

ORDER BELOW EXH. 44 IN RCS NO. 92/2020

This is an application filed by the plaintiff under Order XXVI Rule 9 of the Code of Civil Procedure for appointment of TILR (Nimtandar) as a Court Commissioner.

Short history of the present case :-

2. Previously the application for appointment of court commissioner is allowed and TILR, Jath was appointed as a court commissioner vide order below Exh. 9 dt. 31.07.2020. Accordingly the Taluka Land Inspector of Land Records through surveyor conducted the commission and filed his report at Exh. 35 alongwith map. On the said report the plaintiff raised the objection vide Exh. 42 contending therein that the map attached to the sale deed executed by defendant no.1 and 2 and map filed by court commissioner are different. The new road passing through Shegaon is not attaching to the old road passing from survey No. 654 as shown by the court commissioner in his map. Further, it is contended that, the map prepared by the court commissioner is not prepared with the help of plain table. Therefore, plaintiff opposed to read the said report of court commissioner vide Mojani Register No. 161. Therefore, plaintiff again filed the present application for appointment of Nimtandar with direction to carry out the measurements of survey no. 654 and 673/1 as per plain table method.

3. It is the case of plaintiff that, the plaintiff has filed this present suit for permanent injunction against the defendant for not to encroachment on the suit property and not to disturb the plaintiffs possession. According to plaintiff as per the direction given order below Exh. 9 the court commissioner measured the suit property with the help of ATS machine and while actual measuring the suit property the boundary marks are fixed with

the help of limestone but the court commissioner has not prepared the map as per the said marks.

4. Learned advocate for the plaintiff submitted that, during the pendency of the suit the defendant no. 1 and 2 has executed a sale deed in favour of plaintiff in respect 45 R area out of survey No. 673/1 bearing sale deed no. 1621/2020 dated 18..08.2020. In the said sale deed the defendant no. 1 and 2 have attached the map wherein the part 1 of Survey No. 673 is shown on eastern side of the suit property and part 2 of Survey No. 673 is adjacent to the old road leading from Shegaon to Jath which is western side. Now, the map produced by the court commissioner alongwith his report at Exh. 35 shows part no. 2 of Survey no. 673 is adjacent to the old road and new and old road are also merged on the northern end of the suit property. However, actually both these roads are not matching with each other in the suit property therefore, submitted that the measurement carried out by the previous court commissioner is not as per the actual position over the suit propriety. Hence, submitted to allow their application.

5. On the other hand the learned advocate for the defendant opposed the application by filing his say at Exh. 45 and submitted that as per provision of O 26 R 9 the Nimtandar cannot be appointed as a court commissioner. According to him at the time of appointment of previous court commissioner vide order below Exh. 9 the plaintiff submitted that there is only boundary dispute and after measurement court commissioner he will withdraw the suit. Considering the same the defendant given no objection for appointment of court commissioner. Further he submitted that, the court commissioner prepared the map as per the actual position over the suit property and no ground for appointment of Nimtadnar as prayed by the plaintiff. No specific ground raised by the plaintiff. He further submitted that, the plaintiff during pendency purchased the 45 R property vide sale

deed bearing No. 1621 and therefore, the said sale deed cannot be considered in the present suit. The road leading from Shegaon to Jath is passing through the plaintiffs property bearing survey no. 654 and for the said road the property of the plaintiff is acquired therefore, the plaintiffs filed this application. According to him the surveyor has prepared the map as per the order of the court and now it is disclosed from the said report that the plaintiffs encroached in the defendants property therefore, the plaintiff filed this application and made allegation on the commissioner report. Lastly he submitted that, now the property is measured with the help of advanced machinery and technology. In this new era of technology it is not expected to direct the plain table method therefore, submitted to reject the application with cost.

6. I have considered following points for determination and recorded my findings with reasons thereon.

<u>Sr.No.</u>	<u>Points</u>	<u>Findings</u>
1	Whether the appointment of Court Commissioner is necessary for the purpose of elucidating the matter in the dispute?	Yes
2	What order?	Application is allowed.

