

ORDER BELOW EXH.19
(Passed on 21.09.2019)

By way of present application the applicant i.e. defendants soliciting to appoint the Court Commissioner under Order 26 Rule 9 of the Civil Procedure Code.

2. In order to issue the Court Commissioner under the said provision the applicant contends that as per plaintiff, on the measurement sheet 'C' respecting to the field gat nos.149/1 and 149/1(A) therein two roads shown and between them the open space mentioned. In fact there is no such two roads have been gone through the said area, however the plaintiff showing wrong picture as to the facts relating to the disputed area trying to mislead the Court. The applicant contends that, there is no two roads available and between them no open space is available as asserted by the plaintiff. Hence the present application.

3. The plaintiff resisted the present application on the ground that, the Court is not a machinery to collect the evidence. While deciding the application under order 39 rule 1 and 2 of the C.P.C. the available material on record is to be considered. At the stage of hearing on application for temporary injunction present application cannot be entertained. Hence, he sought for rejection of the present application imposing heavy cost.

4. I heard the respective counsel of defendants as well as

plaintiff. I have gone through the contention of application and documents filed along with suit. Following points arise for my determination and I recorded findings thereon for the reasons given against each:

Sr.No.	Points	Findings
1	Whether the the present application is fit to grant under Order XXVI Rule 9 of the Civil Procedure Code?	Yes.
2	What order ?	As per final order.

REASONS

As to point Nos.1 & 2 :-

5. The learned counsel for defendants submits that, the plaintiff come up with the suit for removal of encroachment and possession thereof and the relief of inquiry for mesne profit in that regard. He submits that, the plaintiff on wrong or incorrect measurement sheet in respect of field gat no.149/1 and 149/1(A) come up with the present suit. In the said measurement sheet the plaintiff has shown two roads gone through the field gat no.149/1. He contends that, there is no such two roads have been gone through the field gat no.149/1 and no such open space is there between these two roads which is allegedly owned by the plaintiff.

6. The learned advocate for defendants further submits

that, in fact originally there was one road which was less in width, however subsequently the said road has been extended in its width. However the said fact has been hide by the plaintiff in its measurement sheet 'C' in respect of field gat no.149/1 and 149/1(A).

7. It is the contention of defendants that, field gat no.149/2 admeasuring 1.70 H.R. is owned and possessed by the defendants thereon the layouts by following due procedure thereof is laid down. In fact in order to harass the defendants the plaintiff on false ground filed the present suit.

8. To negate the said aforesaid contention the learned advocate for plaintiff submits that, at the time of deciding the present application for temporary injunction the Court has to consider the material evidences on record. With the help of present application the defendant trying to collect the evidences which is not permissible in the law. Therefore, the learned advocate for defendant argued to reject the present application by imposing heavy cost.

9. After going through the rival submission advanced by the respective counsel and documents on record, it comes to my notice that, the measurement sheet 'C' in respect of field gat no.149/1 and 149/1(A) which is relied upon by the plaintiff two roads through the said fields and open space in between has been

shown. It is the contention of plaintiff that the open space between these two roads is a part and parcel of field gat no.149/1 which is owned by the plaintiff.

10. But as per defendants there is no such two roads available and it was the original road which has been broader in its width. Therefore, there is no such open space between two roads is in existence. Looking to the controversy involved, it appears that there is a dispute as to the encroachment area between alleged two road shown by the plaintiff. Therefore, to dissolve the said dispute whether there is two road as asserted by the plaintiff is in existence or not ? and is there any open space between these alleged two roads or not ? to ascertain these facts it is essential and expedient to inspect the said disputed property by local investigation.

11. As per order XXVI rule 9 of the C.P.C. 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, the Court may issue a commission to a such person as it things fit directing him to make such investigation and report thereon to the Court.

12. In view of order XXVI rule 9 of the C.P.C. it is very clear that, in order to elucidate matter in dispute the Court may issue a commission for inspection of the said disputed property. Here in the case at hand, there is a dispute at to the existence of two roads

through the field gat n.149/1 and 149/2 and open space between these two roads between the parties to the proceeding. Therefore in order to elucidate the said dispute in controversy between the parties to the proceeding it is just and proper to appoint the commission for its inspection as per rule.

13. No doubt, in view of facts and circumstances involved in the case at hand, in my view by appointing Court Commissioner the Court is not trying to collect evidence, but it will justify the actual circumstances prevailing over the suit property which will not prejudice the plaintiff, but will help the Court to arrive the proper and just conclusion in the suit.

14. Thus, the facts and situation in the case at hand would definitely fall within the expression "elucidating any matter in dispute" which is a crux of Order XXVI Rule 9 of the Civil Procedure Code. Thus, looking to the controversy involved in my view to elucidate the matter in dispute appointment of Court Commissioner will be helpful.

15. In addition, looking to the controversy involved in my view the appointment of Court Commissioner will be helpful for ascertaining certain facts to make it clear, intelligible and to throw light upon the matter in issue relating to main case as well as the facts leading to the dispute. Thus, in case of appointment of Court Commissioner no prejudice will be caused to the plaintiffs. On the

contrary it will help the Court to bring on record the existence of circumstances over the suit property.

16. Hence, in view of aforesaid discussion in my view present application is fit under Order XXVI Rule 9 of the Code of Civil Procedure. Hence, I pass following order.

ORDER

- i] The application is allowed.
- ii] Issue commission for local inspection of the road which has been passed through between the field of plaintiff and defendants, as per Order XXVI Rule 9 of the Code of Civil Procedure.
- iii] An advocate shall be appointed as the Court Commissioner, the name of such advocate is to be suggested by the plaintiff and defendants jointly.
- iv] The defendants shall bear all expenses of issuance of commission.
- v] Issue commission letter accordingly to the Court Commissioner.

Ralegaon
Dt.21/09/2019

Sd/-
(P. D.Azade)
Civil Judge (Jr.Dn.),
Ralegaon