



R.C.S. No.462/2023
Shankar Vs. Vijaysing and ors.

Order below Exhibit No.53
(Passed on 08/07/2025)

This is an application filed by the plaintiff under Order XXVI Rule 9 of the Code of Civil Procedure, for appointment of the Court Commissioner to make local investigation. He submitted that the present suit has been filed for the relief of perpetual injunction thereby restraining the defendants or any other person from taking forcible possession from him without following due process of law.

2. He further submitted that the original survey No.85 was divided and Gat No.592/1 was created out of that. The plaintiff is in its possession and taking crops therein. Some of the land of the suit property is grass and the hilly land. His predecessors carried out the leveling work and he used to cultivate it for taking crops like *Jwari*, *Bajari*, *Matki*, *Hulga*. Some of the grass land was also used for the purpose of grazing cattle. The plaintiff used to run a stone mine in 1.00 HR area of the said land. The plaintiff has also planted trees like *Sitafal*, *Bor*, *Avala* etc. and the predecessors of plaintiff erected a huge well having 30ft. diameter and 50ft. deep. The plaintiff has placed diesel engine and pipeline for watering his plants and crops. There is one cattle shed and farm house in the said suit property. Prior to that on 06.05.2016, the plaintiff paid sale consideration during the proceeding under Section 32(G) of the Maharashtra Tenancy and Agricultural Lands Act.

3. The plaintiff further submitted that the defendants No.1 to 12 are trying to take forcible possession of the suit property by contending that the plaintiff and his predecessors were never tenant in the suit property. On 16.9.2016, the Circle Officer visited the spot and prepared panchanama of the suit property, wherein it has been clearly mentioned that some of the part of the suit land is the agricultural land having well therein. However, it is now necessary to appoint the Court Commissioner, so as to make local inspection to ascertain the existence of tin shed (farm house), cattle shed and well in the suit property. If the application is allowed, it will help to bring the factual position on record. The plaintiff is ready to bear expenses for the Court Commission. Ultimately, he prayed to allow the application.

4. The defendants No.1 to 12 have resisted the application by filing their say at Exh.54. They contended that the plaintiff is not in actual possession of the suit property. Even, he was never a tenant therein. The mutation entry No.724 is clear to that effect, which also provides that the suit property is a barren land. The earlier entry regarding tenancy of the plaintiff was cancelled vide mutation entry No.4491 and the decision to that effect have been confirmed up to the Hon'ble High Court. In such circumstances, the prayer of appointment of the Court Commissioner cannot be entertained. The mutation entry No.1272 dated 16.07.1964 is also clear, which shows that there was no crop in the suit property. Even, there was panchanama to that effect. They further denied the existence of well, stone mine, etc. The plaintiff now wants to create evidence in support of his case and to delay the hearing of

temporary injunction application, which is not permissible in the eyes of law. For all these reasons, they prayed to reject the application.

5. Perused the application and say alongwith the entire record. On hearing both sides and considering their rival submissions, following points arise for my determination, to which I record my findings with the reasons given as under -

<u>Sr. No.</u>	<u>Points for determination</u>	<u>Findings</u>
1.	Whether the Court Commissioner is required to be appointed, as prayed ?	No.
2.	What order ?	The application is rejected.

REASONS

6. Heard Ld. Advocate Mr. P.A. Pawar for the plaintiff and Ld. Advocate Mr. U.H. Sanas for the defendants. Mr. Pawar argued that the position in respect of the well and mine is required to be brought on record. It will not amount to collection of evidence. The defendant has already prayed for measurement and fixing the boundaries. The defendants have denied the existence of well and mine and therefore, it now becomes necessary to make local inspection in that regard by appointment of Advocate Court Commissioner. Further, he submitted that even during the revenue proceeding, the possession of plaintiff was held.

7. The plaintiff has relied upon decision in case of **Kamgar Sahakari Patsanstha Limited Vs. R.D. Thorat 2000(1) Mah. L. R. 324**, wherein the Hon'ble Bombay High Court held that "the commission may be issued by the Court u/sec. 75(b) to make a local investigation. The word "investigate" is not a legal expression. It means to examine, inquire into, study carefully, make official inquiry into. The local investigation in a suit, if requires some explanation the Court may exercise the powers under Order XXVI 26 Rule 9 of C.P.C. However, object of local inspection / investigation is not so much to collect the evidence which can be taken in the Court, but to obtain the evidence which due to its peculiar nature, can only be lead at the spot. Further, it is observed by the Hon'ble Court that "the report of the commissioner cannot be read in evidence, the moment it is placed on record, unless requirement of Rule 10(2) of Order XXVI has been gone into."

8. The plaintiff further relied upon decision in case of **Bali Ram Vs. Mela Ram and another, AIR 2003 Himachal Pradesh, 87**, wherein the Hon'ble Himachal Pradesh High Court observed that "the Court can exercise the power of the appointment of Court Commissioner for making local investigation, suo motu. In that case (cited), it was found that the part of the suit land was in possession of the plaintiff and the defendant was interfering with his possession and therefore, it was observed that it was necessary to ascertain the actual possession of the spot for fair and just decision of the case by appointment of Court Commissioner to make local investigation.

