

MHJN10-000348-2011



Order passed below Exh.96
(Dt. 19/11/2024)

1] The present application is filed on behalf of defendant No. 1 to 3 under the provision of Order XXVI Rule 9 of the Code of Civil Procedure. (hereinafter referred to as 'C.P.C')

2] The defendant No. 1 to 3 contends that the plaintiff has instituted the present suit, alleging that defendants has encroached upon 1 H land of Gat No. 1 total admeasuring 40 H 32 R and Potkharba 29 R. During pendency of suit, plaintiff moved an application vide Exh. 34 under provisions of Order XXVI Rule 9 of the C.P.C. for measurement of suit land. The said application was allowed by this Court, however, the Court Commissioner measured the land as per the say of plaintiff and in collusion with plaintiff. The concerned authority filed false measurement report which was objected by this defendants.

3] The defendants further contends that in order to find out the correct encroachment by any party, their should have been joint measurement of the land in question of the said Gat number also the measurement of adjoining lands of four sides of the Gat No. 1. Thus, the defendant prayed for appointing the Court

Commissioner to carried out joint measurement of Gat No. 1 and other land in Gat No. 1 along with land situted at four boundaries of Gat No. 1. They further prayed for fixation of boundaries and demarcation of Gat No. 1 and adjoining lands.

4] Say of plaintiff was called upon. Plaintiff has filed his written say overleaf the same application and objected the application. The plaintiff contends that already the plaintiff had filed an application under Order XXVI Rule 9 of the CPC at Exh. 34. Accordingly, the said application was allowed and the T.I.L.R. Mantha on 04.05.2013 measured the entire Gat No. 1 and submitted his report. The said measurement was objected by plaintiff itself. Hence, again the plaintiff moved an application for re-measurement of Gat No. 1 vide Exh. 53. Hence, the D.I.L.R. Jalna was appointed by this Court for measurement of Gat No. 1. Plaintiff had paid Rs. 45,000/- fees towards the measurement of Gat No. 1 on 04.07.2019. The. D.I.L.R. carried out the joint measurement of plaintiff and defendants land and filed his report vide Exh. 73.

5] In the said report (Exh.73) it is shown that defendant No. 1 and 2 have encroached upon an area of 54 R and defendant No. 3 had encroached upon the area of 5 R in the land of plaintiff. As per the said report, vide Exh. 83 the plaintiff carried out the necessary amendment in the plaint. Lastly, the plaintiff contends that already the joint measurement of plaintiff and defendants

land was carried out with the order of Court through Court Commissioner. Defendants in order or delay proceeding of suit have moved this application. The defendants purposely not mentioned the measurement report of Exh. 53. Thus, the defendants by misleading the Court is trying to delay the trial. Hence, prayed for rejection of this application.

6] Heard the learned advocate for the plaintiff and defendants at length. The learned advocate for the the defendants argued that the earlier the measurement of Gat No. 1 carried out by T.I.L.R. Mantha was in collusion with plaintiff and hence the reports submitted, does not clear the actual encroached portion by in party. Thus, proper adjourning of matter and to have correct measurement of Gat No. 1, it is necessary to carry out the joint measurement not only of Gat No. 1 but also the lands adjoining four boundaries of Gat No. 1. Learned advocate further argued that if the said measurement is carried out it will be easy to Court find out who has actual, encroached upon whose land.

7] The learned advocate for the defendants in support of his contentions relied upon the ratio laid down in following judgments;

(1) Ramzan Sheikh Chand Sheikh (D) thr. LRs. & Ors. Versus Panjab s/o Nathuji Gawande 2016 (4) ALL MR 765 of

the Hon'ble Bombay High Court Bench at Nagapur

(2) Yeshwant Bhaduji Ghuse Versus Vithobaji Laxman Ladekar 2010 (2) ALL MR 694 of the Hon'ble Bombay High Court Bench at Nagapur

(3) Nijamuddin Abdul Aziz Khan & Anr. Versus Hemant Agencies Firm 2010 (2) ALL MR 696, Hon'ble Bombay High Court.

