

ORDER BELOW EXH. 5 and 15 IN R.C.S.No.57/16

1] The plaintiff has filed an injunction application against the defendant for seeking injunction that the water channel shall not be damaged and the road to approach his property shall not be obstructed. The defendant has filed counter-claim for seeking injunction against the plaintiff as not to obstruct his possession.

2] Perused application, say and records of the suit.

3] Heard, learned advocate Shri. Lad for the Plaintiff and learned advocate Shri. Magar for the defendant.

4] The plaintiff contended that he is the owner of gut no. 209 and 211 situated at Kamleshwar Tq. Malegaon. There is one water channel passing by his boundaries and one road to approach his property. The defendant with any just reason obstructed the plaintiff's road and also trying to damage water channel. Therefore, he filed present application.

5] On the contrary the defendant contended that there is no road in existence as alleged by the plaintiff. The plaintiff has his separate access to approach to his field. The defendant has never intended to damage any water channel. The water is flowing towards its natural slope. The plaintiff himself has changed the flow of his water channel and created obstruction to the natural water channel. Therefore, the defendant has apprehension that the plaintiff will damage his property. Therefore, he has filed injunction application against the plaintiff.

6] Before going in the details of the applications filed by either parties, I

am of the view that there is a need of Court Commission in order to understand exact location of disputed road and water channel.

7] Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

8] The plaintiff has filed this suit seeking permanent injunction against the defendant as not to cause obstruction to use the right of way and water channel. The defendant by filing his written statement has denied the existence of the road and the plaintiff's right of way. He has also filed counter claim against the plaintiff, alleging that the plaintiff is intending to damage the natural flow of water channel. Thus, the dispute between the plaintiff and defendant is about the existence of way and flow of water channel. Therefore, keeping in mind the scope and object of Order 26 Rule 9, as discussed supra, if an advocate is appointed to act as commissioner in this matter, it will help to bring on record the situation existing in respect of road and water channel, if any and will not cause any harm or injustice to any party.

9] The appointment of an advocate as Court commissioner in this matter will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the disputed road and flow of water channel on record and nothing more than that.

10] Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. In the result, the order.

ORDER

1. The application exh. 5 and 15 kept filed till commission report.
2. Shri. S. J. Somani, Advocate, Malegaon is appointed to act as Court commissioner in this matter.
3. The plaintiff and defendant both are directed to deposit Rs.1500/- (Rs. One thousand five hundred only) each towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 09-10-2019.
4. The Court Commissioner is directed to issue notices to both the parties about the commission.
5. The Court Commissioner is directed to visit gut no. 209, 210, 211 and 212 and file detail report along with sketch about the disputed road and water channel keeping in mind the contents in the pleadings of both the parties and the situation shown by both parties and their respective advocates, if present and submit his report on or before 08/11/2019.

(Pronounced in Open Court).

Sd/-

(S. M.Bohara),
Jt. Civil Judge, J.D. Malegaon.

Dt.30-09-2019

ORDER BELOW EXH.15 IN R.C.S.No.320/2004
(Passed on 25-06-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiff seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The plaintiff has contended that he has filed this suit seeking permanent injunction against the defendant in respect of Gut No.274 and 275 and the trees standing towards Southern side of those Gut numbers. The defendants by filing W.S. have contended that there is a joint bund in between their and plaintiff's land. The plaintiff has cut down the trees and they have not made any encroachment as alleged by the plaintiff. Therefore, in order to bring these facts on record, it is necessary to appoint an advocate as Court Commissioner. On these grounds, the plaintiff has prayed to grant the application.

FACTS IN THE SAY

3. The defendants have filed their say and contended that the application is not tenable. The defendants have strongly objected the application.

They have contended that there is no need to bring any fact on record. The plaintiff is trying to collect evidence by seeking appointment of Court Commissioner. On these grounds the defendants have prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri.P.M.Alat, advocate for the plaintiff and Shri. A.R.Patil, advocate for the defendants , at length.

5. They argued in consonance with their contentions in the application and say.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.
2. What order?	Application is allowed.

REASONS AS TO POINT No.1

7. O.XXVI, R.9 of C.P.C. read as under. :-

7.1 **Commission to make local investigations.--**

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 of damages of annual net profits, the Court may issue a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiff has filed this suit seeking permanent injunction against the defendants, as not to damage the Southern side trees, bund , fencing and should not obstruct him to erect fence .

10. Per contra, the defendants have contended that the bund is joint. They have not cut down the trees as alleged by the plaintiff. They never made encroachment.

11. After going through the rival contentions of both parties and keeping in mind the scope and object of Order 26 Rule 9 of C.P.C. as discussed supra I am of the considered view that it is not possible for the plaintiff to bring on record the situation pleaded by him in respect of the alleged cutting of trees and so on , by any other means. Therefore, I am inclined to appoint an advocate as Court Commissioner.

13. The appointment of an advocate as Court commissioner in this matter will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the suit property on record and nothing more than that.

14. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative and

proceed to pass the following order

ORDER

1. The application exh. 15 is granted.
2. Shri. K.C.Mane, Advocate Barshi is appointed to act as Court commissioner in this matter.
3. The plaintiff is directed to deposit Rs.800/- (Rs. Eight hundred only) towards costs and fees of the Court commissioner in the Court with requisite fee on or before 02-07-2007 process
4. The Court Commissioner is directed to do the commission work keeping in mind the observations order and also contents in the application, situation shown by both parties and their advocates, if present and to submit his report 16/07/2007 failing which substantial commission fees will be made in the say and the respective on or before amount from his deducted.

(Pronounced in Open Court).

Barshi
Dt.25-06-2007

(M.B.Lambe),
Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH. 88 IN R.C.S.No.379/1999
(Passed on 20-06-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the defendant No.1 seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The defendant No.1 has contended that the plaintiff has filed this suit seeking partition in respect of ancestral suit properties. The defendant No.1 has contested the suit alleging that already partition was effected as per order passed by Tahsildar and accordingly the defendant No.1 is in possession of western side H. 0. 40 Are. land out of Gat No.144 and the plaintiff is in possession of eastern side H. 0. 35 Are land out of Gat No.144. The land Gat Nos.184/1 and Gat No.185/1 are allotted to defendant No.2 during the said partition. The plaintiffs and defendants were given 1/3 share in the well water and mango tree in Gat No.144. Accordingly, mutation entry No.661 was passed. Therefore, in order to bring the facts in respect of well out of Gat No.144/2, pipe line, the improvements made by defendant No.1 in land Gat No.144/1, the present crops standing upon Gat No.144/2, the distance between lands Gat Nos.184/1, 185/1 and the land Gat

No.145, the present possession of Gram Panchayat property No.172, the situation in respect of 3000 fts. pipeline which is lying from Gat No.144 appointment of an advocate as Court Commissioner is necessary. On these grounds, the defendant No.1 has prayed to grant the application.

FACTS IN THE SAY PLAINTIFF

3. The plaintiff has filed his say Exh.92 and strongly objected the application. He has contended that the plaintiff and defendants have closed their evidence. The application is not legal and tenable. The application Exh.43 filed by the defendant was rejected on merits. Hence, the application is liable to be rejected. In order to prolong the hearing of the application the present suit is filed. On these grounds the plaintiff has prayed to reject the application.

THE ARGUMENT

4. I heard, Shri. D.K.Kulkarni, advocate for the defendant No.1 and Shri. P.R.Karanjkar, advocate for the plaintiff, at length.

5. They argued in consonance with the contentions in the application and say. So it is not necessary to repeat the same.

POINTS AND FINDINGS

7. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow:-

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	No.
2. What order?	Application
	is rejected.

REASONS AS TO POINT No.1

8. O.XXVI, R.9 of C.P.C. read as under. :-

8.1 **Commission to make local investigations.--**

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 of damages of 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... ..

9. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

10. The plaintiff has filed this suit seeking partition and separate possession in respect of the suit properties alleging that no partition has taken place among him and the defendants. The defendant Nos.1 defended the suit by denying the plaintiff's claim and alleging that as per Tahsildar's order partition is already effected.

11. The issues are Exh. 56. The point in dispute between plaintiff and defendants is in respect of joint family property, the tenability of the suit, and about alleged previous partition as is clear from the issues exh.55. There is no question involved in this suit in respect of the situation of suit properties, the possession of plaintiff and defendants, the facts about lying of pipeline, its length and so on. It is not necessary at all to bring on record any situation in respect of situation of suit properties, the possession of plaintiff and defendants, the facts about lying of pipeline, its length, as prayed by the plaintiff in this application.

Therefore, keeping in mind the scope and object of Order 26 Rule 9, I am not inclined to grant this application.

12. It is well settled principle in law that the commission cannot be appointed for collecting evidence. The plaintiff by way of filing this application is definitely collecting evidence through the machinery of Court and by getting order from the Court. In view of this legal position also the application is not tenable. Therefore, the application is liable to be rejected.

13. Furthermore, if facts pleaded by the plaintiff and defendants are considered along with all documentary evidence produced by them, it transpires that local inspection u/o 26, rule 9 of C.P.C. is not necessary in respect this suit as there is nothing on record produced by the plaintiff or defendants of which **elucidation** (emphasis supplied) is necessary. Therefore, the application is liable to be rejected.

14. The evidence of plaintiff and the defendants is almost complete. The suit is of the year 1999. The reasons given in the application are not convincing because as per order below Exh.67 more than sufficient opportunity was given to the defendant No.1 to produce on record any evidence about alleged partition as pleaded by him. But, he failed to comply the order. Hence, the matter proceeded further. In view of the dispute at hand, there is no necessity to appoint Court Commissioner as prayed by the defendant No.1. Therefore, I am declined to grant the application.

15. It is well settled that the principle of res judicata applies in different stages of the same proceedings. The defendant No.1 had filed application Exh.43 seeking appointment of an advocate as Court Commissioner on 5.9.200 on the same grounds and praying for the same relief as prayed in this application. The application exh.43, is rejected, on merits after giving opportunity to the defendant

No.1. The order below Exh.43 was passed by my predecessor on 12.9.2001. In these facts and circumstances, I am of the considered view that the present application itself is not tenable and is hit by the principle of res judicata . For this view I am buttressed by Bhanu Kumar Jain Vs Archana Kumar & Anr. reported in 2005(1) Apex Court Judgments 121 (S.C.) : 2005(1) Civil Court Cases 725 (S.C.) .

