

**ORDER BELOW EXH.19**

1] The present application is filed by plaintiff for appointment of Court Commissioner for measurement of suit property through T.I.L.R. as per Order 26 Rule 9 of Code of Civil Procedure. It is submitted that the present suit is filed by plaintiff against defendant for grant of permanent injunction. It is further submitted that the dispute between plaintiff and defendant is with respect to boundary of agriculture lands. It is further submitted that plaintiff had pleaded in the suit that defendant had obstructed her peaceful possession over the suit property, however, defendant had denied the said fact in his written statement. It is further submitted that the plaintiff and defendant had made contradictory pleadings. The dispute between plaintiff and defendant had arisen with respect to eastern and northern side road of the suit property. It is further submitted that defendant is not admitting that land is acquired for road from suit property Gat No.175 and is trying to illegally create encroachment over the plaintiff's land.

2] It is further submitted that, in present suit appeal was filed against the order passed by this Court below Exh.5 in the Court of Hon'ble District Judge Aurangabad bearing MCA No.37/17. In the said Judgment the Hon'ble District Court observed that, there must be joint measurement of the lands of plaintiff and defendant and therefore as per the direction of Hon'ble District Court Aurangabad in MCA

No.37/17 it is necessary to measure the plaintiff and defendant's land and to call its map and report in the Court. It is finally submitted that the application may be allowed and TILR Paithan may be appointed as Court Commissioner.

3] The advocate for defendant in his say at Exh.20 submitted that the application is strongly opposed. It is further submitted that, the agriculture land situated at Mouje Bhabhulgaon, Tq. Paithan bearing Gat No.175 total area 3 H. 72 R including (Potkharaba 11 R) was originally owned and possessed by Raosaheb Tukaram Gidhane resident of Mouje Chitegaon, Tq. Paithan. It is further submitted that from the said land from its northern side Babhulgaon-Kesapuri road has gone and there is also road in the eastern side, however, the land which is acquired for the purpose of road from said Gat Number is not shown less in the revenue record. It is further submitted that the previous owner of the defendant i.e. Proprietor of Bhogale Graphics System namely Yogesh Shantaram Bhogale resident of Shahanoor Wadi, Aurangabad purchased 81 R land from Gat No.175 on 15.5.1997 by way of registered sale-deed bearing No.1549 from its original owner Raosaheb Gidhane by giving the land acquired towards northern and eastern side for the purpose of road and thereafter the said Yogesh Bhogale carried out the measurement of his purchase 81 R land from TILR office on 28.7.1997 and as per the said measurement the northern side area acquired for the purpose of road was left and the remaining area was taken in possession from its previous owner.

4] It is further submitted that thereafter neighbouring said 81 R land of Yogesh Bhogale, from the western side of said land the 81 R

land was purchased by brother of Yogesh Bhogale namely Shripasad Shantaram Bhogale by way of registered sale-deed bearing No.1929 dated 6.7.1997 and the said land was also sold by leaving the land acquired for the purposes of road from its northern side and therefore, as per these both sale-deeds the land acquired for the purposes of road from northern side of Gat No.175 the Bhogale brothers had purchased 1 H. 62 R land from Gat No.175 and got it measured and thereafter only had taken the possession of said land. It is further submitted that in between 1 H. 62 R land of Bhogale brothers and the remaining land in the said Gat Number there is north-south Bandh. It is further submitted that the defendant Indramohan had purchased 1 H. 62 R land from Bhogale brothers by way of registered sale-deed bearing No.1794 on 27.4.2001 and since then the defendant is in possession of said land and the land in possession of defendant is different from the land situated towards northern side, which is acquired for the road.

