



**ORDER BELOW Exh. 20 IN R.C.S. No.100/2023**  
**( Shivlal Vs. Vijay )**  
**(CNR No. MHWS-0800-1469-2023)**

The present application has been moved by the defendants for appointing of Court Commissioner.

2. It is averred by the defendants that, the plaintiff has filed suit for permanent injunction along with an application for temporary injunction. The defendant has filed their written statement. Their land is adjacent to the suit property and plaintiff constructed house on it. There is open space in front of house of plaintiff and defendant. There is permanent boundary fixed of by constructing compound wall of bricks between their house. The plaintiff trying forcefully encroachment in the land of defendants. If court commissioner is appointed real situation come in to picture. The plaintiff has filed plaint map the defendant has not admitted because it has not prepared by government engineer. Therefore, they want to appoint survey commissioner. There is boundary fixed by compound wall and taar fencing between the house of plaintiff and defendant. Therefore, there is no question of encroachment on the land of plaintiff.

3. They further submitted that for knowing whether the boundaries of suit property are fixed? Whether there is compound wall and taar fencing? Whether there is trees? Whether land remained after construction? How is the map? Therefore, to unfold

the real fact, it is necessary to bring facts whether existence of above said open space the encroachment has made or not? To appoint advocate as court commissioner is necessary. Defendant is ready to pay court commissioner fee. Therefore, they prayed to appoint the Court Commissioner.

4. To the contrary, the plaintiff has filed his say vide Exh.21 to resist the application. According to him, the application is not legal. At this stage this application is not tenable. This is basic principle of law that court commissioner can not be appointed for collecting evidence regarding possession. The plaintiff has filed sale deed and other documents sharing his possession over the suit property. The defendants wants to appoint commissioner for verifying possession. Hence, this application is not legal. Only to prolong the matter this application is filed by the defendants. In such circumstances it is necessary to reject the application forthwith in the interest of justice with heavy cost.

4. Heard both sides. Perused the record. The suit is for perpetual injunction. According to defendants plaintiff trying to encroach into their land. They are the owner and possessor of suit land.

5. The learned advocate for defendant has relied on *Special Leave Petition (Civil) No.31345/2023 Committee of Management Anjuman Intezamia Masajid Vrs. Rakhi Singh and Others* Wherein Hon'ble Supreme Court observed in para 13 that

“ Oder XXVI Rule 10-A stipulates that where any issue in a

suit involves any scientific investigation which can not in the opinion of the court be conveniently conducted before the court, the court may, if it thinks necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit directing them to inquire into such question and report thereon to the court. Under sub-rule (2) of Rule 10-A, the provisions of Rule 10 of the order shall, as may be, apply in relation to a Commissioner appointed under the rule as they apply to a Commissioner appointed under Rule 9 and 10 Order XXVI therefore assume relevance and are extracted below :

9. Commission to make local investigation : In any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court :

Provided that, where the State Government has made rule as to the persons to whom such commission shall be issued , the court shall be bound by such rules.

10. Procedure of Commissioner :- (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the court.

(2) Report and depositions to be evidence in suit : The report of

the Commissioner and the evidence taken by him ( but not the evidence without report ) shall be evidence in the suit and shall form part of the record : but the court or, with the permission of the court, any of the parties to the suit may examine the commissioner personally in open court, or as to his report, or as to the manner in which he has made the investigation

(3) Commissioner may be examined in person : - Where the court is for any reason dissatisfied with the proceeding of the commissioner, it may direct such further inquiry to be made as it shall think fit.

10-A Commission for scientific investigation – (1) Where any question arising in a suit involves any scientific investigation which can not , in the opinion of the court , be conveniently conducted before interest of justice so to do , issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the court .

(2) The provisions of Rule 10 of this Order shall, as far as may be apply in relation to a commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9.

6. The defendant also relied on ***Civil Revision Petition No. 3760 of 2014 K Dayananda and another*** Wherein Hon'ble Andhra Pradesh High Court observed in para 10 that “The respondent filed preset interim application under the provisions of Order XXVI Rules 1 and 9 of C.P.C, seeking appointment of advocate commissioner to note down the physical features of the suit schedule property and

also for a direction to the commissioner to take photograph and video of the scheduled property. In the affidavit filed in support of the present application, the respondent stated that the total area of the suit schedule property is Ax . 1.05 gunthas, which is an agricultural land and he raised sesame crop in the suit schedule property and that he is in exclusive possession of the same. In he said affidavit the respondent further stated that he erected fencing around the suit schedule property by fixing the gate and also constructed a small room towards South West corner for the purpose of residence of his far servant and also obtained a service connection from the Electricity Department. The said affidavit further states that in order to prove his case that schedule property is an agricultural land and is not converted into house plots and there are no roads in existance at all, appointment of advocate commissioner is necessary to note down the physical features of this suit schedule property.

7. The defendants wants to bring the existence of boundaries of suit property are fixed, there is compound wall and taar fencing? Whether there is trees? Whether land remained after construction?. It is clear that, a major dispute between the parties in respect of the defendant trying to encroach upon the site of plaintiff on southern suit site. This matter is pending for hearing on the application temporary injunction. Issues are yet be framed. After perusal of proceeding also appears that, the plaintiff has filed map in respect of the suit property.

8. In *Dhondiram Pawar & Ors. Vs. Laxman Pawar & Ors.*

2018 DGLS(Bom.) 458, wherein the Hon'ble High Court observed that, *the appointment of 'Court Commissioner' to submit the factual report as regards possession or user of the land is amounting to collection of evidence and it is not permissible in law.* Further Sanjay Thorat Vs. Ramchandra Thorat 2018 DGLS(Bom.) 270, wherein the Hon'ble High Court observed that, *the plaintiffs cannot seek appointment of 'Court Commissioner' for the purpose of proving their case.*

9. It is pertinent to note that, the suit is for perpetual injunction. The plaintiff would have to prove the ownership as well as possession over the suit property i.e. Bhukhand No.89. The plea raised by the defendants have to be prove independently or on their self footing. Defendant's are trying to collect evidence with the help of court commissioner.

10. Considering the nature of the suit, there is no need for appointment of Court Commissioner in respect of to elucidate factual position of said property i.e. Bhukhand No.89. Parties can bring these facts adducing evidence on record. It appears that, the defendant's wanted to collect the evidence in respect of possession in suit property by appointing Court Commissioner. When the court does not find it necessary, there is nothing which mandates the court to appoint the Court Commissioner. 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.

Considering the nature of the suit, there is no need at this stage for appointment of Court Commissioner in respect of to elucidate factual position of said suit site.

Hence, the present application deserves to be rejected at this stage. Therefore, I proceed to pass the following order.

**ORDER**

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

Sd/-

Dated: 13.02.2024

(Smt. Pratibha M. Kamble)  
2<sup>nd</sup> Jt. Civil Judge J.D., Risod.

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	:-	PP Sonune, Sr. Clerk
Court	:-	2 <sup>nd</sup> Jt. Civil Court,J.D.,Risod.
Date:-	:-	13/02/2024
Judgment/Order signed by the Presiding Officer	:-	13/02/2024
Judgment/Order uploaded on	:-	13/02/2024

However, in the present case the plaintiffs to prove the existence or location of Gat No.92/4 as well as show how the boundaries mentioned in alleged sale-deed are wrongful. The plaintiffs can do it by producing necessary documentary evidence on record. The temporary injunction application yet be decided. The plaintiffs can not seek the appointment of Court Commissioner for proving their case or to collect the evidence.

12.

**ORDER**

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