

MHTH080002842023



ORDER

1] Defendant No. 1 has filed this application under Order XXVI, Rule 9 of C.P.C., and prayed for appointment of court commissions for making local inspection of CTS No. 2883(B), CTS No. 2883/A/2 and 2883/B of Kalyan City, owned/possessed by plaintiffs and defendants No. 1 and 2 respectively and further for ascertaining whether there exist 12 meter road at northern side of CTS No. 2883/A/2 and 2883/B owned by defendant No. 2.

2] Plaintiffs have filed their reply at Exh. 59.

3] Heard Ld. Counsel Sumedh Modak for defendant No. 1, Ld. Counsel R.V. Karnik for defendant No. 2 and Ld. Counsel Abhyankar for plaintiffs.

**Contention/submission of defendant No. 1 and
plaintiffs can be summarized as under :-**

4] Defendant No. 1 is builder and developer by profession. Defendant No. 2 is co-operative housing society. Defendant No. 2 is owner and possessor of CTS No. 2883/A/2 and 2883/B. On dated 03.06.2022 by registered development agreement bearing No. 6504/2022, defendant No. 2 has given

its property for redevelopment to defendant No. 1. Members of defendant No. 2 society and defendant No. 1 – builder and developer, are having right of pathway to reach their property from property bearing CTS No. 2883(B) owned by plaintiffs. Members of defendant No. 2 society and defendant No. 1 have no alternative pathway than existing 3x100 meters road/pathway from suit property. It is contended by defendants No. 1 and 2 that there is easementary right to use pathway going from the suit property. Plaintiffs are obstructing/disturbing to defendants No. 1 and 2 to use said pathway to approach to them to its property. In such circumstances, defendant No.1 has filed this application for appointment of court commissions to carry out local investigation relating to above mentioned properties and for the purpose of ascertaining whether there exist 12 meters approach road at northern side of property of defendant No. 2. Hence, this application.

5] It is contention/submission of plaintiffs that there does not exist any pathway from the suit property to approach property of defendant No. 2. It is submitted that as per construction permission/approved plan of defendant No. 3 granted in respect of re-development of property owned by defendant No. 2, 12 meter width east road is shown to approach upon property of defendant No. 2. As defendant No. 1 and 2 have no approach road from the suit property, in spite of this

they are carrying vehicles/machinery from the suit property, they are also carrying construction materials from the suit property for re-development purpose of property of defendant No. 2. It cause inconvenience and grate hardship to plaintiffs as well as their family members. Defendants No. 1 and 2 have no easementary right to use road of plaintiffs property. Plaintiffs have not executed any easementary agreement in favour of defendants No. 1 and 2 to use suit property for carrying vehicles/machinery/construction materials. As there is no pathway to approach to property of defendant No. 2 from the suit property. In such circumstances, the present application deserves to be rejected.

6] For determination of this application, I have framed following points and I have given my findings thereon as under :-

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether appointment of Court Commissions is necessary ?	Yes.
2. What order ?	--- Application is allowed.

REASONS

AS TO POINT NO.1 :-

7] After hearing to defendants No. 1 and 2 and plaintiffs, I perused pleadings of both parties. So also I have

gone through documents filed on record by both parties.

8] In support of this application defendant No. 1 has relied upon following authorities.

- a) ***Shantaram Dattatraya Kekan & Ors. Vs. Bhausahab Karbhari Kekan & Ors., (2013) 2 Mah. L J -77.***
- b) ***Saraswati Pulavar R. Palanisamy & Ors. Vs. Vishwanathan Muthusamy, 2002 (2) CTS 199 –***
Hon'ble Madras High Court.
- c) ***Shadaksharappa Veranna Vs. Kum. Vijayalaxmi Pampanna & Ors., W.P. No. 201274/2022, dated 24.01.2023*** Hon'ble High Court of Karnataka.

9] Defendant No 1 and plaintiffs have relied upon number of documents relating to their respective properties in support of their contention/submission about this application. Much argued by both sides upon documents submitted in this suit relating to decision of this application. Submission of both parties relating to documents is contrary to each others. In such situation, in my opinion, unless evidence relating to these documents is not come on record before this court, it would not be justifiable to accept submission/contention of either party. In such situation, considering facts and circumstances of this suit, I am of the opinion that, appointment of court commissions for the purpose of elucidating matter in dispute, is necessary.

