

**ORDER BELOW EXH.27 IN RCS NO.675/2018**

(CNR : MHAH250016652018)

This is an application for issuance of commission, as provided under Order 26, Rule 9 of the Code of Civil Procedure, 1908. The application is accompanied by the affidavit of plaintiff No.1 Seema. The defendant No.1, 2, 5 and 6 have filed their say on the application itself.

2. Perused the application. The suit is proceeded without WS against defendant No.3 and 4 and proceeded *ex-parte* against defendant Nos.7 to 11. Heard Learned Advocate Shri P. S. Kolhe for the plaintiff.

3. According to plaintiff, it is the contention of the plaintiffs that they purchased the suit property bearing gat No.765 area admeasuring 2H 30.80R + pot kharab 8R situated at village Vadzire, Tal. Parner (in short 'suit property') for the consideration of Rs.6,75,000/- by way of sale-deed dated 10.10.2016. Therefore, they are the owner and possessor of the suit property. The defendant No.1 to 5 are the owner of the land from gat No.764 which is situated towards the eastern side of the suit property, the defendant No.6 and 7 are the owner of the land gat No.763 which is situated towards the southern side of the suit property and the defendant No.8 to 11 are the owner of land gat No.729 which is situated towards the northern side of the suit property. The defendant No.1 and 2 had made illegal encroachment on the suit property by raising tin shade construction. So also, the defendant

No.5 to 8 have made encroachment on the suit property. Therefore, the plaintiff made an application to the TILR office for the measurement of the suit property in the year 2017. Accordingly, the measurement was carried out by the TILR, Parner on 30.10.2017. In the said measurement, it was shown that the defendant No.6 and 7 who are the holder of land gat No.763 had made encroachment to the extent of 9R over the suit property. The defendant No.1, 2, 5 and 8 have also made encroachment on the suit property from eastern, southern and northern side. However, the said encroachment has not been shown in the measurement map by the measurement officer with the collusion of defendants. The measurement officer has not conducted the measurement as per record. Therefore, it would cause great loss to the plaintiff due to the said measurement, the defendant No.1, 2, 5 to 7 are unhappy towards the defendant and therefore, causing obstruction to the enjoyment of the plaintiff over the suit property by preventing them from using the road running from common *bandh*. As such, there arose the boundary dispute in between plaintiffs and defendants. Therefore, plaintiff prayed for measurement of the suit properties by the Taluka Inspector of Land Records, Parner to ascertain the encroachment, if any, made by the defendants.

4. The defendant No.1, 2, 5 and 7 opposed the application by filing their on the application itself contending that the application is not true, therefore, not tenable. The plaintiffs are trying to collect the evidence by appointing the court commissioner. The trial of the suit is not yet commenced. The application is not

tenable as per the order of Hon'ble Bombay High Court in the 2019 Mh.L.J.

5. According to the plaintiff, even though the measurement in respect of the suit property was previously carried out, but the said measurement has not carried as per land record. The defendant No.1, 2, 5 to 8 have made encroachment on the suit property, however, the encroachment was not shown by the cadestral surveyor by joining hands with the said defendants. Therefore, through this application plaintiff seeks for appointment of TILR, Parner as a court commissioner to measure their lands along with lands of defendants.

6. The present suit is filed for seeking measurement of the suit property to show the encroachment and permanent injunction. On perusal of the pleading of the plaintiffs and defendants it is seen that, there is a boundary dispute and dispute about identity of the lands in between plaintiff and defendants. In the aforesaid factual background the Order 26 Rule 9 of the CPC assumes importance and which reads as under.

Order 26 Rule 9 :-

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 commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court.

7. It is settled position of law that under order 26 rule 9 of the CPC, the court has discretion to order local investigation. The

object of local investigation is not so much to collect evidence, which can be taken in court, to obtain evidence which from its peculiar nature can only be had on the spot. Cases of boundary disputes, disputes about encroachment and identity of the lands are the instances when the court should order local investigation for the purpose of elucidating any matter in dispute. So far as the contention of the Ld. advocate for defendants that the court commissioner cannot be appointed in view of the judgment of Hon'ble Bombay High Court, 2019 Mh.L.J. is concerned, he has not given the proper citation in that regard.

8. The plaintiff filed the present suit alleging encroachment by the defendants. In order to determine the encroachment it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. So that, on the basis of measurement map and other relevant evidence on record, the necessary consequential order could be passed. Therefore, considering the settled legal position discussed above and in the light of facts and circumstances of the case, in the interest of justice, the application deserves to be allowed. Hence, following order.

ORDER

1. Application (Exh.27) is allowed.
2. The Taluka Inspector of Land Records (TILR), Parner is appointed as a Court commissioner.

3. The Court Commissioner so appointed shall measure the land bearing Gat No.765 situated at village Vadzire, Tal. Parner, Dist. Ahmednagar, in presence of the parties.
4. He shall prepare authentic measurement map showing therein the boundaries of the disputed lands along with the measurement in the map itself. He is further directed to show the area of plaintiffs and to show encroachment, if any.
5. The necessary charges of court commissioner fee be paid by plaintiff directly to the office of TILR as per rules and file copy of receipt in the court.
6. After depositing the commission fee and furnishing the necessary documents, commission writ be issued.
7. The commissioner shall also prepare his report and file on the record of the present suit within 60 days from the date of this order.

Date : 22.12.2021

Sd/-
(Mayura V. Nimbalkar)
2nd Jt. Civil Judge Junior Division,
Parner.