

MHST070006122005



**Common Order Below Exh. 81 and 83 in RCS No. 314/2005
(Rajendra Babaso Mane Vs. Anandrao Nivrutti Patil)**

1. This is the suit for recovery of possession by removal of encroachment and mesne profit. The plaintiff has adduced his evidence and filed evidence close pursis. Thereafter, the matter is posted for evidence of defendants. The application (Exh. 81) is filed by the plaintiff for grant of permission adduce further evidence and the application at Exh. 83 is filed by the plaintiff for appointment of Court commissioner to carry out joint measurement of property No. 41/7+42/7+43/1+44/1 (old survey No. 41/7, 42/7, 43/1 and 44/1) along with plots, internal roads, open space, no development area and the property owned by the defendant in property No. 43/2B/2A.

2. it is contended that, this Court has decreed the suit and Regular Civil Appeal No. 40/2022 was filed challenging the decree. Said appeal was decided on 21/11/2022 and the matter was remanded for appointment of Court commissioner and decision according to law. Thereafter, the plaintiff has filed application (Exh.50) for the appointment of Court commissioner which was

allowed. During said period, defendants agreed for mediation and matter was referred for mediation and parties have filed pursis giving particulars of the property which are measured jointly.

3. The plaintiff further contended that, this Court has directed the TILR, Karad to carry out joint measurement of Survey No. 43/1, 42/7, 41/7, 42/6, 41/6, 43/2, 42/5, 42/4 and 42/3. The Court commissioner was also directed to show the encroachment in red colour and to specify the measurement, length and width of the encroachment. The Court commissioner has carried out measurement on 27/02/2024 and filed its report in the Court. However, the Court commissioner has not shown the encroachment in red ink and also not given the length and width of the encroachment.

4. The plaintiff further contended that, he is the owner of survey No. 43/1, 41/7, 42/7, 44/1 were converted into non agricultural plots and converted into 41/7+42/7+43/1+44/1. The plot No. 1 is of 469.46 sq.mtr, plot No. 2 is of 9168.45 sq.mtr open space 1250.12 sq.mtr, internal roads 900 sq.mtr and no development area 711.97 sq.mtr and property owned by defendants is 43/2B/2A to the extent of 1H 31R Pot Kharab 00H, 1R.

5. The plaintiff further contended that, this Court in advertently has directed to give the encroachment of constructed area. However, there is no constructed area in the encroachment

area. The Court commissioner has not carried measurement as per the order passed by this Court. Hence, it is necessary to appoint fresh Court commissioner for carrying out joint measurement of 41/7+42/7+43/1+44/1 (old survey No. 41/7, 42/7, 43/1 and 44/1) along with plots, internal roads, open space, no development area and the property owned by the defendant in property No. 43/2B/2A. The Court commissioner has filed defected report. Hence, it is necessary to appoint fresh Court commissioner and to grant permission to the plaintiff to adduce further evidence. Therefore, the plaintiff prayed to allow the applications.

6. Defendants opposed application by filing of say (Exh. 85 and 86). It is contended that, applications filed by the plaintiff are not maintainable. The plaintiff has admitted the commission report by filing pursis and also adduced evidence of the Court commission. After evidence all plaintiff witnesses, the plaintiff has filed evidence close pursis (Exh.80) on 23/01/2026. Thereafter, no cause of action arises for grant of permission to adduce further evidence to the plaintiff and appointment of Court commissioner.

7. Defendants further contended that, the plaintiff was fully aware about the order passed by this Court and directions given to the Court commissioner. In spite of having knowledge, the plaintiff has not objected the Court commissioner report and adduced

evidence of himself and the Court commissioner. The plaintiff and the Court commissioner have admitted various facts. Therefore, plaintiffs have filed these application for causing delay in the matter.

8. Defendants further contended that, the plaintiff has not disputed the report filed by the Court commissioner and adduced his evidence. The Court commissioner has proved the map (Exh.77). The plaintiff is not claiming for relief to cancel to said map. Hence, as already Court commissioner is appointed and Map (Exh.77) is proved by the Court commissioner, this application is not maintainable. Discretionary relief for appointment of Court commissioner cannot be sought continuously.

