

ORDER BELOW Exh. 52 IN R.C.S. No. 05/2012
(Bhimashankar Patil Vs. Lingaraj Trigule etc.)

1. The present application has been moved by the plaintiffs for appointing of Court Commissioner under *Order 26 Rule 9 of the Civil Procedure Code*. The plaintiffs averred that, there is has/had road existing north-south direction to the eastern side of suit property. The defendants obstructed through leaving the well water on the road. The alternative road is available to the defendants, but they intentionally claiming road through the suit property. Therefore, the plaintiffs prayed to appoint court commissioner to inspect the suit property and surrounding lands.

2. The defendant Nos. 1 to 9 have filed their say thereon. They contended that, the Tahsildar already inspected the land. The plaintiffs trying to collect evidence and lingering the matter. The application is not tenable. Hence, the application is liable to reject.

3. Read application, say and perused the proceeding. Heard both sides.

4. The present suit is filed by plaintiffs for seeking relief of declaration of an order dated 30/12/2003 passed by Tahsildar is illegal, void ab-initio as well as permanent injunction against the defendants have not obstructed the peaceful possession over the suit property by creating new way as per order of Tahsildar. The suit properties Gat No. 413/2/B and Gat No. 413/2/1/A/2 belong to the plaintiffs. The Gat Nos. 401, 412, 404/1A, 399, 400, 402/2, 401/2A, 401/1/A are belonging to the defendants.

5. It also appears that, the defendant Nos. 1 to 9 had filed an Application No. JAMA/3SR/18/2003 before the Tahsildar under the Mamletdar Court Act seeking injunction restraining the plaintiffs from claiming right of way through their field. This application is allowed and against that order the plaintiffs and defendant Nos. 10 to 15 have preferred revision application before the Collector and it was remanded to the Tahsildar. Thereafter, the plaintiffs and defendant Nos. 10 to 15 have filed writ petition before the Hon'ble High Court and it was remanded to the Additional Collector. Thereafter, the Additional Collector had allowed the revision application. Thereafter, the defendant Nos. 1 to 9 have filed writ petition before the Hon'ble High Court and it was directed to conduct the refresh trial on Revision Application No. 05/2004. Thereafter, the Additional Collector was rejected the Revision Application No. 5/2004 and has confirmed the order of Tahsildar passed in Application No. JAMA/3SR/18/2003. Thereafter, the plaintiffs and the defendant Nos. 10 to 15 had filed Writ Petition No.5747/2011 before the Hon'ble High Court and it was dismissed.

6. The plaintiffs filed certified copy along with Exh.40 about रस्ता वहिवाट आरटीएस २ रे अपील क्रमांक ०१/०६. It is appeal against the order passed by Tahsildar on 09/10/2006 in JAMA/3/KAVI/569/2004. From it appears that, the defendant Basaveshwar dug well in a stream by way of encroachment. The order of Tahsildar is confirmed by the Additional Collector.

7. The issues were framed at Exh.35 and matter is fixed for

hearing. By way of present suit the plaintiffs challenged the order of Tahsildar Application No. JAMA/3SR/18/2003 and claiming injunction against the defendants. In the above said circumstances it appears that, there were various applications and revisions filed on each other. It is specifically averred in Para No.7 of the plaint that, the defendants trying to obstruct and create new way in July-2011. The present suit is filed in the year 2011. The रस्ता बहिवाट आरटीएस २ रे अपील क्रमांक ०१/०६ which is filed against the order passed by Tahsildar on 09/10/2006 in JAMA/3/KAVI/569/2004 is in respect of dug will in stream. The subject matter of the suit is order of Tahsildar passed in Application No. JAMA/3SR/18/2003. On perusal of present application there is no specific contention about the order passed by Tahsildar on 09/10/2006. The contention in the application are vague in nature. It is also appears that, the Tahsildar also visited the spot and the matter was decided in respect of disputed road. The plea raised by the plaintiffs have to be prove independently or on their self footing. The plaintiff is trying to collect evidence with the help of court commissioner.

8. Considering the nature of the suit, there is no need for appointment of Court Commissioner in respect of to elucidate factual position of suit property. Parties can bring these facts adducing evidence on record. It appears that, the plaintiffs wanted to collect the evidence in respect of obstruction to the suit property by appointing Court Commissioner.

9. In *Dnyandeo Salke & Ors. Vs. Dagdu Inamdar 2017(5)*

ALL MR 104, wherein the Hon'ble High Court observed that, Commissioner cannot be appointed under Order 26 Rule 9 of C.P.C. for the collection of evidence.

10. As per the settled position, the Court Commissioner cannot be appointed for collecting evidence. Further, as per the provisions of Order 26 Rule 9 of Civil Procedure Code which are directory in nature. The trial court if, it finds local investigation necessary for the purpose of deciding the matter in dispute, it may exercise the discretion for appointment of Court Commissioner. When the court does not find it necessary, there is nothing which mandates the court to appoint the Court Commissioner. Hence, the present application deserves to be rejected. Therefore, I proceed to pass the following order.

ORDER

- 1 The application is rejected.
- 2 Cost in main cause.

Dated: 06.02.2020

Sd/-
(S.N.Gavali)
Jt. Civil Judge Junior Division, Akkalkot.

Certificate

I affirm that, the contents of this PDF file Order/Judgment are same word to word, as per original Order/Judgment.

Name of Stenographer	:-	D.S.Landage (L.G.)
Court	:-	Jt.Civil Court,J.D.,Akkalkot.
Date	:-	06/02/2020
Judgment/Order signed by the Presiding Officer	:-	10/02/2020
Judgment/Order uploaded on	:-	10/02/2020