

**ORDER BELOW EXH. 48 IN REG.CIVIL SUIT NO. 91/2018**  
(CNR No. MH5006-001162-2018)  
IA No. 03/2019

1. This is an application by defendants no.5 and 9 for appointment of Court Commissioner.
2. Perused application and say on it. Heard both learned advocates. Perused the written statement and arguments.
3. It is submitted by the application that the Court Commissioner should be appointed to ascertain the suit way as well as another way as alleged by the defendants. It is also prayed that the ways towards the land of plaintiff and defendants should also be ascertained by the said commissioner. Whether Chale-Tarapur road is in existence, or not should be ascertained by the Court Commissioner. There is no question of collection of evidence. Hence, application should be allowed.
4. The application is strongly challenged on the count that already such application was filed in another R.C.S.no. 373/2018. It is submitted by the plaintiff in say that in another suit R.C.S.no. 373/2018 the sons of plaintiff filed said suit and filed similar commission application, which was objected by the defendants. The application is rejected. Hence, there is res-judicata to the present application. There is no need of court commission in the present matter. Therefore, application be rejected.
5. The learned advocate for the plaintiffs relied on authorities of **“Syed. Mushtaque Ahmad Syed Ismail & Ors. Vs. Syed Ashique Ali Khan Haidar Ali [2012(1) ALL MR 80 and Mrs. Else Pauline Loesh**

**Geb Dorfeld Camara & Anr. Vs. Deputy Collector (LAO) & Land Acquisition Officer, Panaji & Anr. [2012(1) ALL MR 82]**” that court commissioner cannot be appointed for the collection of evidence.

6. In the present matter, the suit is filed so as to get declaration that the order of Tahsildar, as to Chale-Tarapur road about disputed way is illegal and not binding on the plaintiffs. The consequential injunction is claimed. As per plaintiffs, there is no such road in existence. While defendants no.5 and 9 in their written statement vide Exh.31, it is submitted that in government map also said road Chale to Tarapur was in existence and it is ploughed by the plaintiffs. Therefore, suit is liable to be dismissed.

7. Considering these pleadings, the dispute is about existence and use of the suit way and alternative ways. The Court Commissioner cannot be appointed, so as to ascertain such facts otherwise it would amount to decide the suit by the Court Commissioner itself. Whether the road is in existence or not, who is in possession etc. are the facts which parties should prove by their oral and documentary evidence. There is no question of collecting evidence by appointing Court Commissioner for the same. The application on face of it is for collection of evidence as to all the situations on the spot i.e. all the roads, existence, or use of said roads. The same is not permissible. There is no question of identification of lands, or demarcation of lands etc.. The application is itself not maintainable.

8. Admittedly, another application in another suit between these parties for appointment of Court Commissioner is rejected. Hence, said fact will also amount to an issue estoppel. The law on the point that the Court

Commissioner cannot be appointed for inspecting such roads etc. in dispute is laid down in “**Mohinder Kumar Vs. Sita Devi [AIR 2019 HIMACHAL PRADESH 114 : AIR Online 2019 HP 384]**”, 6. From the record it is clear that as the defendant was obstructing the passage, suit was filed by the plaintiff. The plaintiff is claiming the right of the staircase and path as easementary right, so present dispute cannot be said to be a boundary dispute. It is for the plaintiff to prove that there exist any path or passage over the suit land and she was using it for ingress and egress since long and the right has accrued to her as easementary right, vide sale deed dated 14.07.1992. So, in the given facts and circumstances of the case, no purpose would be served by getting the demarcation of the land as the plaintiff has not disputed that both the disputed Khasra numbers are in the possession of the defendant or there is any encroachment etc., which the defendant and the plaintiff want to prove. Accordingly, this Court finds that present dispute is with respect to the obstruction of the passage only and the Court is not to create evidence for the party to prove its case.”

Hence, there is no substance in the application and same deserves to be rejected. Therefore, following order is passed.

### Order

The application vide Exh. 48 is rejected.

( Mahendra R. Jadhav )  
Jt.Civil Judge S.D.  
Pandharpur.

Date: 18.09.2019.

**CERTIFICATE**

*I affirm that, the contents of this PDF file order are same word to word, as per the original order.*

*Name of Stenographer : A.K. Vibhute*

*Court : Jt.Civil Judge Senior Division  
Pandharpur*

*Date : 18.09.2019.*

*Order signed by the  
Presiding Officer on : 18.09.2019.*

*Order uploaded on : 19.09.2019.*