendant has not mentioned the specific provision, it is well settled principle of law that non mentioning or wrong mentioning of the provision of law is itself not fatal when there is specific provision in the law. During argument, learned advocate for defendant has invited my attention to the Rule 10(3) of Order 26 of Code of Civil Procedure (hereinafter referred to as CPC). For ready reference the rule is quoted as under;

10. Procedure of Commissioner.

(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.

(2) Report and deposition to be evidence in suit. Commissioner may be examined in person-The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to suit may examine the Commissioner personally in open Court touching any part of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

APPRECIATION

6. Learned advocate for defendant Mr. S. D. Mane submitted that suit is for perpetual injunction restraining defendant from causing obstruction to his possession and creating further construction so also mandatory injunction for removing of construction which is already made which shows that the issue of constructing is the fact in issue and to decide whether defendant has made construction in his property or has made encroachment will be best decided after joint measurement. He submitted that joint measurement of properties is necessary so that the dispute of encroachment will finally come to an end. On the other hand learned advocate for plaintiff Mr. F. R. Magdum submitted that this is suit for injunction and not for removal of encroachment and therefore Court Commission cannot be allowed to help defendant to collect the evidence.

7. It is specific pleading of plaintiff that defendant has dug out a pit at the road (suit property 'B') for construction. The nature of suit though shown to be for injunction but in really the relief of mandatory injunction of removal of construction already made itself shows that according to plaintiff the defendant by encroaching upon the public road has made construction and trying to complete construction. According to defendant he has made construction within the four corners of his property and therefore whether the said construction is within the property of defendant or outside the boundary of defendant will be decided in best way after joint measurement.

8. Whether defendant has encroached upon the public road? if yes, to what extent? is required to be ascertained. Though certain area has been mentioned as encroached portion in the plaint an agreed map by way of joint measurement at the hands of expert is required to be taken on record. The officers of land record are the expert persons to ascertain as to whether there is encroachment and if yes to what extent and from which side. In this regard appointment of Court Commissioner is necessary because the fact of encroachment cannot be proved by oral evidence. It can only be proved by measurement by an expert person who is none other than surveyor. Thus what and how much portion in the suit property is encroached by the defendant is the matter in dispute in the present case and to elucidate such matter in dispute and to find out the truth, appointment of Court Commissioner is necessary. Thus, considering the aforesaid observation it is necessary to appoint Court Commissioner to measure the land and to ascertain whether there is encroachment made upon suit property and if yes, to what extent. In the light of above discussion I answer point no.1 in affirmative and for point no.2 pass following order :

ORDER

- i. Application is allowed.
- ii. The Taluka Inspector of Land Record, Walwa (T.I.L.R.) is hereby appointed as Court Commissioner to measure the suit property i.e. gat no.2655 and 2654 situated at Mauje : kameri, Taluka : Walwa, District : Sangli.

- iii. The Defendants are hereby directed to deposit the necessary charges with the office of T.I.L.R. immediately within 15 days from today and submit the receipt of payment.
- iv. After depositing necessary charges with the office of T.I.L.R., Walwa, the T.I.L.R. shall fix the day of his visit to carry out measurement and shall issue prior notice in that respect to both the parties and/or adjoining land holders.
- v. Both the parties are hereby directed to remain present on the appointed date for carrying out measurement and shall produce necessary documents at the time of measurement.
- vi. The Court Commissioner is hereby directed to submit the report of the measurement as early as possible within 1 month from the depositing necessary charges by the defendant with the office of T.I.L.R.
- vii. Court Commissioner i.e TILR is directed to clearly mention in his report as to whether there exist a road towards end of eastern side of gat no.2655.

Dated : 06.01.2022

(Kailas K. Kurandale)

7th Jt. Civil Judge (J.D.), Islampur.

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

I affirm that the contents of this P. D.F. file Order are same word to word, as per the original Order.

Name of Stenographer :- J. S. Ghabak.(Steno Grade-3)

Court Name :- Shri. K.K.Kurandale,
7th Jt. Civil Judge (J.D.) and
J.M.F.C., Islampur

Date of decision :- 06.01.2022

Order signed by PO. on :- 10.01.2022

Order uploaded on :- 10.01.2022