10] Ld. Counsel for plaintiffs at the time of argument has taken strong objection to appoint court commissions, before commencement of trial of this suit. Ld. Counsel for plaintiffs further argued that, if this application came to be allowed then it would amounts to collection of evidence at the hands of court commissions.

11] In my opinion, provisions of Order 26 of C.P.C., is not stage centric. Provision of Order 26 can be invoked either before the commencement of the trial or after.

12] Hon'ble Bombay High Court, in Shantaram Kekan (supra) authority held that, there is no hard and fact rule that court commissions can be appointed only at particular stage. It is further held that, Hon'ble High Court in few decisions has permitted appointment of court commissions even before commencement of the trial. It is further held in this authority that if the fact of particular case requires the court to ascertain the physical status of the land, the court's power to appoint court commissions at any stage does not appear to be circumscribed. In the case in hand, I find that facts and circumstances of this suit are require to appoint court commissions for making local investigation relating to properties owned by plaintiffs as well as defendant No. 2 and for ascertaining whether there exist 12 meter width road situate at northern side of property owned by defendant No. 2.

13] Hon'ble High Court of Karnataka, in Shadaksharappa Veranna (supra) authority held that, it is always desirable to appoint court commissions in disputes relating to the existence of pathway. It is further held that, appointment of court commissions in such situation would help for the court at the time of trial of the suit to cut short of the trial in as much as the party relying upon the report may not examine multiple witness to prove matters covered by the report of the court commissions.

14] The present application is moved by defendant No. 1. Yet trial of this suit is not commenced. Unless evidence of plaintiffs' side would not be commence/concluded, question of collection of evidence at the hands of court commissions would not arise, if this application is allowed. Law is well settled that, the report of the court commissions is not conclusive proof of what is stated therein. The report is only a piece of evidence that the court has to examined based on the other materials on record. In such situation, no harm/hardship would cause to plaintiffs, if this application is allowed.

15] Law is well settled that, application for appointment of court commissions can not be rejected on the premise that it amounts to collection of evidence. In such situation, this court does not accept submission of Ld. Counsel for plaintiffs.

16] In view of discussion made in foregoing paras, this court deems fit to appoint court commissions for making local investigation for the purpose of elucidating matter in dispute of this suit. In the interest of justice and having taken into consideration facts and circumstances of this suit, I am of opinion that the present application deserves to be allowed. Hence, I answer point No. 1 in the affirmative.

AS TO POINT NO.2 :

17] I have given affirmative finding to point No.1. Hence, I pass the following order :-

ORDER

1. Application is allowed.
2. Deputy Superintendent of Land Record Office, Kalyan, Tal. Kalyan, Dist. Thane, is hereby appointed as court commissions as per Order 26, Rule 9 of Code of Civil Procedure, for making local investigation of CTS No. 2883 (B), CTS No. 2883/A/2 and CTS No. 2883/B of Kalyan and for making local investigation on the issue of existence of 12 meter width road at the northern side of CTS No. 2883/A/2 and CTS No. 2883/B and further to submit its final report.

3. Defendant No. 1 shall deposit/pay proper fees in the office of Land Record, Kalyan, towards court commissions fees, within fifteen days from the date of obtaining certified copy of this order.
4. Court commissions shall make local investigation as above and shall submit its final report in this court along with three copies, within two months, without fail, from the date of actual necessary payment deposited/paid by defendant No. 1 in its office. Court commissions shall issue advance notice to defendant No. 1 and plaintiffs for their attendance/presence at the time of making local investigation as above.
5. Defendant No. 1 and plaintiffs are directed to present at the time of making local investigation by court commissions and further they are directed to assist court commission for the said purpose.
6. Issue writ accordingly.



Digitally signed
by VYANKATESH
NAGNATH
GIRWALKAR
Date: 2023.10.04
13:34:56 +0530

Kalyan
Date :- 04.10.2023

(V.N. Girwalkar)
6th Jt. Civil Judge, S.D. Kalyan.