8] On the contrary, the learned advocate for the plaintiff argued that the measurement carried out by T.I.L.R. Mantha dated 04.05.2013 was not admitted by plaintiff, hence, he moved an application for re-measurement of Gat No. 1 with joint measurements of plaintiff and defendants land vide application vide Exh. 53. Accordingly, the DILR Jalna submitted the report along with map vide Exh. 73 in which it is specifically shown that defendant No. 1 and 2 have encroached upon an area of 55 R and defendant No. 3 had encroached upon an area of 5 R in plaintiff's land. Accordingly, plaintiff carried out the necessary amendment in plaint. The said fact is deceived by this defendants in the present application. Mere, to delay the trial the defendants have moved the present application. As the joint measurements of suit property and land in possession of defendants had already carried out by relevant authorities there is not need for re-measurement of the said lands.

9] The learned advocate for the plaintiff in support of his contentions relied upon the following judgments;

(1) Bhausahab Kondiba Tengale Versus Vitthal Khandu Tengale & Ors. decided on 13 October 2022 by the Hon'ble Bombay High Court in Second Appeal No. 323 Of 2021.

(2) Chandrarao Hanumantrao Wable versus Dhondu Fula Patil Writ Petition No. 3854 of 2011 of the Hon'ble Bombay High Court Bench at Aurangabad.

10] Prior to discuss the present application, it will be pertinent to consider the provisions of Order XXVI Rule 9 of the CPC which provides;

“Commissions to make local investigations – 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, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.”

11] In the present application the defendant No. 1 to 3 are seeking measurement of land in possession of plaintiff and defendants as well as the other lands in Gat No. 1. Also the

defendants are seeking the measurement of lands situated at four boundaries of Gat No. 1. In the present suit the plaintiff has prayed for possession of encroached area, which will be found encroached by the defendants. Thus, the relief sought by the present plaintiff is against these defendants. Plaintiff had not sought any relief against other land holders in Gat No. 1 or the land holders adjacent to the four boundaries of Gat No. 1.

12] In the present application defendants have not contended anything about the report submitted by D.I.L.R. Jalna vide Exh. 73 of re-measurement of Gat No. 1. The defendants have not objected the said report. From perusal of the map and the measurement report submitted by D.I.L.R. Jalna (Exh. 73) it reveals that during the said measurement, plaintiff, defendants & the adjacent land holders were present. The map of Gat No. 1 shows that the concerned authority has re-marked the exact land in possession of plaintiff and defendants. He has also remarked with different colour the excess land in possession of parties.

13] From the careful reading of the judgments of Hon'ble High Court laid down on behalf of the defendants it reveals that in all the cases, the Hon'ble Court has insisted for joint measurement in presence of parties by the appropriate officers and submitting by them map and report of measurement before the Court for consideration. The said measurement should be carried out to determine whether has been the encroachment.

Accordingly, this Court has already allowed joint measurement of Gat No. 1 and the D.I.L.R. has submitted their report along with map vide Exh. 73.

14] Though the said report (Exh.73) is not binding on Court. However, the said report may aid to Court to elucidated the matter in dispute. From the citation submitted by the learned advocate for the defendants it reveals that the Hon'ble Court has laid down that were the evidence on record primarily depicts that property was not only independently measured but also joint measurements were carried out by the Court Commissioner. The attempt on the part of the applicant again seek measurement of the land can be viewed as an attempt to collect additional evidence to create contradictions and to prolong the litigations.

15] From perusal of the entire report and the report of D.I.L.R vide Exh. 73 it reveals that the appropriate authority had already carried out the joint measurement of the land in possession of plaintiff and defendants. Thus, I do not found any reasons for re-measurement of Gat No. 1 along with the lands adjacent to four boundaries of Gat No. 1. Because the plaintiff had not sought any relief against the land holders adjacent to the four boundaries of Gat No. 1. Neither the re-measurement will serve any purpose of elucidating the matter in disputed in the present suit. If the said measurement of entire Gat No. 1 along with the lands adjacent to four boundaries of Gat No. 1 is allowed

it will only create contradictions and laid to prolong the litigation. Hence, considering the above all discussions I proceed to pass the following order.

ORDER

Application is hereby **rejected**.

Date- 19/11/2024

(Smt. Pallavi M. Suryawanshi)
Civil Judge (Junior Division)
Mantha.

CERTIFICATE

“ I affirm that the contents of this PDF file order are same word for word as per original order”.

Name of the stenographer	Shri. Vaibhavsing N. Thakur
Name of the Court	Smt. P. M. Suryawanshi, Jt. C.J.(Jr. Div.), Mantha Tal. Mantha, Dist. Jalna.
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(Vaibhavsing N. Thakur)
Stenographer (Grade-III)