

ORDER BELOW EXH.5 IN R.C.S.No. 311/2016

1] Present application has been placed on behalf of the plaintiffs under Order XXVI Rule 9 of Code of Civil Procedure 1908, seeking appointment of Court Commissioner to undertake the joint and internal measurement of land bearing Gat no. 228, situated within the limit of village *Ghotavi*, Tal. Shrigonda, Dist. Ahmednagar, for the purpose specifying and demarcation of boundaries of the co-sharers in said Gat alongwith ascertaining alleged encroachment on the part of defendant. Defendant has resisted the application by filing her written statement cum say at Exh.14. Perused the application and say. Heard, learned advocates appearing on behalf of both the parties. Having regards to the rival contentions of both the parties, argument advanced on behalf of both the parties and factors required to be taken into account while appointing the court commissioner, following points have been arisen for determination and discussion and my findings against each of the point along with it's reason is as under :-

Sr. No.	Points	Findings
1	Whether there is a boundary dispute between the parties to the suit ?	Yes
2	Whether there is eminent necessity for appointment of court commissioner ?	Yes
3	What order ?	Application is allowed.

:: REASONS ::

AS TO POINT NO. 1 TO 3:

2] Appointment of Court commissioner has been resisted by the defendant on the ground the map and record which has been prepared during consolidation scheme suffer from technical defect and same came to the notice while under taking the measurement of land bearing Gat no.229 in pursuance of order passed in R.C.S. 186/2012. It is further contention of the defendant that unless the revenue record pertains to consolidation scheme is rectified, measurement can not be carried out. I must mention here that the land bearing Gat no. 228 (suit property) was not subject matter of R.C.S. no. 186/2012. Even it is not contention of the defendant that either plaintiffs or defendant were parties to that suit. Therefore, without being prejudiced from the measurement directed or carried out in pursuance of order passed in R.C.S. 186/2012, emphasize on the necessity of appointment of court commissioner and measurement of suit the property need to be laid. The application has also been resisted on the ground that the land acquired for the *Kukadi* Canal and *Ghotavi* dam has not been subtracted from total area as mention in 7/12 extract of the suit property. It is relevant to mention here that the facts pertains to acquisition of land for *Kukadi* Canal and *Ghotavi* dam and its effect on the revenue record, would evaluated on the basis of evidence. If there is an ambiguity pertains to acquisition of land from Gat no.228 for *Kukadi* Canal and *Ghotavi* dam, the report of court commissioner and measurement map prepared by him would be useful for removal of said ambiguity.

3] While advancing his argument, Ld. Advocate appearing on behalf of defendant has submitted that if land of respective parties got measured through court commissioner, said measurement map would be misused in other litigation. I must mention here that the measurement map prepared by the court commissioner does not possess the presumptive value whereas, as per second part of section 83 of Indian Evidence Act 1872, maps or plans made for the purpose of any cause are essential to be proved to be accurate. Though the court commissioner is appointed and measurement of the suit property is undertaken, the accuracy of measurement map prepared by court commissioner would be required to be proved as per the mandate of II part of section 83 of Indian Evidence Act, 1872. Therefore, measurement map prepared by the court commissioner would not be taken into account unless its accuracy is being proved by the party relying upon it. Having regards to said aspect, no question arise as to misuse of map prepared by court commissioner.

4] Admittedly, defendants and plaintiff are adjacent owner having their land being situated in Gat no.228 of village *Ghotavi*. It is contention of the plaintiffs that, defendant has made encroachment over their land. Through their written statement cum say, defendant has not only swept aside the contention of the plaintiffs but she has also denied the factum with regards to making encroachment over the land belonged to plaintiffs. Having regards to rival contention of both the parties, boundary dispute appears to be in exist between the

parties. Since there is a specific assertion and denial with regards to making the encroachment over the land of plaintiffs, said question is essential to be resolved on the basis of cogent and concrete evidence. The ocular evidence upon the fact as to whether the encroachment over the land of plaintiffs has been made, would be contrary to each other. Therefore, for ascertaining the fact whether the defendant has made the encroachment over the land of plaintiffs, the land of plaintiffs as well as defendant is essential to get measured through Deputy Superintendent of Land Records by appointing him as Court Commissioner. It is settled position of law that, if there is a boundary dispute or dispute pertaining to encroachment, said fact must be elucidated by way of directing the local inspection to be done by Court Commissioner. As I said earlier, the ocular evidence of both the parties on the issue of encroachment, would be contrary to each other and on the basis of ocular evidence, it would be highly difficult to arrive at definite conclusion as to whether or not the defendant has made the encroachment over the land of plaintiffs. In such circumstances, the report of Court Commissioner and map or sketch prepared by him after undertaking the measurement of the land of both the parties, would be crucial evidence for determining the fact with regards to alleged encroachment. Therefore, in order to determine the real question into controversy between the parties, the joint and internal measurement of the suit property is essential to be undertaken. Considering above facts and circumstances, I answer point no. 1 & 2 in affirmative and pass following order for point no.3 :-

:: ORDER ::

01. Application is allowed.
02. Deputy Superintendent of Land Records, Shrigonda, Dist. Ahmednagar, is hereby appointed as Court Commissioner for internal and joint measurement of entire land bearing Gat no.228, situated within the limit of Village *Ghotavi*, Tal. Shrigonda, Dist. Ahmednagar.
03. Deputy Superintendent of Land Records, Shrigonda is hereby directed to visit and inspect the land bearing Gat. no.228, and undertake internal joint measurement of entire land bearing Gat no.228, situated within the limit of Village, *Ghotavi*, Tal. Shrigonda, Dist. Ahmednagar and submit his report as to whether any encroachment over the land of plaintiffs is found, if so, to what extent, on or before 30/09/2022.
04. Plaintiffs are directed to pay the fees of measurement and make the necessary compliance.
05. Issue writ, accordingly.

Shrigonda.
Date :- 23/08/2022.

(**H. J. Pathan**)
2nd Jt Civil Judge (S.D.),
Shrigonda.