5] It is further submitted that the land acquired for road from Gat No.175 is not deleted from the complete area 3 H. 72 R in the revenue record and therefore in the revenue record 2 H. 10 R land is shown to be left in the name of original owner Raosaheb Gidhane, however, he was not in actual possession of said land. It is further submitted that the original owner Raosaheb Gidhane after selling the land to the persons from whom defendants had purchased the said land, the remaining land is transferred to plaintiff and therefore in the sale-deed of plaintiff in Gat No.175 in revenue record 2 H. 10 R land is shown to be sold, however, the said 2 H. 10 R land was not in the possession of original owner and, therefore, less area had come in the possession of plaintiff. It is further submitted that the plaintiff

intentionally and to create pressure over the defendant and to grab the land in the possession of the defendant had given the false application. It is further submitted that in such circumstance the Court commissioner be directed that at the time of measurement the area acquired for road from the northern side and the eastern road area and thereafter 1 H. 62 R land in the possession of defendant and the remaining area in Gat No.175 be shown in the map by fixing its boundaries. It is finally submitted that, the defendant is not having objection to appoint Court Commissioner.

6] Considered rival submission made. Heard Advocates for both parties at length. The following points arise for my consideration to which I have noted my findings for the reasons mentioned below :

POINTS

FINDINGS

- | | |
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| 1] Whether the commissioner is required to be appointed as per Order XXVI Rule 9 of the CPC for local investigation or for elucidating the matter in dispute ? | - In affirmative. |
| 2] What order ? | -Application allowed. |

R E A S O N S

AS TO POINT NOS.1 AND 2 :

7] Heard. Argument advanced for both side at length. Considering controversy between parties, it is settled principle of

law as per Order XXVI Rule 9 of CPC that appointment of court commissioner can help the court to find out whether the map or plan produced on record coming from authentic source is agreeable between the parties. Such map of land drawn by the city surveyor or the competent surveyor though not conclusive when produced, if agreed between the parties can ensure early end of the civil dispute between the parties. It is also settled position that 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 the court, but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of encroachment, boundary disputes and disputes about identity of lands are instances when the court should ordered local investigation under Order XXVI Rule 9 of CPC. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out exact area encroached upon, oral evidence cannot conclusively prove such an issue. The trial court may certainly required authentic map so as to draw statutory presumption of Section 83 of the Indian Evidence Act regarding accuracy of such map or plan produced on record of the competent officials from DILR or TILR as the case may be. It is also settled that when there is a boundary dispute, location or measurement of the land or both party alleging encroachment of their property, identification of the property by demarcation is necessary.

8] In the case of **Ram Kishore Sen Vs. Union of India and others AIR 1966 SC 644** it is observed that:

“The appointment of court commissioner who shall be competent official of the DILR or TILR as the case may be and who shall secure copies of necessary public record relating to subject matter of dispute to settle the boundaries of suit property by carrying out measurement after due notice to the parties to the suit and also issuing notice to the adjacent owners/ possessors to the suit property so as to prepare and submit the detail map. The trial court on the basis of such written report may allow the parties to lead additional evidence and endeavor to get an agreed map on record. Thus the court can decide the real controversy in the suit between the parties and executing court would have no any difficulty to effectively execute the decree passed in such suit”.

9] In the case of **Haryana Wakf Board v/s Shanti Sarup and others AIR 2008 SC (supp) 616** it is observed by Hon'ble Supreme Court that

“ The dispute that was raised by the parties before the court was whether the respondent had encroached upon any land belonging to the appellant-Board. Therefore, it cannot be in dispute that the dispute was in respect of the encroachment of the suit land. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact what it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 of the CPC”

10] Thus it is also observed that in the cases of encroachment, measurement of both adjoining lands is not necessary. It is also observed that the measurement and preparation of the map is a scientific method based on principle of mathematical

calculations. It is also observed that, the determination of encroachment is nothing but a comparisons of the map i.e. one is revenue map which forms basis and the second is the map prepared on spot showing situation on spot as regards actual possession. For the purpose of the suit, main object of the map is to find out encroachments, to identify the property in dispute or to show various situations and positions on ground. The encroachment has to be find out on the basis of difference in two maps i.e. the basic survey map and the map drawn as per spot situation or the field map drawn by the surveyor.

11] It is settled position that according to section 75 and Order XXVI of the CPC the court has discretion to appoint a Commissioner, but the discretion has to be exercised in a judicious and sound manner and not whimsically. Before appointing commissioner the court shall examine pleadings, relief claimed and real controversy between the parties.

