

MHAU110011942024



**ORDER BELOW EXH.04**

Present application is filed by the plaintiff for appointing Court Commissioner under O.26,R.9 of the Code of Civil Procedure, 1908. Present suit is filed for removal of encroachment and to deliver possession of 10R land in Gut no.360 out of 1H.54R. 03R pot-kharab which is divided in two parts i.e. 1H.54R and 40R as given within boundaries mentioned in the plaint (hereinafter referred as 'suit property' in short).

2. Plaintiff came with the case that he is owner and in possession of suit property which was mortgaged by Jayshree and Priyanka who stood surety to Ashish Vishnu Gadekar. Plaintiff further stated that as Ashish failed to repay loan amount therefore, proceedings initiated and properties mortgaged against loan were ordered to be auctioned. Plaintiff purchased said property in auction ordered by Hon'ble District Court, Aurangabad. Since then, plaintiff is in possession of suit property. While, defendant being lady taking advantage of the same, started encroaching portion of suit property and approximately 10R land is encroached till date by defendant. When plaintiff went to defendant for measuring Gut no.360, the defendant do not agreed and taken objection for the same when plaintiff tried to measure his land. Therefore, present suit is filed.

3. After service of summons, defendant not appeared therefore, proceeded ex-parte against her.

4. In this matter, advocate for the plaintiff filed present application stating to measure land of Gut no.360 and fixing boundaries of plaintiff through TILR office. The plaintiff stated in the application that two months ago plaintiff measured his land through private persons, at that time, plaintiff came to know

that defendant encroached 10R land over suit property and when plaintiff requested her to remove said encroachment, she denied, therefore, present suit is filed and so present application is filed to fix boundaries of plaintiff by measuring Gut no.360. considering nature of suit, burden is upon plaintiff to prove said encroachment though matter is proceeding ex-parte. Therefore, to know that how much land is encroached by the defendant, measurement of land of plaintiff is necessary as prima facie encroachment can be seen to be made upon suit property which is not possible for plaintiff to prove orally. Therefore, it is essential to appoint Court Commissioner to measure land of plaintiff and defendants. So also defendants denied boundaries of suit property for that purpose also it is necessary to measure land of both parties with the help of old land records and land presently in possession of both the parties. Lastly, prayed to allow the application.

5. As matter proceeded ex-parte against defendant, hence, proceeded for order after hearing Ld. Adv. for plaintiff. Read application and documents annexed with it. Heard both parties. Following points arise for my determination. I have recorded my findings against each of them for the reasons as follows.

Sr. No.	Points	Findings
1.	Does appointment of Court Commissioner is essential for the purpose of elucidating matter in dispute?	Negative
2.	What Order?	Application is rejected.

### **REASONS**

6. Present suit filed for removal of encroachment and deliver possession of encroached portion alongwith for injunction and mesne profit. Adv. for plaintiff argued that suit is for removal of encroachment, therefore, it is necessary to measure suit property and also to fix its boundaries for deciding main issue involved in the suit.

7. On perusal of the plaint, it is evident that, plaintiff is claiming possession over suit property being purchased during auction held in RD No.479/2018 and have filed on record only 7/12 extract of Gut no.360. However, name of plaintiff can be seen primarily from 7/12 extract filed, though it being fiscal document, there is no document filed on record, by plaintiff showing their title to the property. No documents filed on record to support contentions of plaintiff. Moreover, plaintiff came stating that defendant encroached upon 10R land but failed to mention from which side, even plaintiff is asking to fix his boundaries by appointing TILR.

8. It seems that as provided by O.26, R.9 of CPC there is no any specific stage though which point out satisfaction of Court necessary for appointment of court commissioner. At this stage, where advocate of plaintiff filed present application where no any evidence on record given by plaintiff, to show alleged encroachment by defendant. Therefore, at this stage, to come to satisfaction there seems no oral or documentary evidence to support claim of plaintiff. Though it is true that in the suit of encroachment, in order to derive at just decision of the case measurement of land of plaintiff and defendants by Cadastral Surveyor is essential but first plaintiff has to prima facie discharge his burden without which this Court cannot derive satisfaction. Hence, this being premature stage, I am not satisfied to issue court commission for local investigation in the absence of oral as well as documentary evidence on record by plaintiff. However, can be considered at appropriate stage after discharging primary burden by plaintiff by filing evidence at his disposal. Considering this application is filed at premature stage. Accordingly, passed following order.

**ORDER**

Application stands rejected.

Date:07/11/2024

(V.V. Raojadeja)  
Civil Judge Junior Division  
Phulambri.

**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	:-	Shri. Yuvraj Bhagwansing Mirdhe
Court	:-	CJJD & JMFC Phulambri.
Date	:-	07.11.2024
Order signed by the Presiding Officer on	:-	07.11.2024
Order uploaded on	:-	14.11.2024