16. To sum up, the defendant No.1 has not come with diligence before this Court. No bona fides are seen in the conduct of the defendant No.1. In view of this and my discussion, supra, I am not inclined to grant this application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh.88 is rejected.
2. The costs will be in the cause.

(Pronounced in Open Court.)

DATE -20-02-2007.
BARSHI.

(M.B.Lambe),
IV th Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.27 IN R.C.S.No.97/2007
(Passed on 16-06-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiff seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The plaintiff has contended that he has filed plaintiff this suit seeking permanent injunction against the defendants in respect of their alleged obstruction to his ingress and egress facility through Gat No.402 and 407. He is using the said facility since long, but the defendants have damaged the said road and excavated the same by making pits upon it. Therefore, in order to bring these facts on record, it is necessary to appoint an advocate as Court Commissioner. On these grounds, the plaintiff has prayed to grant the application.

FACTS IN THE SAY

3. The defendant No.1 has filed his say Exh.36 and contended that the application is not tenable. The defendant No.1 has strongly objected the application. He has contended that there is no need to bring any fact on record. The decision given by the revenue officer in respect of the road is set aside and the

matter is remanded back for fresh inquiry by the Additional Collector. The plaintiff is trying to collect evidence by seeking appointment of Court Commissioner. On these grounds the defendant No.1 has prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri. P.N.Shinde, advocate for the plaintiff and Shri. P. B. Kulkarni, advocate for the defendant No.1, at length.
5. They argued in consonance with their contentions in the application and say.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.
2. What order?	Application is allowed.

REASONS AS TO POINT No.1

7. O.XXVI, R.9 of C.P.C. read as under. :-

7.1 Commission to make local investigations.--

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 of damages of 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,

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiff has filed this suit seeking permanent injunction against the defendants, as not to obstruct his ingress and egress facility. According to him, the alleged road is granted by the Tahsildar and Sub-Divisional Officer has confirmed the order of Tahsildar. The defendants have no right to damage the said road or to obstruct the plaintiffs right of way in any manner.

Per contra, the defendant No.1 has contended that the orders passed by the Tahsildar and Sub-Divisional Officer are set aside by Additional Collector and the matter is remanded for fresh inquiry. Therefore, the plaintiff in order to collect the evidence, has filed this application.

Shri.Kulkarni, advocate of the defendant No.1 relied on Union of India v. M/s. Kripal Industries, reported in A.I.R. 1998 224 wherein His Lordship has held :-

“That power of appointment of commissioner for local investigation cannot be exercised by the Court to assist the party to collect the evidence where it can get evidence itself. “

10. After going through the rival contentions of both parties and keeping in mind the scope and object of Order 26 Rule 9 of C.P.C. as discussed supra I am of the considered view that it is not possible for the plaintiff to bring on record the

situation pleaded by him in respect of the alleged road available for him to approach his land Gat Nos. 403, 402 and 407, by any other means. Therefore, I am inclined to appoint an advocate as Court Commissioner.

11. The appointment of an advocate as Court commissioner in this matter will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the suit property on record and nothing more than that. In view of this the case law relied by Shri. Kulkarni Advocate for the defendant No.1 is of no avail for the defendant.

12. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative and proceed to pass the following order

ORDER

1. The application exh. 27 is granted.
2. Shri. P.B.Lokhande, Advocate Barshi is appointed to act as Court commissioner in this matter.
3. The plaintiff is directed to deposit Rs.800/- (Rs. Eight hundred only) towards costs and fees of _____ the Court commissioner in the Court with requisite _____ process fee on or before 25-06-2007.
4. The Court Commissioner is directed to do the commission work keeping in mind the observations _____ made in the order and also _____ contents in the application, _____ say and the situation shown by both parties and their _____ respective advocates, if present and to submit his report _____ on or before 09/07/2007 failing which substantial _____ amount from his commission fees will be deducted.

(Pronounced in Open Court).

Barshi
Dt.16-06-2007

(M.B.Lambe),
Iv Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.87 IN R.C.S.No.46/1998

(Passed on 26-04-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the defendant No.2 seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The defendant No.2 has contended that the plaintiffs have filed this suit seeking permanent injunction against him. There is no dispute about ownership of defendant No.2 in respect of C.S.No. 1349 and 1351 and 1347.

However, according to him C.S.No.1348 is included in C.S.No. 1347 and 1349 which is admeasuring 15 x 7. Therefore, in order to bring the measurements of these properties, it is necessary to appoint an advocate as Court Commissioner. On these grounds, the defendant No.2 has prayed to grant the application.

FACTS IN THE SAY

3. The plaintiffs have filed their say and strongly objected the application. They have contended that there is no need to bring any fact on record. The property extracts of C.S.No. 1348 and of other properties are on record at exh.65/1 to 7. The defendant No.2 is interested in prolonging the hearing of the suit. The defendant No.2 is trying to collect evidence by seeking appointment of Court Commissioner. On these grounds the plaintiffs have prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri. V. B. Naiknaware, advocate for the defendant No.2 and Shri. P. M. Alat, advocate for the plaintiffs, at length.

5. They argued in consonance with their contentions in the application and say.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.
2. What order?	Application is allowed.

REASONS AS TO POINT No.1

7. O.XXVI, R.9 of C.P.C. read as under. :-

7.1 **Commission to make local investigations.--**

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 of damages of annual net profits, the Court may issue a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiffs have filed this suit seeking permanent injunction against the defendants, as not to disturb their possession upon 4 x 12 ft. lane which is towards C.S.No. 1351, 1347 and 1348. According to the defendant No.2 C.S.No.1348 is included in C.S.No. 1347 and 1349 which is admeasuring 15 x 7.

10. After going through the rival contentions of both parties and keeping in mind the scope and object of Order 26 Rule 9 of C.P.C. as discussed supra I am of the considered view that it is not possible for the defendant No.2 to bring on record the situation pleaded by him in respect of inclusion of C.S.No.1348 in C.S.No. 1347 and 1349 which is admeasuring 15 x 7 or in respect of the facts pleaded by the defendant No.2, by any other means. Therefore, I am inclined to appoint an advocate as Court Commissioner.

11. The appointment of an advocate as Court commissioner in this matter

will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the suit property on record and nothing more than that.

12. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application.

13. However, an advocate is not an expert. The crux of the dispute lies in deciding whether C.S.No.1348 is included in C.S.No. 1347 and 1349 which is admeasuring 15 x 7 or not. So, an advocate who will act as Court Commissioner in this matter is required to be directed to take assistance of a licensed architect or Government recognized Civil Engineer while doing commission work which will meet the ends of justice. Accordingly, I answer point No.1, in the affirmative and proceed to pass the following order

ORDER

1. The application exh. 87 is granted.
2. Shri. R. U. Vaidya, Advocate Barshi is appointed to act as Court commissioner in this matter.
3. The defendant No.2 is directed to deposit Rs.700/- (Rs. Seven hundred only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 27-04-2007.
4. The defendant No.2 is directed to provide assistance of a Licensed architect or Government recognized Civil Engineer while doing commission work and bear his expenses also .
5. The Court Commissioner is directed to do the commission work keeping in mind the observations made in the order and also contents in the application, say and the situation shown by both parties and their respective advocates, if present and to submit

his report on or before 06/06/2007 failing which substantial amount from his commission fees will be deducted.

(Pronounced in Open Court).

(M.B.Lambe),

Dt.26-04-2007

Iv Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.19 IN R.C.S.No.471/2006

(Passed on 02-04-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiffs seeking appointment of an advocate as Court Commissioner under order 26 Rule 3 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The plaintiffs have contended that they have filed this suit seeking permanent injunction against the defendants. The defendants have alternate way from Nari-Bhatambare road and also from Eastern side of Nari-Pimpri road so also Kapasi-Bhatambare road. In spite of this they are intending to create new road

upon the bund of Gat No. 78/1, 2 and 79. Therefore, it is necessary to appoint an advocate to report about the factual situation in respect of the roads in existence and available for the defendants. In order to bring all these facts on record it is necessary to appoint an advocate as Court Commissioner. On these grounds, the plaintiffs have prayed to grant the application.

FACTS IN THE SAY

3. The defendants have filed their say and strongly objected the application. They have contended that there is no need to bring any fact on record. The Tahasildar has clarified the road in his order. The plaintiffs are trying to collect evidence by seeking appointment of Court Commissioner. On these grounds the defendants have prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri. S. A. Bhosale, advocate for the plaintiffs and Shri. A. R. Patil, advocate for the defendants, at length.

5. They argued in consonance with their contentions in the application and say.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.
2. What order?	Application is allowed.

REASONS AS TO POINT No.1

7. O.XXVI, R.9 of C.P.C. read as under. :-

7.1 **Commission to make local investigations.--**

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 of damages of annual net profits, the Court may issue a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiff has filed this suit seeking permanent injunction against the defendants as not to disturb his possession upon land Gat Nos. 78/1, 2 and 79 and as not to create new road through these lands in any manner. The defendants have come with a specific contention that they are not doing any act of creating new road, as alleged by the plaintiffs.

10. After going through the rival contentions of both parties and keeping in mind the scope and object of Order 26 Rule 9 of C.P.C. as discussed supra I am of the considered view that it is not possible for the plaintiffs to bring on record the situation pleaded by them in respect of their Gat Nos. 78/1, 2 and 79 and also in respect of the roads or in respect of the facts pleaded by the defendants, by any other means. Therefore, I am inclined to appoint an advocate as Court Commissioner.

11. The appointment of an advocate as Court commissioner in this matter

will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the suit property on record and nothing more than that.

12. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative. I proceed to pass the following order

ORDER

1. The application exh. 19 is granted.
2. Shri. B. V. Diwakar, Advocate Barshi is appointed to act as Court commissioner in this matter.
3. The plaintiffs are directed to deposit Rs.1,000/- (Rs.One thousand only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 07-04-2007.
4. The Court Commissioner is directed to do the commission work keeping in mind the contents in the application, say and the situation shown by both parties and their respective advocates, if present and to submit his report on or before 23/04/2007 failing which substantial amount from his commission fees will be deducted.