9. Defendants further contended that, evidence of the Court commissioner is recorded who has admitted various things. Therefore, these application are filed at belated stage to wipe out said admissions of the Court commissioner. This suit is filed for removal of encroachment over the agricultural land. However, the plaintiff is praying for appointment of Court commissioner to carryout measurement of non agricultural plots which is not permissible. Contending all these, defendants prayed to reject the application.

10. Following points arose for my determination and I record my findings against each of them there under.

Sr. No.	Points	Findings
1.	Whether the plaintiff has made out the case for granting permission to adduce evidence ?	...Yes...
2.	Whether appointment of Commissioner is necessary ?	...Yes...
3.	What Order ?	Applications are allowed.

11. Heard both sides.

12. Perused the record.

REASONS

As to point nos. 1 to 3 :-

13. All these points are interlinked to each other. Hence, in order to avoid repetition, I am deciding these points commonly.

14. Shri. A. V. Jadhav, learned counsel for the plaintiff submits that, the Court commissioner has not carried out measurement as per the directions of the Court and not specified the length and width of the encroached area. The plaintiff has converted to his land in to non agricultural land. Hence, it is necessary to issue fresh commission for joint measurement of plaintiff and defendants land. He therefore, prayed to allow the application. In support of his submissions he placed reliance on following judgments,

- i. Vijay S/o Shrawan Shende And Ors Vs. State of Maharashtra and Ors reported in 2011 STPL 769 Bombay.

ii. Ram Lal and Ors, Vs. Salig Ram and Ors, reported in AIR 2019 Supreme Court 729.

15. Per contra, Shri. P. N. Patil, learned counsel for defendants submits that, after filing evidence close pursis, there is no cause of action for granting permission to the plaintiff to adduce further evidence. Joint measurement by the Court commissioner is already carried out and various admissions are given by the Court commissioner which cannot be wipe out by appointing fresh Court commissioner. There is nothing on record to show that the plaintiff has taken permission of the Court to convert the suit property in non agricultural land. The Court commissioner cannot be appointed without discarding evidence of earlier court commissioner. Therefore, these applications are not maintainable. He therefore, prayed to reject the application.

16. Perusal of record shows that, the suit is filed for recovery of possession by removal of encroachment and mesne profit. Therefore, evidence of the Court commissioner is necessary for the purpose of elucidating matter in dispute between the parties. The very object of local inspection is that, the true facts shall come before the Court. It rather helps to the Court to find truth in contention of either party. If Court Commissioner is appointed by the court, his report would assist the Court in determining the matter in

controversy between the parties to the suit.

17. These applications are opposed mainly on the ground that, the plaintiff has not challenged the report filed by the Court commissioner and therefore, he is not having any right to challenge said report at this belated stage, after filing the evidence close pursis by the plaintiff no cause of action arises for granting permission to the plaintiff to adduce further evidence and fresh Court commission cannot be appointed unless evidence of earlier Court commissioner is discarded.

18. However, the Hon'ble Supreme Court in case of ***Ram Lal and Ors (Supra)*** has in para Nos. 17 and 18 has observed as under,

17. The fact that the Local Commissioner's report, and for that matter a properly drawn up report, is requisite in the present case for the purpose of elucidating the matter in dispute is not of any debate, for the order dated 24.01.1991 passed by the First Appellate Court having attained finality whereby, additional issues were remitted for finding on the basis of Local Commissioner's report. In the given set of facts and circumstances, we are clearly of the view that if the report of the Local Commissioner was suffering from an irregularity i.e., want of following the applicable instructions, the proper course for the High Court was either to issue a fresh commission or to remand the matter for reconsideration but the entire suit could not have been dismissed for any irregularity on the part of Local Commissioner. To put it differently, we are clearly of the view that if the Local Commissioner's report was found wanting in compliance of applicable instructions for the purpose of demarcation, it was only a matter of irregularity and could have only resulted in discarding of such a report and requiring a fresh report but any such flaw,

by itself, could have neither resulted in nullifying the order requiring appointment of Local Commissioner and for recording a finding after taking his report nor in dismissal of the suit. Hence, we are unable to approve the approach of High Court, where after rejecting the Commissioner's report, the High Court straightway proceeded to dismiss the suit. The plaintiffs have been asserting encroachment by the defendants on their land and have also adduced oral and documentary evidence in that regard. As noticed, the First Appellate Court had allowed the appeal and decreed the suit filed by the plaintiff not only with reference to the Commissioner's report but also with reference to the other evidence of the parties. Unfortunately, the High Court appears to have overlooked the other evidence on record.