12] From the submissions made by respective parties it is observed that the Hon'ble District Court while deciding the MCA No.37/17 in its Judgment had observed that:

“It is an admitted fact that, plaintiff is owner of 2 H. 10 R land and defendant is of 1 H. 62 R land, out of total area 3 H. 72 R of Gat No.175. It is also an admitted fact that both parties are measured their respective land independently. By perusing the measurement land it does not disclose how much area is occupied for the Kesapuri and Bullock-cart way (road located towards north and

east). Unless a joint measurement of a land of plaintiff and defendant including an area occupied for the roads is carried out, it is very difficult to conclude that, plaintiff is in actual possession of 2 H. 10 R and defendant is 1 H. 62 R. Therefore, joint measurement is must. If, injunction application is rejected, there is every possibility that, defendant may take its undue advantage to convert the land into non-agricultural, which may cause to plaintiff. Therefore, it is necessary to order to maintain status quo by both parties till Judgment of main suit. Meanwhile, the parties may apply for joint measurement. If joint measurement is taken place, the dispute of boundaries will be resolved forever.”

13] The Hon'ble District Court in its order at Sr. No.3 has directed that, “Both parties may apply for joint measurement including the area occupied for roads. Learned lower Court to give them an opportunity for the same, if they apply.”

14] From the perusal of written statement, it is observed that, defendants had denied the said fact of encroachment. From the perusal of entire case of record it is observed that the evidence of plaintiff had not begin in the case and it is settled that the application for appointment of court commissioner can be entertain at any stage of proceedings and the court commissioner can be appointed. Thus, in such circumstances taking necessary assistance from a qualified Surveyor in present case will not amount to collection of evidence. Thus, local investigation appears to be best way for deciding the real controversy between the parties and it will also be helpful for court in adjudicating the case in its proper perspective.

15] Thus, there appears to be actual necessity in facts and circumstances of the case to appoint TILR to decide the controversy between the parties. There also appears to be controversy as to measurement of the suit property which is required to be done at an early stage so that the parties are aware of the report of commissioner and go prepare for trial. It is also observed that considering the dispute between the parties by mere looking into documents it is not possible to determine their rights unless it is verified as to whether defendants had encroached over the suit property. Thus, in view of above discussion and observations made the application appears to be bonafide and deserves to be allowed. Hence, point No.1 is answered in affirmative and with the help of point No.2 the following order is passed :

ORDER

- 1) Application at Exh.19 is hereby allowed.
- 2) TILR Paithan is hereby appointed as Court Commissioner.
- 3) He is directed to measure the land of plaintiff and defendant including an area occupied for the roads from northern and eastern side of Gat No.175 as per rules by giving advance notice of measurement to both parties and adjoining land holders/possessors. The missing traverse marks should be firstly fixed and on that basis measurement be carried out. The TILR should measure the both properties on the basis of at least two traverse marks. The distance between plane table stations is required to be mentioned.

- 4) The TILR is hereby directed to carry out the measurement of suit property and to fix its boundaries. He is also directed to specifically ascertain and show the encroachment if any in his map and report.
- 5) TILR, Paithan is directed to submit his map and report on or before **03.01.2019**.
- 6) Plaintiff is directed to deposit requisite charges and fees in the TILR office, Paithan as early as possible and place its receipt on record.
- 7) Both parties are hereby directed to give copy of plaint, written statement, copies of all relevant revenue/public/private record and other necessary documents to the TILR before measurement without fail and TILR should take into consideration all such documents before measurement of the lands accordingly.
- 8) Issue commission writ accordingly to TILR Office, Paithan.

Date 03.12.2018

Sd/-
(J. M. Ambodkar)
Civil Judge (J.D.)
Paithan.

Certificate

I affirm that the contents of this P.D.F. file order are same, word to word, as per the original order.

Name of the Stenographer	A. B. Pawar
Name of Court	(J.M. Ambodkar) JMFC, Paithan
Date of dictation	03/12/2018
Judgment signed by the PO on	03/12/2018
Judgment uploaded on	03/12/2018