(Pronounced in Open Court).

Dt.02-04-2007

(M.B.Lambe),
Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.29 IN R.C.S.No.406/2006
(Passed on 16-03-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiffs seeking appointment of an advocate as Court Commissioner under order 26 Rule 3 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The plaintiffs have contended that they have filed this suit seeking permanent injunction against the defendants. The defendants have damaged the boundary marks. Therefore, it is necessary to appoint an advocate to visit Gat No. 284 and 285 and to report about the factual situation in respect those lands. In order to bring all these facts on record it is necessary to appoint an advocate as Court Commissioner. On these grounds, the plaintiffs have prayed to grant the application.

FACTS IN THE SAY

3. The defendants have filed their say and strongly objected the application. They have contended that there is no need to bring any fact on record. The plaintiff is trying to delay the matter. On these grounds the defendants have prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri. M. J. Khupsare, advocate for the plaintiffs and Shri. B. R. Awate, advocate for the defendants, at length.

5. They argued in consonance with their contentions in the application and say. So it is not necessary to repeat the same.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.

2. What order? Application is allowed.

REASONS AS TO POINT No.1

7. O.XXVI, R.9 of C.P.C. read as under. :-

7.1 **Commission to make local investigations.--**

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 of damages of annual net profits, the Court may issue a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiff has filed this suit seeking permanent injunction against the defendants as not to disturb their possession upon land Gat No. 285 and not to encroach upon it. They have also prayed permanent injunction against the defendants as not to damage the boundary marks or not to cut the trees. The defendants have come with a specific contention that they are not doing any act as alleged by the plaintiffs.

10. After going through the rival contentions of both parties and keeping in mind the scope and object of Order 26 Rule 9 of C.P.C. as discussed supra I am of the considered view that it is not possible for the plaintiffs to bring on record the

situation pleaded by them in respect of their Gat Nos. 284 and 285.or in respect of the facts pleaded by the defendants, by any other means. Therefore, I am inclined to appoint an advocate as Court Commissioner.

11. The appointment of an advocate as Court commissioner in this matter will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the suit property on record and nothing more than that.

12. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative .

13. However, considering the urgency pressed by the plaintiffs it is necessary to direct the Court commissioner to do the commission work immediately and file his report which will save time and serve the purpose of justice. So the plaintiffs will be required to pay commission fee amounting to Rs.1,000/-. In the result, I proceed to pass the following order

ORDER

1. The application exh. 29 is granted.
2. Shri. P. B. Katmore, Advocate Barshi is appointed to act as Court commissioner in this matter.
3. The plaintiffs are directed to deposit Rs.1,000/- (Rs.One thousand only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 21-03-2007.
4. The Court Commissioner is directed to do the commission work keeping in mind the contents in the application, say and the situation both parties and their respective shown by advocates, if present

and to submit his report on or before 02/04/2007 failing which substantial amount from his commission fees will be deducted.

(Pronounced in Open Court).

Dt.16-03-2007

(M.B.Lambe),
Iv Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH. 69 IN R.C.S.No.359/1987
(Passed on 27-02-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiffs seeking direction to T.I.L.R. to correct the measurement map prepared by him on record clarifying the area shown by him in red as possessed by defendant.

FACTS IN THE APPLICATION

2. The plaintiffs have contended that the Measurement Surveyor Shri Reddy has filed his report with measurement map prepared by him. He has shown encroached portion in red. According to him it is in possession of the defendant. However, he has failed to clarify the area of the said encroached portion. Therefore, it is necessary to send the measurement report to T.I.L.R., Barshi in order to clarify the area encroached by the defendant. On these grounds, the plaintiffs have prayed to grant the application.

NO SAY BY THE DEFENDANTS

3. The defendant failed to file say. Hence, application proceeded without his say.

THE ARGUMENT

4. I heard, Shri. S. B. Khandelwal, advocate for the plaintiffs, at length

and Shri B. N. Handibag, advocate for the defendant on law points only.

POINTS AND FINDINGS

7. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether the plaintiffs proves that it is necessary to send the measurement report to T.I.L.R., as prayed for?	No.
2. What order?	Application
is rejected.	

REASONS AS TO POINT No.1

8. The T.I.L.R. has filed his report exh.64. The measurement map is at page No.99 in which Measurement Surveyor Shri Reddy has clarified that the portion shown in red is owned by owner of Gat No. 174 which is in possession of Gat No.175. Admittedly, the plaintiffs are owners of Gat No. 174 and the defendants are the owners of Gat No. 175.

9. However, I am unable to persuade with the arguments advanced on behalf of plaintiffs that it is necessary to send the matter to the T.I.L.R. in order to clarify the exact area of the encroached portion. The reasons are viz.,

- i) That the present suit is filed by the plaintiffs seeking permanent injunction and in the alternative for possession of encroached portion, if proved. It means the suit was/is not filed seeking possession of the encroached portion initially. Therefore, in my considered view the appointment of T.I.L.R. itself was not legal.
- ii) The matter is pretty old i. e. of the year, 1987. Nearly 20 years time has lapsed. The plaintiffs instead of proceeding with the suit are themselves causing delay, which in my view is without reasons.

iii) That the Measurement Surveyor, Shri Reddy has clarified specifically the portion encroached in red and even if the plaintiffs are intending to amend their plaint so as to seek possession of the encroached portion, as a substantive relief, there is no hurdle before them to amend the plaint and it is not necessary at all to clarify the area of the encroached portion, as it can very well be gathered after getting it clear from the scale given by the measurement surveyor.

10. Above all the substantive relief in this suit is seeking permanent injunction. There is no prayer seeking possession of encroached portion. Therefore, as pointed out by me above, the appointment of T.I.L.R. was not legal and the work carried out on the order which at its foundation was illegal, is not necessary to be considered at all. Therefore, I am not inclined to grant this application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh. 69 is rejected.
2. The plaintiff is directed to lead his evidence on the next date, failing which necessary order will follow against him.
3. The matter is adjourned till 05/03/2007.

(Pronounced in Open Court.)

DATE -27-02-2007.
BARSHI.

(M.B.Lambe),
Iv th Jt. Civil Judge, J.D. Barshi.

ORDER BELOW EXH. 56 IN R.C.S.No.429/2002
(Passed on 06-02-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiff seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The plaintiff has contended that he has filed this suit seeking partition in respect of ancestral suit properties. There are wells containing water in the suit property lands and having pipe lines. The defendants have denied this fact and are also denying to give water to the plaintiff. Therefore, it is necessary to bring this fact on record by appointing an advocate as Court Commissioner. On these grounds, the plaintiff has prayed to grant the application.

NO SAY BY THE DEFENDANTS

3. The defendants failed to file their say. Hence, applicatin proceeded without their say.

THE ARGUMENT

4. I heard, Shri. B. N. Chavan, advocate for the plaintiff at length.

5. He argued in consonance with the contentions in the application and say. So it is not necessary to repeat the same.

6. The defendants failed to argue in spite of giving more than sufficient oppourtunities. The application is pending since long, hence, I would like to decide it on merits.

POINTS AND FINDINGS

7. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	No.
2. What order?	Application is rejected.

REASONS AS TO POINT No.1

8. O.XXVI, R.9 of C.P.C. read as under. :-

8.1 **Commission to make local investigations.--**

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 of damages of annual net profits, the Court may issue a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

9. Power is conferred on the Court to appoint a Commissioner for local

inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

10. The plaintiff has filed this suit seeking partition and separate possession in respect of the suit properties alleging that no partition has taken place among him and the defendants also seeking declaration that the decree in R.C.S.No. 754/1997 is not binding upon him. The defendant Nos. 4 to 8 have defended the suit by denying the plaintiff's claim.

11. The issues are exh. 55. The point in dispute between plaintiff and defendants is in respect of joint family and self acquired property and the tenability of the suit, as is clear from the issues exh.55. There is no question involved in this suit in respect of right of plaintiff to take well water or any obstruction caused by the defendants to such right, if any. It is not necessary at all to bring on record any situation in respect of wells, its water and pipe lines, as prayed by the plaintiff in this application. Therefore, keeping in mind the scope and object of Order 26 Rule 9, I am not inclined to grant this application.

12. It is well settled principle in law that the commission cannot be appointed for collecting evidence. The plaintiff by way of filing this application is definitely collecting evidence through the machinery of Court and by getting order from the Court. In view of this legal position also the application is not tenable. Therefore, the application is liable to be rejected.

13. Furthermore, if facts pleaded by the plaintiff and defendants are considered along with all documentary evidence produced by them, it transpires that local inspection u/o 26, rule 9 of C.P.C. is not necessary in respect this suit as there is nothing on record produced by the plaintiff or defendants of which

elucidation (emphasis supplied) is necessary. Therefore, the application is liable to be rejected.

14. To sum up, the plaintiff has not come with diligence before this Court. No bonafides are seen in the conduct of the plaintiff. In view of this and my discussion, supra, I am not inclined to grant this application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh. 56 is rejected.
2. The costs will be in the cause.

(Pronounced in Open Court.)

DATE -06-02-2007.
BARSHI.

(M.B.Lambe),
Iv th Jt.Civil Judge,J.D.Barshi.

10. The appointment of an advocate as Court commissioner in this matter will amount to collect evidence which is not at all related to the dispute at hand.

11. Moreover, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative . In the result, the order.

ORDER

1. The application exh.27 is granted.

2. Shri. B. V. Diwakar, Advocate, Barshi is appointed to act as Court commissioner in this matter.

3. The defendants are directed to deposit Rs.800/- (Rs. Eight hundred only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 08-12-2006 failing which the application shall stand rejected automatically.

4. The Court Commissioner is directed to do the commission work keeping in mind the contents in the pleadings of both the parties and the situation shown by both parties and their respective advocates, if present and submit his report on or before 22/12/2006 failing which substantial amount from his commission fees will be deducted.

(Pronounced in Open Court).

Dt.30-11-2006

(M.B.Lambe),
Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.27 IN R.C.S.No.398/2005

(Passed on 05-02-2007)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiffs seeking appointment of Court Commissioner to do Nimtana Measurement.