18. In the totality of circumstances, in our view, for just and effectual determination of all the questions involved in the matter, the proper course is of issuing a fresh Commission and for direction to the Trial Court to decide the entire suit afresh on the issues as originally framed as also on the additional issues after taking the report of the Local Commissioner afresh and affording an opportunity to the parties to submit their objections, if any.

19. The Hon'ble Bombay High Court in case of **Vijay S/o**

Shrawan Shende And Ors (Supra) in para No. 38 has held as under,

38.

(i) -----,

(ii) -----,

(iii) -----,

(iv) *it would not be proper to dismiss the suit simply because the Court commissioner has not adopted a correct procedure of measurement and the exercise of re-measurement, according to rules, will have to be got done through Court commissioner again and again if necessary, because failures of Cadesteral Surveyors are not attributable to parties to the suit.*

20. In present case record shows that, decree passed in the present case was set aside and it was directed to carry out joint measurement of properties of the plaintiff and defendants. This Court vide its order below Exh. 50 has appointed the TILR as a Court commissioner and issued certain directions. However, record shows that the directions issued by this Court are not followed by the Court commissioner.

21. In both cases the Hon'ble Higher Courts in cases relied by the learned counsel for the plaintiff have observed that, if the correct procedure of measurement is not adopted by the Court commissioner and if the report of the Court commissioner is suffering from irregularity i.e. want of following the applicable instructions then fresh report has to be called by issuing the fresh Court commission. Therefore, as directions issued by this Court were not fully observed by the Court commissioner, considering the law laid down in above mentioned cases, in my considered opinion appointment of fresh Court commissioner is necessary for the purpose of ascertainment of actual factual position. It is also the submissions on behalf of defendants that, NA property cannot be measured as the suit is filed in respect of agricultural land. However, it is the submission on behalf of plaintiffs that, during the pendency of the suit, said property is converted in to non agricultural land.

However, there is no dispute about the ownership of the plaintiff over the suit property. Hence, merely converting the property in to NA will not affect the plaintiff rights over the suit property. No prejudice would cause to defendants if applications are allowed as defendants are having every right to cross examine the fresh Court commissioner and to adduce their evidence. Therefore, there is no force in the submissions advanced on behalf of defendants. Hence, these applications deserves to be allowed. Therefore, I record my affirmative finding to point Nos. 1 and 2 and in result of point No. 3, I proceed to pass following order,

ORDER

1. The applications (Exh. 81 and 83) are allowed. Permission is granted to the plaintiff to adduce further evidence.
2. Dept. Superintendent of Land Record, Karad is hereby appointed as Court Commissioner to carry out joint measurement of property No. 41/7+42/7+43/1+44/1 (old survey No. 41/7, 42/7, 43/1 and 44/1) along with plots, internal roads, open space, no development area and the property owned by the defendant in property No. 43/2B/2A situated at Karad, Tal. Karad, Dist. Satara.
3. The Court commissioner is directed to show the encroachment, if any, over the suit property.
4. The plaintiff is hereby directed to deposit the necessary fees of Commission in the Office of Dept. Superintendent of Land Record, Karad on or before the next date.

5. The Commissioner to issue prior notices to the plaintiff and the defendants and the parties are directed to remain present on day fixed by the Court Commissioner for local inspection and measurement of the aforesaid land along with their record and shall co-operate the Court Commissioner.

6. Commissioner shall follow the procedure of such measurement as prescribed by rules and furnish his report to this Court within three months of the receipt of writ of this Court.

Date : 02/04/2026

(Prashant P. Kulkarni)
4th Jt. Civil Judge Junior Division,
Karad.