9. The plaintiff also placed his reliance on decision in case of **Sanku Ranga Rao Vs. Devi Prasad Sahu and another, AIR 1989 Orissa**

21, wherein the Hon'ble Orissa High Court observed that "*appointment of Court Commissioner to ascertain possession and alleged encroachment on the suit land is necessary, where the surveyor gave contradictory reports to plaintiff and defendant.*"

10. On the other hand, Ld. Advocate Mr. Sanas vehemently argued that the suit property cannot be properly identified. The plaintiff has not mentioned proper four boundaries, therefore, there is bar under Order VII Rule 3 of the Code of Civil Procedure. The possession of the plaintiff has been denied by the defendants. The nature of suit has to be considered, while deciding the present application. It is a well settled law that the commission cannot be appointed to ascertain the factum of possession. Ultimately, he prayed to reject the application.

As to Point No.1 & 2 -

11. The present suit has been filed for the relief of perpetual injunction against defendant No.12, thereby restraining him from taking forcible possession from the plaintiff and defendant No.24 to 38. The plaintiff has also prayed for the relief of declaration that the sale deed which got executed by the defendant No.12 is not binding on the share of plaintiff and defendant No.24 to 38. The plaintiff has further prayed for the relief that the defendant No.12 should not alienate the suit property by creating third party interest.

12. Thus, this is a suit is for simplicitor injunction with the prayer of declaration in respect of the alleged sale deed in between the original owners of the suit property and defendant No.12. By the present application, the plaintiff has prayed for the local inspection /

investigation of the suit property. According to him, he is having its possession and he is also having well, tin shed, cattle shed therein since long. He has also submitted that he has planted some trees and taken crops therein. However, it is pertinent to mention here that the plaintiff is claiming to have possession of the suit property on the basis of tenancy rights. Though the defendant has denied his the possession, but this cannot be the ground to appoint the Court Commissioner to make local inspection / investigation in the suit property.

13. It is pertinent to note here that admittedly, the issue of tenancy was agitated before the Hon'ble Revenue Authorities. The document No.7 filed by defendant No.12 alongwith list (Exh.17) is a copy of judgment dtd. 15th February, 2021 delivered by the Hon'ble Designated Member of the Maharashtra Revenue Tribunal, Bench at Pune in Case No. NS/X/1/2019 (B-179/19). Its prima facie perusal shows that the suit land was part of original Survey No.85 and it was held to be the grass land, which was not suitable for the cultivation. Even, it was held that the plaintiff's predecessor was not in possession of said field on Tiller's day.

14. The tenancy issue was further agitated before The Hon'ble Bombay High Court in Writ Petition No.10257/2022. In which, vide judgment dtd. 28th March, 2023 the Hon'ble High Court observed that the original Survey No.85 was excluded from the proceeding u/sec. 32G of the Maharashtra Tenancy and Agricultural Lands Act, 1948, as it was a hilly land and was used only for the purpose of quarrying. The Hon'ble High Court has also observed that the land was not under cultivation on the Tillers day and

therefore, the provisions of the Tenancy Act were not applicable to the suit property.

15. Thus, the issue of tenancy of plaintiff has already been decided vide judgment in W.P. No.10257/2022. Moreover, the fact of cultivation in some part of the land was also considered therein. The plaintiff in this suit, has only prayed that he should not be disposed without order of the Court. The relief of declaration is also in respect of the sale deed in between defendant No.12 and the original owners of the suit property. In such circumstances, there is no question of any local investigation or inspection of the suit property, so as to ascertain the alleged development work carried out by the plaintiff or his predecessor. Moreover, the plaintiff has already filed some photographs on record alongwith list (Exh.24) to show that he is in possession of the suit property and he is cultivating it, as well.

16. In view of the above discussion and considering the nature of suit, it is clear that if the order in respect of appointment of the Court Commissioner is passed in the present suit, it will certainly amount to collection of evidence, which is not permissible in accordance with the law. Moreover, looking to the nature of suit, there is no necessity to ascertain the factum of existence of well, tin shade, farm house etc., as prayed by the plaintiff. In such eventuality, with due respect the ratio laid down in cases of *Bali Ram* and *Sanku Ranga Rao (supra)* are not applicable to the facts of present case. Resultantly, the application is liable to be rejected. Hence, I answer Point No.1 in the negative and in answer to Point No.2, following order is passed.

ORDER

- 1] The application (Exh.53) is hereby rejected.
- 2] Costs in main cause.

[Dictated & pronounced in open Court.]

Wai.

Date : 08.07.2025.

(R.M. Bhende)
2nd Jt. Civil Judge Jr. Dn.
Wai, District Satara.