FACTS IN THE APPLICATION

2. The plaintiffs have contended that they are in possession of Gat No. 371 and the defendants are owners of Western side adjacent land Gat No. 370/2.

In the suit property land there is a bund in existence which is put to reduce soil erosion. The defendants are trying to damage the said bund and boundary stones. They have also got measured the land vide Measurement Register No. 2081 by joining hands with the Measurement Surveyor. The said measurement was not carried by following the procedure and therefore, it is not legal. In order to settle the dispute between parties finally, it has become necessary to appoint Taluka Inspector Land Records(for short T.I.L.R.), Barshi to do Nimtana Measurement work. On these grounds the plaintiffs have prayed to grant the application.

FACTS IN THE SAY

3. The defendant No.2 has filed his say exh.29 and denied all the material averments in the application. He has contended that the measurement carried vide Measurement Register No. 2081 was done by following all legal procedures and it is correct. The said measurement was not carried on the order of the Court. The plaintiffs were required to file application for Nimtana Measurement to the Survey Office separately. The application is not legal and tenable. On these grounds, the defendant No.2 has prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri.S. M. Gund, advocate for the plaintiffs and Shri. J. B. Jadhawar, advocate for the defendant No. 2, at length.

5. They argued in consonance with their application and say.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

POINTS

FINDINGS

1. Can the Taluka Inspector Land Records, Barshi be appointed as Court commissioner to do

- | | |
|-------------------------------------|-------------|
| Nimtana Measurement, as prayed for? | No. |
| 2. What order? | Application |
| is rejected. | |

REASONS AS TO POINT No.1

7. The plaintiff has filed this suit seeking permanent injunction against the defendant Nos. 1 to 3. The defendant No.2 by filing his written statement Exh.14 has denied the suit alleging that the plaintiffs have made encroachment upon his land Gat No. 370/2.

8. Admittedly, the defendant No.1 and Rajendra Mahadeo Katmore have got measured their land Gat No. 370/2 vide Measurement Register No. 2081 exh.17/2. The date of measurement is 08/08/2005. The boundaries were shown on 01/09/2005. It is shown in the measurement map exh.17/2 that the owners of land Gat No. 370/2 and 371 have made encroachment upon the land Gat No. 370/1 and 370/2. There is no dispute that the said measurement was carried as per the application filed by the defendant No.1 and Rajendra Katmore. There was no order of any Court directing the Measurement Surveyor to carry out that measurement. Under the Land Revenue Code T.I.L.R./Measurement Surveyor is vested with separate jurisdiction and power to measure land/plot within his jurisdiction after receiving application by any land holder/owner. There is no explanation given by the plaintiffs why they failed to approach the T.I.L.R. to get Nimtana Measurement. If at all they were aggrieved by the Measurement Register No.2081. This non-diligence on the part of plaintiffs cannot be overlooked and due to inaction on their part any discretionary order to appoint T.I.L.R., Barshi, as Court commissioner cannot be passed in their favour. Therefore, the application is liable to be rejected.

9. It is well settled principle in law that the commission cannot be

appointed for collecting evidence. The plaintiffs by way of filing this application is definitely collecting evidence through the machinery of Court and by getting order from the Court. In view of this legal position also the application is not tenable. Therefore, the application is liable to be rejected.

10. Furthermore, if facts pleaded by the plaintiffs and defendants are considered along with all documentary evidence produced by them, it transpires that local inspection u/o 26, rule 9 of C.P.C. is not necessary in respect this suit as there is nothing on record produced by the plaintiffs or defendants of which **elucidation** (emphasis supplied) is necessary. Therefore, the application is liable to be rejected.

11. Furthermore, as this is the suit seeking simplicitor injunction as not to disturb plaintiffs possession on the basis of his prior possession there is nothing on record which will lead me to infer that an order can be passed in favour of the plaintiffs within the scope and ambit of Order 26 Rule 9 of Civil Procedure Code. Therefore, the application is liable to be rejected.

12. Above all, the person who will measure the land while acting as Nimitana Measurement Surveyor either on the application of the plaintiffs filed independently to Survey Office or by appointment on an order of the Court, is a person who is an expert from the Survey Office. The discretion is given to the applicant applying to get measure his property to file application for simple measurement, for urgent measurement and for most urgent measurement and accordingly as per the order issued by the Settlement Commissioner, Director land records Maharashtra State dated 30-10-2001 the different fee is charged. So far as the commission appointed by the order of the Court the applicant is required to pay fee as for urgent measurement. These facts also show that there is no difference from getting Nimitana Measurement by filing separate application to

survey office and through the order of the Court. Therefore, I am of the considered view that this is not the case where an order for commissioner can be made. Therefore, the application is liable to be rejected.

13. Moreover, there is nothing in Order 26 Rule 9 of C.P.C., which gives jurisdiction to this Court to appoint Surveyor/T.I.L.R., to do Nimtana Measurement. In fact there is no provision to appoint Nimtana Measurement Surveyor on the measurement map produced in evidence by the contesting party. For this view I am buttressed by the case of Gangadhar M. Gajakas V/s. Shantilal U. Gandhi reported in 2001(3) Bom.C.R.260 wherein, His Lordship was pleased to held that there is no provision of Nimtana on the Court Commissioner's report. Though, there is no Court Commissioner's report on record in view of the allegations made by the plaintiffs in their application, this case law is squarely applicable which will lead me to held that there is no provision in Civil Procedure Code to appoint T.I.L.R./Superintendent Land Records as Court Commissioner to do Nimtana Measurement work or Super Nimtana Measurement. Above all as observed by me Supra, the Nimtana measurement work is not within the scope of Order 26 Rule 9 of Civil Procedure Code. Therefore, also the application is not tenable and is liable to be rejected.

14. To sum up, the plaintiffs have not come with diligence before this Court. No bonafides are seen in the conduct of the plaintiffs. There is no provision to order Nimtana Measurement. Even the Surveyor from the T.I.L.R. Office cannot be appointed as Court Commissioner. The plaintiffs are at liberty to get measure their land through competent authority either in the form of Nimtana Measurement. or Super Nimtana Measurement. by following procedure laid down under the Maharashtra Land Revenue Code, 1966 for which no order of Court is necessary. In view of this and my discussion, supra, I am not inclined to grant this

application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh. 27 is rejected.
2. The costs will be in the cause.

(Pronounced in Open Court.)

DATE -05-02-2007.
BARSHI.

(M.B.Lambe),
Iv th Jt.Civil Judge,J.D.Barshi.

Furefore, the application is liable to be rejected.

8. It is well settled principle in law that the commission cannot be appointed for collecting evidence. The defendant by way of filing this application is definitely collecting evidence through the machinery of Court and by getting order from the Court. In view of this legal position also the application is not

tenable. Therefore, the application is liable to be rejected.

9. Furthermore, if facts pleaded by the plaintiffs and defendants are considered along with all documents it transpires that local inspection u/o 26, rule 9 of C.P.C. is not necessary in respect suit as there is nothing on record produced by the plaintiffs or defendants of which **elucidation** (emphasis supplied) is necessary. Therefore, the application is liable to be rejected.

10. Furthermore, as this is the suit seeking simplicitor injunction as not to disturb plaintiffs possession on the basis of nimtana measurement there is nothing on record which will lead me to infer that order can be passed in favour of the plaintiffs within the scope and ambit of Order 26 Rule 9 of Civil Procedure Code. Therefore, the application is liable to be rejected.

11. The non-raising of any objection by the defendant will not give any legal right to the plaintiffs to pass any discretionary order or to give relief in his favour when they are not otherwise legally entitled for the same. The plaintiffs have to stand on their own legs. In view of my discussion supra the plaintiffs though were aware about their rights have not shown any diligence so as to use any discretion in their favour. Therefore, also the application is liable to be rejected.

12. Above all, the person who will measure the land while acting as Superintendent Land Records either on the application of the plaintiffs filed independently to Survey Officer or by appointment on an order of the Court, is a person who is an expert from the Survey Office. The discretion is given to the applicant applying to get measure his property to file application for simple measurement, for urgent measurement and for most urgent measurement and accordingly as per the order issued by the Settlement Commissioner, Director land records Maharashtra State dated 30-10-2001 the different fee is charged. So far as the commission appointed by the order of the Court the applicant is required to pay fee as for urgent measurement. These facts also show that there is no difference

from getting Super Nimatana Measurement by filing separate application to survey officer and through the order of the Court. Therefore, I am of the considered view that this is not the case where an order for commissioner can be made. Therefore, the application is liable to be rejected.

13. I have brought to the notice of plaintiffs Advocate Shri Karanjkar, the case of Gangadhar M. Gajakas V/s. Shantilal U. Gandhi reported in 2001(3) Bom.C.R.260 wherein, His Lordship was pleased to held that there is no provision of Nimtana on the Court Commissioner's report.

14. Though, there is no Court Commissioner's report on record in view of the allegations made by the plaintiffs in their application, this case law is squarely applicable which will lead me to held that there is no provision in Civil Procedure Code to appoint Superintendent Land Records as Court Commissioner to do Super Nimtana Measurement work. Above all as observed by me Supra, the Super Nimtana measurement work is not within the scope of Order 26 Rule 9 of Civil Procedure Code. Therefore, also the application is not tenable and is liable to be rejected.

13. To sum up, the plaintiffs have not come with diligence before this Court. No bonafides are seen in the conduct of the plaintiffs. There is no provision to order Super Nimtana Measurement. Even the Surveyor from the T.I.L.R. Office cannot be appointed as Court Commissioner. The plaintiffs are at liberty to get measure their land through competent authority either in the form of nimtana measurement or super nimtana measurement by following procedure laid down under the Maharashtra Land Revenue Code for which no order of Court is necessary. In view of this and my discussion, supra, I am not inclined to grant this application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh.38 is rejected.
 2. The costs will be in the cause.
- (Pronounced in Open Court.)

DATE -07-06-2006.
BARSHI.

