

ORDER BELOW EXH. 54 IN R.C.S. NO. 28/2024**(CNR NO. MHBI-1100-0081-2024)**

This is an application filed by the plaintiffs praying for cancellation of the order passed below Exh. 37 and to pass an appropriate order on the application at Exh. 37 filed under Order XXVI Rule 9 of the Code of Civil Procedure for appointment of Court Commissioner for measurement of suit property.

2. It is the contention of the plaintiffs that the suit is filed for the removal of encroachment and for the declaration of ownership. It is contended that the report of the court commissioner is essential for the plaintiffs to prove their case, and that justice would not be done unless the said report is obtained. Hence, they have sought cancellation of the earlier order and appropriate directions on Exh. 37.

3. Defendant Nos. 1 to 3 have filed their say at Exh. 55 and have opposed the application. It is contended that the earlier order passed below Exh. 37 is legal and proper, and the plaintiffs are required to first establish their ownership over Gat Nos. 235 and 236. Unless ownership is proved, the application for the appointment of a court commissioner is not tenable. It is further argued that once the Court has passed an order, it cannot recall or cancel the same, and the plaintiffs, if aggrieved, may challenge the said order before the Appellate Court. Therefore, they prayed for rejection of the present application with costs.

4. Heard learned advocates for both sides. Perused the record.

5. It is an admitted position that the plaintiffs have not yet adduced any evidence in support of their claim after framing of an issue. The application at Exh. 37 for the appointment of a court commissioner was

kept pending to be decided at the stage of evidence, which has been clearly recorded in the earlier order. Despite this, the plaintiffs have filed the present application seeking appropriate directions on Exh. 37.

6. The suit is filed for declaration of ownership, removal of encroachment and perpetual injunction. The plaintiffs claim that there has been encroachment upon their land and that the exact extent of such encroachment is ascertainable only through the report of the court commissioner. However, the plaintiffs have not yet led any evidence to support their claim.

7. In ***Shantaram Dattatray Kekan v. Bhausahab Karbhari Kekan, 2022 SCC OnLine Bom 6466***, the Hon'ble Bombay High Court addressed the issue of appointing a Court Commissioner for land measurement and boundary fixation before the commencement of trial. The Court held that such an appointment is generally unwarranted prior to the presentation of evidence by the parties. It emphasized that a Court Commissioner should not be appointed solely to assist parties in collecting evidence. However, the Court acknowledged that in certain circumstances, where understanding the physical status of the land is essential, appointing a Court Commissioner at any stage may be justified, depending on the specific facts of the case.

8. In the present case, no exceptional circumstances have been made out by the plaintiffs. In the absence of any evidence being led, this Court finds no reason to alter the earlier order passed below Exh. 37. The plaintiffs must first lead evidence. The application at Exh. 37 shall be considered on its merits at the appropriate stage as already directed. Hence, I pass the following order:

ORDER

1. The application at Exh. 54 is hereby rejected.
2. The application at Exh. 37 shall be considered at the stage of evidence as already directed.
3. Costs in cause.

Place : Georai

Date: 27/03/2025

(R. R. Jadhav)

4th Jt. Civil Judge Jr., Div.
Georai.

CERTIFICATE

I affirm that, the contents of this PDF file of Order/Judgment are same word to word as per the original Order/Judgment.

Name of Clerk : S. Y. Sulakhe
Court : Jt. Civil Judge J. D., Georai
Date : 27/03/2025
Order signed by the Presiding Officer : 27/03/2025
Order Uploaded on : 28/03/2025