REASONS

Point No. 1 -

7. Read the plaint and written statement. I have heard both the learned advocates. The plaintiff filed the present suit for restraining the defendant from encroaching over the suit property. According to plaintiff after filing the suit plaintiff purchased the part 1 of survey no. 673 as per the sale deed dt. 18.08.2020 bearing no. 1621/2020. The certified copy of map attached to this sale deed shows that the new road is passing from survey

No. 654 and old road is not attached to the new road in that property. Further, it appears that survey NO. 673/1 is on the eastern side of the suit property and thereafter, towards west part 2 of the survey no. 673 and thereafter, the old road leading from Shegaon to Jath. Further it appears that, the properties of the plaintiff and defendants are divided by the old road leading from Shegoan to Jath. Further, on perusal of sale deed in respect of survey No. 673/1/2 purchased by the Survana Waghmode from the defendant no. 1 and 2 it appears that the certified copy of the map attached to said sale deed also fortify the above said position. However, the present map prepared by court commissioner filed at Exh. 35 is not matching with the certified copy issued by the TILR office which are attached to the said sale deed. In the map of court commissioner both the roads are attaching on the northern side of the suit property which are never meet in the certified copies of the same office. Therefore, it appears that there are two different maps in respect of the same property.

8. The contention of learned advocate for the defendant that the present application is not maintainable as per the provision of Order 26 Rule 9 of Code of Civil Procedure. As per Rule 9 of Order 26 of CPC the commission can be appointed for local investigation and this application is for appointment of court commissioner for fixation of boundaries of the plaintiffs property bearing survey no. 654 and 673/1 with the help of plain table through TILR (Nimtandar). Further contention of learned advocate for the defendants that the village map filed alongwith Exh. 35 at page no. 43 is disclosing the actual position as the part 1 of survey no. 673 is adjacent to the old road leading from Shegaon to Jath and part 3 of survey no. 673 is on the northern side of the suit property. On perusal of said map it is disclosed that the part 1 of survey no. 673 is adjacent to the old road and on eastern side also. Therefore, which part is adjacent to the old road cannot be gathered from the said village map as there are part 1 of survey no. 673 is on

both sides i.e on the eastern side and to the adjacent of the old road.

9. The learned advocate for the defendant also submitted that the, suit is only for injunction and therefore, in the present suit commission cannot be appointed. However, on perusal of record it appears that the suit is for injunction and there is boundary dispute in respect of the suit properties due to newly constructed road leading from Shegaon to Jath. Admittedly the defendant have given no objection for the appointment of court commissioner as per order below Exh. 9. However, there is difference between the map prepared by the court commissioner and map certified by the TILR which are attached to the above said sale deeds. The map produced alongwith court commissioner report shows the dispute is in respect of boundaries of the suit properties. Therefore, considering the nature of the present suit and nature of the dispute between parties in respect of boundaries the actual position of the suit property cannot be brought on record without the demarcation of the suit property. Therefore, if again the court commissioner is appointed as a Nimtdanar then it will help to elucidate the matter between the parties and would not cause any prejudice to defendant. Therefore, I answer the point no. 1 in the affirmative.

POINT NO. 2

10. The learned advocate for the plaintiff sought the demarcation is to be made plain table method and not with the help of ATS machine as there are drawbacks of the new machine. The plaintiff has not brought any instances about the ATS machine is not demarcate properly. However, one map which is produced on record which is prepared with the help of ATS machine and the same is not as per the certified copies of the same map prepared by the same TILR. Therefore, there is substance in the argument of the learned advocate for the plaintiff. Therefore, I am of the opinion that the measurement is to be carried out plain table method.

11. Therefore, considering the discussion above the case is fit to appoint the court commissioner TILR (Nimtandar) under O.XXVI Rule 9 of the code of Civil Procedure. Hence, considering answer to point No. 1 in answer to point No. 2, I pass the following order.

ORDER

1. The application is allowed.
2. Taluka Inspector Land Record, (Nimtandar) Jath is appointed as Court Commissioner for the measurement of Survey No. 654 and 673/1 of village Jath, Tal. Jath, Dist. Sangli.
3. Court Commissioner is directed to measure the above property with plain table method as per survey manual and fix the boundaries and shall submit report along with the map within 3 months from the date of communication of this order.
4. The plaintiff is directed to bear the expenses of court commission and shall supply all the necessary documents and all necessary facilities to the Court Commissioner.
5. Writ be issued to the Court Commissioner accordingly.

Sd/-

Date: 14/10/2021

Place: Jath

(Amarjeet B. Jadhav)
Jt. Civil Judge Junior Division,
Jath

I affirm that the contents of this P.D.F. file order/judgment are same word for word as per original order.

Name of steno : M. M. Buchade
Name of court : Jt. C.J.J.D.& J.M.F.C., Jath,
Order Date : 14.10.2021
Judgment/order signed
by Presiding Officer on : 14.10.2021
Judgment/order
uploaded on : 18.10.2021