(M.B.Lambe),
Iv th Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH. 27 IN R.C.S.No.280/2006
(Passed on 30-11-2006)
NATURE OF THE APPLICATION

1. This is an application filed by the defendants seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The defendants have contended that the plaintiff is not in possession of the suit property land. In fact from the year, 1976 no one was in possession of the land allotted to the plaintiff and therefore, the persons from village had excavated minor minerals (murum) from the said land, because of which there are pits upon the land making it uncultivable. So also Nandani-Halduge road is passing through the said land due to which it is not possible to enjoy the said land. Therefore, in order to bring the fact of natural flow of the water, it is necessary to appoint an advocate as Court Commissioner. If an advocate is appointed as Court Commissioner it will help to decide the suit on merits and will not cause any harm or injustice to the defendants. On these grounds, the defendants have prayed to grant the application.

FACTS IN THE SAY OF PLAINTIFF

3. The plaintiff has filed say exh.29 and denied all the material averments in the application. It is contended that to see the possessor of any land Court Commissioner cannot be appointed. The plaintiff is in possession of the suit property land which is handed over in his possession by Tahasildar, Barshi. Therefore, it is not necessary to see the situation existing upon the said land. Only to prolong the hearing of application exh.5, the present application is filed. It is not necessary to appoint Court Commissioner in this matter. On these grounds the plaintiff has prayed to reject the application.

THE ARGUMENT

4. I heard, Shri. B. N. Chavan, advocate for the defendants and Shri S.B.

Kapase, advocate for the plaintiff, at length.

5. They argued in consonance with their contentions in the application and say. So it is not necessary to repeat the same.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

POINTS

FINDINGS

- | | |
|--|-------------------------|
| 1. Can the Court Commissioner be appointed, as prayed for? | Yes. |
| 2. What order? | Application is allowed. |

REASONS AS TO POINT No.1

7. O.XXVI, R.9 of C.P.C. read as under. :-

7.1 Commission to make local investigations.--

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 of damages of annual net profits, the Court may issue a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiff has filed this suit seeking permanent injunction against the defendants as not to disturb his possession upon the suit land property Gat

No.3 eastern side H.1.60 Are area. The defendants by filing their written statement exh.18 have contested the suit denying plaintiff's possession upon the suit property land. According to them from the year, 1976 no one was in possession of the land allotted to the plaintiff and therefore, the persons from village had excavated minor minerals (murum) from the said land, because of which there are pits upon the land making it uncultivable. So also Nandani-Halduge road is passing through the said land due to which it is not possible to enjoy the said land. Thus, the defendants are intending to bring on record the situation existing upon the land Gat No.3. Therefore, I am unable to persuade the submissions of plaintiff that the present application is filed to see possession of the suit property land. Therefore, keeping in mind the scope and object of Order 26 Rule 9, as discussed supra, if an advocate is appointed to act as commissioner in this matter, it will help to bring on record the situation existing upon suit property land and nothing else. Further, it will not cause any harm or injustice to the plaintiff also if the situation existing upon the suit property land comes on record.

10. The appointment of an advocate as Court commissioner in this matter will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the suit property land on record and nothing more than that.

11. Moreover, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative . In the result, the order.

ORDER

1. The application exh.27 is granted.
2. Shri. B. V. Diwakar, Advocate, Barshi is appointed to act as Court commissioner in this matter.
3. The defendants are directed to deposit Rs.800/- (Rs. Eight hundred only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 08-12-2006 failing which the application shall stand rejected automatically.
4. The Court Commissioner is directed to do the commission work keeping in mind the contents in the pleadings of both the parties and the situation shown by both parties and their respective advocates, if present and submit his report on or before 22/12/2006 failing which substantial amount from his commission fees will be deducted.

(Pronounced in Open Court).

Dt.30-11-2006

(M.B.Lambe),
Iv Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH. 7 IN R.C.S.No.338/2005

(Passed on 17-11-2006)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiffs seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The plaintiffs have contended that the defendants have obstructed the natural flow of water by putting obstruction of soil and are doing illegal act to cause damage to them. Therefore, in order to bring the fact of natural flow of the water, it is necessary to appoint an advocate as Court Commissioner. If an advocate is appointed as Court Commissioner it will help to decide the suit on merits and will not cause any harm or injustice to the defendants. On these grounds, the plaintiff has prayed to grant the application.

FACTS IN THE SAY OF DEFENDANTS

3. The defendants have filed say and denied all the material averments in the application. It is contended that it is not necessary to appoint Court Commissioner in this matter. On these grounds the plaintiff has prayed to reject the application.

THE ARGUMENT

4. I heard, Shri. B. N. Handibag, advocate for the plaintiff and Shri P. R. Karanjkar, advocate for the defendants, at length.

5. They argued in consonance with his contentions in the application and say. So it is not necessary to repeat the same.

POINTS AND FINDINGS

6. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

POINTS

FINDINGS

- | | | |
|----|---|----------------------------|
| 1. | Can the Court Commissioner be appointed, as prayed for? | Yes. |
| 2. | What order? | Application
is allowed. |

REASONS AS TO POINT No.1

7. O.XXVI, R.9 of C.P.C. read as under. :-

7.1 **Commission to make local investigations.--**

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 of damages of annual net profits, the Court may issue a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

8. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

9. The plaintiffs have filed this suit seeking permanent injunction against the defendants as not to damage the tal standing in their land or to obstruct the natural flow of water. The defendants have denied any overact done by them as alleged by the plaintiffs. Thus, the dispute between the plaintiffs and defendants is about the flow of water and alleged obstruction caused by the defendants. Therefore, keeping in mind the scope and object of Order 26 Rule 9, as discussed supra, if an advocate is appointed to act as commissioner in this matter, it will help to bring on record the situation existing in respect of road, if

any and will not cause any harm or injustice to the defendants.

10. The appointment of an advocate as Court commissioner in this matter will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the disputed well, its water and tamarind tree so also mango trees, on record and nothing more than that.

11. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative . In the result, the order.

ORDER

1. The application exh.35 is granted.
2. Shri. R. U. Vaidya , Advocate, Barshi is appointed to act as Court commissioner in this matter.
3. The plaintiff is directed to deposit Rs.800/- (Rs. Eight hundred only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 22-11-2006 failing which the application shall stand rejected automatically.
4. The Court Commissioner is directed to do the commission work keeping in mind the contents in the pleadings of both the parties and the situation shown by both parties and their respective advocates, if present and submit his report on or before 03/12/2006 failing which substantial amount from his commission fees will be deducted.

(Pronounced in Open Court).

Dt.17-11-2006

(M.B.Lambe),
Iv Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH. 35 IN R.C.S.No.423/2001
(Passed on 15-11-2006)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiff seeking appointment of an advocate as Court Commissioner under order 26 Rule 9 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The plaintiff has contended that he is in possession of Gat No. 119, middle portion, of which an area is admeasuring Hectare 1.21 Are land which was purchased by him. There is a Malegaon boundary adjacent to the said land towards Southern side. The said boundary is 20 to 25 feet in width. The defendants are owners of land Gat No. 279/1 and 279/2 which are adjacent to the said Malegaon boundary. The plaintiff is required to approach his land from Village Mungshi-Malegaon road up to the Malegaon boundary and upon the said boundary he has to pass towards Eastern side. The said road is in existence and used by plaintiff and other 15 to 20 agriculturalists. But during pendency of this suit the defendants have damaged the said road and have put stones so as to cause obstruction upon the said road. Therefore, in order to bring these facts on record,

it is necessary to appoint an advocate as Court Commissioner. If an advocate is appointed as Court Commissioner it will help to decide the suit on merits and will not cause any harm or injustice to the defendants. On these grounds, the plaintiff has prayed to grant the application.

NO SAY BY THE DEFENDANTS

3. The defendants have failed to file their say. Hence, application proceeded without their say.

THE ARGUMENT

4. I heard, Shri. S.M. Gund, advocate for the plaintiff, at length and Shri B.N. Chavan, advocate for the defendants on law points only.

5. Shri Gund, advocate for the plaintiff argued in consonance with his contentions in the application. So it is not necessary to repeat the same.

6. Shri Chavan, advocate for the defendants forcefully argued that after paying the costs of Rs.500/- for causing delay in proceeding with this matter, the plaintiff has filed this application to cause further delay. Hence, the application is not tenable and is liable to be rejected.

POINTS AND FINDINGS

7. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.
2. What order?	Application is allowed.

REASONS AS TO POINT No.1

8. O.XXVI, R.9 of C.P.C. read as under. :-

8.1 **Commission to make local investigations.--**

will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the disputed well, its water and tamarind tree so also mango trees, on record and nothing more than that.

12. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative . In the result, the order.

ORDER

1. The application exh.35 is granted.
2. Shri. R.P. Karanjkar, Advocate, Barshi is appointed to act as Court commissioner in this matter.
3. The plaintiff is directed to deposit Rs.800/- (Rs. Eight hundred only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 20-11-2006 failing which the application shall stand rejected automatically.
4. The Court Commissioner is directed to do the commission work keeping in mind the contents in the pleadings of both the parties and the situation shown by both parties and their respective advocates, if present and submit his report on or before 01/12/2006 failing which substantial amount from his commission fees will be deducted.

(Pronounced in Open Court).

(M.B.Lambe),

Dt.15-11-2006

Iv Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH. 79 IN R.C.S.No.270/1998**(Passed on 09-10-2006)****NATURE OF THE APPLICATION**

1. This is an application filed by the defendant seeking appointment of an advocate as Court Commissioner under order 26 Rule 3 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The defendant has contended that the plaintiff has filed this suit in respect of well, well water and tamarind tree in respect of which he has no right. In Gat No. 72 there is one well having water and mango trees, tamarind tree is there. The plaintiff has denied the defendant's right in the well, its water and tamarind tree. He has also contended that there are no mango trees in the same Gat number. The plaintiff's Gat No. 70 is at a distance of three to four lands from the defendant's land. In order to bring these facts on record it is necessary to appoint an advocate as Court Commissioner. On these grounds, the defendant has prayed to grant the application.

FACTS IN THE SAY

3. The plaintiff has filed say and denied all the material averments in the application. It is contended that the plaintiff and defendant have closed their evidence. Only to collect evidence the present application is filed at the stage of argument which is not tenable. It is not possible for the advocate commissioner to know the pot hissas of the Gat number. On these grounds the plaintiff has prayed to reject the application.

THE ARGUMENT

4. I have heard, Miss. A. C. Mangire, advocate for the defendant and Shri. A. R. Patil, advocate for the plaintiff, at length. They argued in consonance with their contentions in the application and say. So it is not necessary to repeat the same.

POINTS AND FINDINGS

5. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.
2. What order?	Application is allowed.

REASONS AS TO POINT No.1

6. O.XXVI, R.9 of C.P.C. read as under. :-

6.1 **Commission to make local investigations.--**

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 the market-value of any property or profits of damages of a commission to such person at it thinks fit directing

ascertaining the amount of any mesne annual net profits, the Court may issue

him to make such investigation and to report thereon to the Court.

Provided that,

7. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

8. The plaintiff has filed this suit seeking permanent injunction against the defendant as not to obstruct him from enjoying the well in Gat No. 72, its water and tamarind fruits. The defendant by filing his written statement has denied the plaintiff's right in respect of well, its water and tamarind tree.

9. The plaintiff and defendants have led their entire evidence. After going through this evidence it is not at all possible to know the situation in respect of the disputed well, water and tamarind tree. Therefore, keeping in mind the scope and object of Order 26 Rule 9 of C.P.C. as discussed supra I am of the considered view that it is not possible for the defendant to bring on record the situation pleaded by him and the plaintiff in respect of the well, its water and tamarind tree so also mango trees, by any other means. Therefore, I am inclined to appoint an advocate as Court Commissioner.

10. The appointment of an advocate as Court commissioner in this matter will

not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the disputed well, its water and tamarind tree so also mango trees, on record and nothing more than that.

11. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application. Accordingly, I answer point No.1, in the affirmative .

12. However, considering the stage when the defendant has filed this application it is necessary to direct the Court commissioner to do the commission work as early as possible by giving a time bound programme and file his report which will save time and serve the purpose of justice. So the defendant will be required to pay commission fee amounting to Rs.1,000/-. In the result, I proceed to pass the following order

ORDER

1. The application exh.37 is granted.
2. Shri. S. J. Mujawar, Advocate, Barshi is appointed to act as Court commissioner in this matter.
3. The defendant is directed to deposit Rs.1,000/- (Rs. One thousand only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 13-10-2006 failing which the application shall stand rejected automatically.
4. The Court Commissioner is directed to do the commission work keeping in mind the contents in the

application, say and the situation shown by
and their respective advocates, if
report on or before
substantial amount from

both parties
present and submit his
20/10/2006 failing which
his commission fees will be deducted.

(Pronounced in Open Court).

Dt.09-10-2006

(M.B.Lambe),
Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.37 IN R.C.S.No.130/2006

(Passed on 04-10-2006)

NATURE OF THE APPLICATION

1. This is an application filed by the defendants seeking appointment of an advocate as Court Commissioner under order 26 Rule 3 of Civil Procedure Code.

FACTS IN THE APPLICATION

2. The defendants have contended that the plaintiff has raised objection in respect of defendants possession in the cattle shed which is upon Gat No. 37/4. It is not possible for the defendants to bring the factual situation in respect of the

said cattle shed by any other mode. Further towards western side of Gat No. 37/4 there is a road available for the defendants to approach their cattle shed. In order to bring all these facts on record it is necessary to appoint an advocate as Court Commissioner. On these grounds, the defendants have prayed to grant the application.

FACTS IN THE SAY

3. The plaintiff has filed say exh.48 and denied all the material averments in the application. It is contended that after filing of the suit the defendants have changed the situation existing in respect of the road by cutting trees etc. Only to collect evidence the present application is filed. On these grounds the plaintiff has prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri. M. P. Dhus, advocate for the defendants and Shri. S.B. Khandelwal, advocate for the plaintiff, at length. They argued in consonance with their contentions in the application and say. So it is not necessary to repeat the same.

POINTS AND FINDINGS

5. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can the Court Commissioner be appointed, as prayed for?	Yes.
2. What order?	Application is allowed.

REASONS AS TO POINT No.1

6. O.XXVI, R.9 of C.P.C. read as under. :-

6.1 **Commission to make local investigations.--**

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 the market-value of any property or profits of damages of a commission to such person at it thinks fit directing him to make such investigation and to report thereon to the Court.

Provided that,

7. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

8. The plaintiff has filed this suit seeking permanent injunction against the defendants as not to enter upon the suit property or as not to create a new road and as not to cut down the trees etc. The defendants have come with a specific contention that they are in possession of a cattle shed and nearby space since long. It is their further contention that to approach their cattle shed there is a road available for them and the plaintiff has filed this suit only to harass them.

9. The plaintiff has produced on record a map of Gat No. 37 exh.4/2, the defendants have also produced on record the village map exh.44/1. After going through these maps it is not at all possible to know the situation in respect of the disputed portion i.e. Suit property, road etc. Keeping in mind the scope and object of Order 26 Rule 9 of C.P.C. as discussed supra I am of the considered view that it is not possible for the defendants to bring on record the situation pleaded by them in respect of their cattle shed and road etc. or in respect of the facts pleaded by the plaintiff, by any other means. Therefore, I am inclined to appoint an advocate as

Court Commissioner.

10. The appointment of an advocate as Court commissioner in this matter will not amount to collect evidence in any manner. For the simple reason that if an advocate is appointed as Court Commissioner he will bring factual situation in respect of the suit property on record and nothing more than that.

11. Further, if an advocate is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the application exh.5 and ultimately the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application.

12. Moreover, at the time of filing of the suit itself the plaintiff had filed application exh.7 seeking appointment of an advocate as Court Commissioner. This itself is sufficient to infer that the plaintiff was also intending to appoint an advocate as Court Commissioner and therefore the objection raised by the plaintiff is not at all sustainable. Accordingly, I answer point No.1, in the affirmative .

13. However, considering the urgency pressed by the plaintiff it is necessary to direct the Court commissioner to do the commission work immediately and file his report which will save time and serve the purpose of justice. So the defendants will be required to pay commission fee amounting to Rs.1,000/-. In the result, I proceed to pass the following order

ORDER

1. The application exh.37 is granted.
2. Shri. R. U. Vaidya, Advocate Barshi is appointed to act as Court commissioner in this matter.
3. The defendants are directed to deposit Rs.1,000/- (Rs.One thousand only) towards costs and fees of the Court commissioner in the Court with requisite process fee on or before 06-10-2006.

4. The Court commissioner is directed to do the commission work on 08/10/2006 in between 10 a.m. To 3 p.m. and submit his report on or before 10/10/2006 failing which substantial amount from his commission fees will be deducted.

5. The plaintiffs and defendants are directed to file pursis waiving the notice of proposed commission work and to remain present on 08/10/2006 upon the suit property. If any of them fails to file pursis or remain present, the commissioner is at liberty to do the commission work exparte without waiting for any one and submit his report, as directed.

6. The Court Commissioner is directed to do the commission work keeping in mind the contents in the application, say and the situation both parties and their respective shown by advocates, if present in respect of the suit property only.
(Pronounced in Open Court).

Dt.04-10-2006

(M.B.Lambe),
Iv Jt.Civil Judge,J.D.Barshi.

ORDER

1. The application exh.37 is granted.
2. _____, Advocate Barshi is appointed to act as Court commissioner in this matter.
3. The defendants are directed to deposit Rs.1,000/-(Rs.One thousand only) towards costs and fees of the Court in the Court with requisite process fee on or before 06-10-2006. _____ commissioner
4. The Court commissioner is directed to do the commission work on 08/10/2006 in between 10 a.m. To 3 p.m. And submit his report on _____ or before 10/10/2006 failing which _____ substantial amount from his commission fees will be deducted.
5. 5. Plaintiffs and defendants are directed to file _____ the pursis waiving the notice of proposed _____ commission work and to remain present on _____ 08/10/2006 upon the suit property. If any of them fails to file pursis or remain present, a _____ commissioner is at liberty to do the _____ commission work exparte without waiting for any one and submit his report, as directed.
6. 6. The Court Commissioner is directed to do the commission work keeping in mine the contents in the application, say and

the situation shown by both parties and their respective advocates in respect of the suit property only.

(Pronounced in Open Court).

Dt.19-08-2006

(M.B.Lambe),
Iv Jt.Civil Judge,J.D.Barshi.

The plaintiff has filed this suit seeking permanent injunction against the defendants as not to take possession forcibly of the plaintiffs' land on the basis of nimtana measurement. The defendants by filing their written statement Exh.15 and 30 have denied the suit alleging that there is no force in the suit and it is falsely filed against them.

7. Admittedly, the plaintiffs have got measured their lands vide Measurement Register Nos. 1895+1910+1915, Exh. 4/4. After the said measurements nimtana measurement was carried vide nimtana Measurement Register No.88/2002 Exh. 24/2. There is no dispute that the respective measurements and nimtana measurement was carried as per the applications filed by the plaintiffs and the defendants. There was no order of any Court directing the Measurement Surveyor to carry out those measurements. Under the land revenue code T.I.L.R. is vested with separate jurisdiction and power to measure land/plot within his jurisdiction after receiving application by any land holder/owner. There is no explanation given by the plaintiffs why they failed to approach the Superintendent Land Records, Solapur to get Super Nimtana measurement, if at all they were aggrieved by the Nimtana measurement Register No.88/2002. This non-diligence on the part of plaintiffs cannot be overlooked and due to inaction on their part any discretionary order to appoint Superintendent Land Records, Solapur as Court commissioner cannot be passed in their favour. The

ORDER BELOW EXH.121, IN R.C.S.No.71/1995

(Passed on 19-11-2005)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiff seeking appointment of T.I.L.R. as Court Commissioner under O.26, R.9 of C.P.C.

FACTS IN THE APPLICATION

2. It is contended that the plaintiff has filed this suit seeking permanent injunction. After filing of this suit the plaintiff by filing his applications exh.64, 91 alleged that the defendants have made encroachment in an area more than 1000 square feet. Alternatively the plaintiff has prayed possession. According to which the defendant had made encroachment in the entire area of Western side. Unless the surveyor is appointed it is not possible to know the exact area of encroachment. Therefore, it is necessary to appoint a surveyor as Court commissioner, who should be directed to measure old Gat No.638(new Gat No.644) H 0.25 Are. On these grounds the plaintiff has prayed for grant of the application.

FACTS IN THE SAY

3. The defendants have filed say exh.125 and strongly objected the application. It is contended that the application is not tenable. The suit is seeking permanent injunction. The plaintiff wants to collect evidence as he has not produced any document evidence to prove his separate possession. Before filing of this suit the plaintiff was never in possession, as alleged. Only to prolong this suit the present application is filed. On these grounds the defendants have prayed for rejection of the application.

THE ARGUMENT

4. I have heard, Shri.S.B.Khandelwal, advocate for the plaintiff and Shri. P. B. Kulkarni, advocate for the plaintiff, at length.

POINTS AND FINDINGS

5. Upon hearing the application the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

POINTS**FINDINGS**

- | | | |
|----|---|--------------------------|
| 1. | Can the T.I.L.R. be appointed as Court commissioner, as prayed for? | No. |
| 2. | What order? | Application is rejected. |

REASONS AS TO POINT No.1

6. The plaintiff has filed this suit seeking permanent injunction against the defendants in respect of suit property 1A,B and not to make encroachment upon suit property 1B. The plaintiff has alternatively prayed that if after filing of this suit if it is found that the defendants have made encroachment it be removed. The plaintiff has pleaded that he is in possession of the suit property since long and the defendants have no concern with it. From the pleadings of plaintiff it is clear that this suit is seeking substantive relief of simpliciter injunction and plaintiff has to prove his possession upon the suit property by leading necessary evidence. Therefore, the alternative prayer cannot be considered at this stage since there is no evidence led by the plaintiff proving his possession itself in the suit property, as alleged. Hence no question of appointing T.I.L.R. as surveyor will arise. Therefore, on this ground the application is liable to be rejected.

7. The plaintiff has specifically contended that he is in possession of the suit property 1A as tenant and suit property 1B is purchased by him. This shows that the plaintiff is not owner of suit property 1A. Now, when according to the plaintiff separate sale-deed is standing in his name and his name is also mutated on the basis of said sale-deed in the revenue record, I am of the view that there is no hurdle before the plaintiff to approach the competent authority to measure his

purchased property, i e. suit property 1B. Nothing is on record which will show that the plaintiff has made any such attempt to get measure his land through T.I.L.R. or the competent authority and the said attempt failed. Therefore, on this ground also the application is liable to be rejected.

8. The plaintiff has filed present suit in the year 1995 in which he has made alternate prayer that if after filing of the suit any encroachment is made it be removed. In this application the plaintiff has vaguely stated that according to his knowledge the defendants have made encroachment in the entire western side portion. No specific date or period is given of the alleged encroachment made by the defendants for the best reasons known to the plaintiff. If at all there was any encroachment made by the defendants after filing of this suit the plaintiff might have approached this Court seeking orders in respect of that encroachment. Unless the exact period, date is clarified by the plaintiff in respect of alleged encroachment it will not be in the interest of justice to allow this application treating that the defendants have made encroachment and appointment of T.I.L.R as Court commissioner is necessary. Therefore, on this ground also the application is liable to be rejected.

9. The plaintiff has filed applications exh.64. Dated 2-12-1995, exh.91, dated 23-7-2002, exh.100, dated 5-8-2003. In all these applications the plaintiff has specifically contended that the defendants have made illegal construction by making encroachment in suit property 1B. The applications exh.91 and exh.100 came to be rejected on 5-7-2003 and 16-8-2004, respectively. This shows that since 2-12-1995, at least, the plaintiff is contesting this suit on the same type of allegations in respect of illegal constructions made by the defendants. There is

no explanation on record why he failed to file said applications before the competent authority as discussed by me supra or before this Court seeking appointment of Court commissioner before filing this application. This shows that the plaintiff wants to collect evidence with the help of Court and is not diligent about his rights. So, the application is devoid of merits. Therefore, the application is liable to be rejected.

10. The suit is filed on 18-2-1995, issues were framed on 26-2-1997; since matter is posted for hearing. In stead of leading his evidence the plaintiff has sought time and adjournments and at last filed this application without any soul reason. Therefore, the application is liable to be rejected.

11. Furthermore, if facts pleaded by the plaintiff and defendants are considered along with all the documentary evidence it transpires and gives indication that local inspection u/o 26, rule 9 is not necessary in this suit. Therefore, the application is liable to be rejected.

12. Moreover, the person who will measure the land either on the application of the plaintiffs filed independently to Survey Officer or by appointment of an order of the Court, is a person who is an expert from the Survey Office. The discretion is given to the applicant applying to get measure his property to file application for simple measurement, for urgent measurement and for most urgent measurement and accordingly as per the order issued by the settlement commissioner, Director land records Maharashtra State dated 30-10-2001 the different fee is charged. So far as the commission appointed by the order of the Court the applicant is required to pay fee as for urgent measurement.

These facts also show that there is no difference from getting measurement by filing separate application to survey officer and through the order of the Court. Therefore, I am of the considered view that this is not the case where an order for commissioner can be made. Therefore, the application is liable to be rejected.

13. To sum up, the plaintiff has not come with clean hands. No bonafides seen in this application. I am of the considered view that only to prolong the suit and in order to collect evidence present application is filed. In view of this, I am not inclined to grant this application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh.121 is rejected.
2. The costs will be in the cause.

(Pronounced in Open Court.)

DATE -19-11-2005

(M.B.Lambe),

BARSHI.

Iv th Jt.Civil Judge,J.D.Barshi.

Furefore, the application is liable to be rejected.

8. It is well settled principle in law that the commission cannot be appointed for collecting evidence. The defendant by way of filing this application is definitely collecting evidence through the machinery of Court and by getting order from the Court. In view of this legal position also the application is not tenable. Therefore, the application is liable to be rejected.

9. Furthermore, if facts pleaded by the plaintiffs and defendants are considered along with all documents it transpires that local inspection u/o 26, rule 9 of C.P.C. is not necessary in respect suit as there is nothing on record produced by the plaintiffs or defendants of which **elucidation** (emphasis supplied) is necessary. Therefore, the application is liable to be rejected.

10. Furthermore, as this is the suit seeking simplicitor injunction as not to disturb plaintiffs possession on the basis of nimtana measurement there is nothing

on record which will lead me to infer that order can be passed in favour of the plaintiffs within the scope and ambit of Order 26 Rule 9 of Civil Procedure Code. Therefore, the application is liable to be rejected.

11. The non-raising of any objection by the defendant will not give any legal right to the plaintiffs to pass any discretionary order or to give relief in his favour when they are not otherwise legally entitled for the same. The plaintiffs have to stand on their own legs. In view of my discussion supra the plaintiffs though were aware about their rights have not shown any diligence so as to use any discretion in their favour. Therefore, also the application is liable to be rejected.

12. Above all, the person who will measure the land while acting as Superintendent Land Records either on the application of the plaintiffs filed independently to Survey Officer or by appointment on an order of the Court, is a person who is an expert from the Survey Office. The discretion is given to the applicant applying to get measure his property to file application for simple measurement, for urgent measurement and for most urgent measurement and accordingly as per the order issued by the Settlement Commissioner, Director land records Maharashtra State dated 30-10-2001 the different fee is charged. So far as the commission appointed by the order of the Court the applicant is required to pay fee as for urgent measurement. These facts also show that there is no difference

from getting Super Nimatana Measurement by filing separate application to survey officer and through the order of the Court. Therefore, I am of the considered view that this is not the case where an order for commissioner can be made. Therefore, the application is liable to be rejected.

13. I have brought to the notice of plaintiffs Advocate Shri Karanjkar, the case of Gangadhar M. Gajakas V/s. Shantilal U. Gandhi reported in 2001(3) Bom.C.R.260 wherein, His Lordship was pleased to held that there is no provision of Nimtana on the Court Commissioner's report.

14. Though, there is no Court Commissioner's report on record in view of the allegations made by the plaintiffs in their application, this case law is squarely applicable which will lead me to held that there is no provision in Civil Procedure Code to appoint Superintendent Land Records as Court Commissioner to do Super Nimtana Measurement work. Above all as observed by me Supra, the Super Nimtana measurement work is not within the scope of Order 26 Rule 9 of Civil Procedure Code. Therefore, also the application is not tenable and is liable to be rejected.

13. To sum up, the plaintiffs have not come with diligence before

this Court. No bonafides are seen in the conduct of the plaintiffs. There is no provision to order Super Nimtana Measurement. Even the Surveyor from the T.I.L.R. Office cannot be appointed as Court Commissioner. The plaintiffs are at liberty to get measure their land through competent authority either in the form of nimtana measurement or super nimtana measurement by following procedure laid down under the Maharashtra Land Revenue Code for which no order of Court is necessary. In view of this and my discussion, supra, I am not inclined to grant this application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh.38 is rejected.
2. The costs will be in the cause.
(Pronounced in Open Court.)

DATE -07-06-2006.
BARSHI.

(M.B.Lambe),
Iv th Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.36, IN R.C.S.No.561/2001

(Passed on 07-06-2006)

NATURE OF THE APPLICATION

1. This is an application filed by the defendants seeking directions against the plaintiff to appoint an expert as Court Commissioner.

FACTS IN THE APPLICATION

2. The defendants have contended that the plaintiff's C.S.No. 369 is towards Western side of C.S.No.370. The disputed Neem tree is not in C.S.No. 370, in fact it is in defendants' C.S.No. 366. Unless the plaintiff got measures his property C.S.No.369, it is not possible to know the exact location of the disputed tree. Therefore, the plaintiff is required to be directed to get measure his C.S.No.369. On these grounds, the defendants have prayed to grant the

application.

FACTS IN THE SAY

3. The Plaintiff has filed say and strongly objected the application. It is contended that defendants have no right to seek direction as prayed. On these grounds, the plaintiff has prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri.B.V.Diwakar, advocate for the defendants and Shri. B.N.Handibag, advocate for the plaintiff, at length, who argued inconsonance with their application and say.

POINTS AND FINDINGS

5. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can direction be given to the plaintiff to seek appointment of Court commissioner, as prayed for?	No.
2. What order?	Application is rejected.

REASONS AS TO POINT No.1

6. O.XXVI, R.9 of C.P.C. read as under. :-

6.1 **Commission to make local investigations.--**

In any suit in which the Court deems a local investigation to be requisite or proper for the

9. Moreover, if according to the defendants, the Neem tree is in their C.S.No.366, they are at liberty to get measure their C.S.No.366, so as to clarify this fact. This is not done by the defendants for the best reasons known to them. There are no bonafides in the application. The application is

liable to be rejected. Accordingly, I answer Point No.1 in the negative and proceed to pass the following order.

ORDER

1. The application exh.36 is rejected.
2. The costs will be in the cause.
(Pronounced in Open Court.)

DATE -07-06-2006.
BARSHI.

(M.B.Lambe),
Iv th Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.38, IN R.C.S.No.134/2004

(Passed on 07-06-2006)

NATURE OF THE APPLICATION

1. This is an application filed by the plaintiff seeking appointment of Court Commissioner to do Super Nimtana Measurement.

FACTS IN THE APPLICATION

2. The plaintiff has contended that he has filed this suit for permanent injunction. The plaintiff has got measured his land vide Measurement Register Nos. 1895+1910+1915. The defendant against these measurements had got measured the lands vide Nimtana measurement Register No. 88/2002. There is difference between these two measurements and issue is also framed to that effect, therefore, it has become necessary to appoint Superintendent Land Records, Solapur to do super nimtana measurement by checking the measurements carried vide Measurement register nos. 1895+1910+1915 and 88/2002. On these

grounds the plaintiff has prayed to grant the application.

FACTS IN THE SAY

3. The defendants failed to file their say. Hence, the application proceeded without defendants' say.

THE ARGUMENT

4. I have heard, Shri.P.R.Karanjkar, advocate for the plaintiff and Shri. S.V.Jadhav, advocate for the defendant Nos. 2 and 3 on law points only. None other defendant appeared and argued. The application is pending since long, I would like to decide it on merits.

POINTS AND FINDINGS

5. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow.

POINTS

FINDINGS

1. Can the Superintendent Land Record, Solapur be appointed as Court commissioner, as prayed for?

No.

2. What order?

Application

is rejected.

REASONS AS TO POINT No.1

6. The plaintiff has filed this suit seeking permanent injunction against the defendants as not to take possession forcibly of the plaintiffs' land on the basis of nimtana measurement. The defendants by filing their written statement Exh.15 and 30 have denied the suit alleging that there is no force in the suit and it is falsely filed against them.

7. Admittedly, the plaintiffs have got measured their lands vide Measurement Register Nos. 1895+1910+1915, Exh. 4/4. After the said measurements nimtana measurement was carried vide nimtana Measurement Register No.88/2002 Exh. 24/2. There is no dispute that the respective measurements and nimtana measurement was carried as per the applications filed by the plaintiffs and the defendants. There was no order of any Court directing the Measurement Surveyor to carry out those measurements. Under the land revenue code T.I.L.R. is vested with separate jurisdiction and power to measure land/plot

within his jurisdiction after receiving application by any land holder/owner. There is no explanation given by the plaintiffs why they failed to approach the Superintendent Land Records, Solapur to get Super Nimitana measurement, if at all they were aggrieved by the Nimitana measurement Register No.88/2002. This non-diligence on the part of plaintiffs cannot be overlooked and due to inaction on their part any discretionary order to appoint Superintendent Land Records, Solapur as Court commissioner cannot be passed in their favour. Therefore, the application is liable to be rejected.

8. It is well settled principle in law that the commission cannot be appointed for collecting evidence. The defendant by way of filing this application is definitely collecting evidence through the machinery of Court and by getting order from the Court. In view of this legal position also the application is not tenable. Therefore, the application is liable to be rejected.

9. Furthermore, if facts pleaded by the plaintiffs and defendants are considered along with all documents it transpires that local inspection u/o 26, rule 9 of C.P.C. is not necessary in respect suit as there is nothing on record produced by the plaintiffs or defendants of which **elucidation** (emphasis supplied) is necessary. Therefore, the application is liable to be rejected.

10. Furthermore, as this is the suit seeking simplicitor injunction as not to disturb plaintiffs possession on the basis of nimitana measurement there is nothing on record which will lead me to infer that order can be passed in favour of the plaintiffs within the scope and ambit of Order 26 Rule 9 of Civil Procedure Code. Therefore, the application is liable to be rejected.

11. The non-raising of any objection by the defendant will not give any legal right to the plaintiffs to pass any discretionary order or to give relief in his favour when they are not otherwise legally entitled for the same. The plaintiffs have to stand on their own legs. In view of my discussion supra the plaintiffs though were aware about their rights have not shown any diligence so as to use any discretion in their favour. Therefore, also the application is liable to be rejected.

12. Above all, the person who will measure the land while acting as Superintendent Land Records either on the application of the plaintiffs filed independently to Survey Officer or by appointment on an order of the Court, is a person who is an expert from the Survey Office. The discretion is given to the applicant applying to get measure his property to file application for simple measurement, for urgent measurement and for most urgent measurement and accordingly as per the order issued by the Settlement Commissioner, Director land

records Maharashtra State dated 30-10-2001 the different fee is charged. So far as the commission appointed by the order of the Court the applicant is required to pay fee as for urgent measurement. These facts also show that there is no difference

from getting Super Nimatana Measurement by filing separate application to survey officer and through the order of the Court. Therefore, I am of the considered view that this is not the case where an order for commissioner can be made. Therefore, the application is liable to be rejected.

13. I have brought to the notice of plaintiffs Advocate Shri Karanjkar, the case of Gangadhar M. Gajakas V/s. Shantilal U. Gandhi reported in 2001(3) Bom.C.R.260 wherein, His Lordship was pleased to held that there is no provision of Nimtana on the Court Commissioner's report.

14. Though, there is no Court Commissioner's report on record in view of the allegations made by the plaintiffs in their application, this case law is squarely applicable which will lead me to held that there is no provision in Civil Procedure Code to appoint Superintendent Land Records as Court Commissioner to do Super Nimtana Measurement work. Above all as observed by me Supra, the Super Nimtana measurement work is not within the scope of Order 26 Rule 9 of Civil Procedure Code. Therefore, also the application is not tenable and is liable to be rejected.

13. To sum up, the plaintiffs have not come with diligence before this Court. No bonafides are seen in the conduct of the plaintiffs. There is no provision to order Super Nimtana Measurement. Even the Surveyor from the T.I.L.R. Office cannot be appointed as Court Commissioner. The plaintiffs are at liberty to get measure their land through competent authority either in the form of nimtana measurement or super nimtana measurement by following procedure laid down under the Maharashtra Land Revenue Code for which no order of Court is necessary. In view of this and my discussion, supra, I am not inclined to grant this application. Accordingly, I answer point No.1, in the negative and proceed to pass the following order.

ORDER

1. The application exh.38 is rejected.
 2. The costs will be in the cause.
- (Pronounced in Open Court.)

DATE -07-06-2006.

(M.B.Lambe),

BARSHI.

Iv th Jt.Civil Judge,J.D.Barshi.

ORDER BELOW EXH.36, IN R.C.S.No.561/2001

(Passed on 07-06-2006)

NATURE OF THE APPLICATION

1. This is an application filed by the defendants seeking directions against the plaintiff to appoint an expert as Court Commissioner.

FACTS IN THE APPLICATION

2. The defendants have contended that the plaintiff's C.S.No. 369 is towards Western side of C.S.No.370. The disputed Neem tree is not in C.S.No. 370, in fact it is in defendants' C.S.No. 366. Unless the plaintiff got measures his property C.S.No.369, it is not possible to know the exact location of the disputed tree. Therefore, the plaintiff is required to be directed to get measure his C.S.No.369. On these grounds, the defendants have prayed to grant the application.

FACTS IN THE SAY

3. The Plaintiff has filed say and strongly objected the application. It is contended that defendants have no right to seek direction as prayed. On these grounds, the plaintiff has prayed to reject the application.

THE ARGUMENT

4. I have heard, Shri.B.V.Diwakar, advocate for the defendants and Shri. B.N.Handibag, advocate for the plaintiff, at length, who argued inconsonance with their application and say.

POINTS AND FINDINGS

5. Upon hearing the following points arise for my consideration and I

record my findings thereon as under for the reasons to follow.

<u>POINTS</u>	<u>FINDINGS</u>
1. Can direction be given to the plaintiff to seek appointment of Court commissioner, as prayed for?	No.
2. What order?	Application is rejected.

REASONS AS TO POINT No.1

6. O.XXVI, R.9 of C.P.C. read as under. :-

6.1 **Commission to make local investigations.--**

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 of damages of 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,

7. Power is conferred on the Court to appoint a Commissioner for local inspection in order that the Court may better appreciate the evidence already on record. Order 26, rule 9 of C.P.C. gives wide discretion to the Court to appoint commissioner when the Court deems the local investigation to be requisite or proper for the purpose of elucidating any matter in dispute.

8. The defendants have failed to satisfy me about any provision which will entitle them to seek direction against the plaintiff to get measure his C.S.No.369 or the disputed portion. If the scope and object of Order 26 Rule 9 of Civil Procedure Code is kept in mind, it is clear that no such direction can be given to the plaintiff on the application of defendants. It is the right of the plaintiff to proceed with his suit as per his own wish and convenience. If the plaintiff fails to prove his possession and ownership in respect of the Neem tree, the same is bound to be dismissed for which the defendants need not bother. What evidence is required to be brought on record is the choice of plaintiff and defendants are not at liberty to seek direction against the plaintiff to do a particular thing or to bring on record evidence in respect of the dispute. Therefore, the application is not legal, tenable and is liable to be rejected.

9. Moreover, if according to the defendants, the Neem tree is in their C.S.No.366, they are at liberty to get measure their C.S.No.366, so as to clarify this fact. This is not done by the defendants for the best reasons known to them. There are no bonafides in the application. The application is

liable to be rejected. Accordingly, I answer Point No.1 in the negative and proceed to pass the following order.

ORDER

1. The application exh.36 is rejected.
 2. The costs will be in the cause.
- (Pronounced in Open Court.)

DATE -07-06-2006.
BARSHI.

(M.B.Lambe),
Iv th Jt.Civil Judge,J.D.Barshi.