

Order below Exhibit 34 in Regular Civil Suit No.206/2010.

This application is filed by the plaintiffs under Order 26 Rule 9 of the Code of Civil Procedure. It is contention of the plaintiffs that towards suit plot there is plot of defendants bearing City Survey No.123(B). The defendant while making construction made an encroachment in North-East corner 6 inch width and 11 feet in length constructed the wall. Likewise, the defendant made an encroachment in South-East corner 6 inch in width 3 feet and 7 inch in height and 7 feet 3 inch in length constructed the wall. In front of the stare case of the plaintiffs. Towards North-East corner of the stare case 11 feet and 11 inch in height and 3 feet 5 inch in length and 6 inch in width constructed the wall. The plaintiffs have filed rough sketch along with the present suit. But, no measurement is carried out from the competent person. It is further contention of the plaintiffs that if the measurement of the property of the plaintiffs and the defendant is carried out jointly, it would transpire at what extent encroachment is made by the defendant. The plaintiffs have prayed for carrying out the measurement by City Survey office of Jaysingpur.

2. The application is strongly resisted by the defendant by filing her reply which is below Exh.39. It is contention of the defendant that measurement is required to be carried out the land of the plaintiffs, defendant and other adjacent owner of the suit property. According to the defendant it would helpful to the Court to arrive at right conclusion. It is further contention of the

defendant that property of the plaintiffs, defendant and adjacent owner from the eastern side of the defendant are part and parcel of the one plot. Therefore, measurement of the entire plot is required to be carried out.

3. Heard learned advocate U.M.Kulkarni for the plaintiffs. He submits that the dispute between the plaintiffs and the defendant is over the boundary line. The plaintiff has filed present suit for perpetual and mandatory injunction. No measurement is carried out from the competent person. Therefore, measurement is required to be carried out by competent authority to ascertain extent of the encroachment. Learned advocate for the plaintiffs further submits that measurement of the suit property and City survey No.123 (B) which belongs to the defendant is required to be carried out. The learned advocate for the plaintiffs has placed reliance upon ***2006(6) Mh.L.J. S.C.545, Subhaga vs. Shobha.***

4. Learned advocate C.S.Killedar for the defendant vehemently submits that the measurement not only of the suit property and the land of the defendant but, also the land of other adjacent owner is required to be carried out.

5. The plaintiffs have filed the suit for perpetual and mandatory injunction. Admittedly, prior to filing the suit no measurement by the competent authority is carried out. The dispute between parties is over the boundary line. It is settled legal proposition of law that even in case of perpetual

injunction, if there is dispute over the boundary line the measurement can be carried out.

6. The next question arises in instant case that whether the measurement of the suit property and the plot of the defendant is required to be carried out or the measurement of other adjacent owner is also required to be carried out. As discussed above, in this regard, learned advocate U.M.Kulkarni for the plaintiffs placed reliance upon the judgment of the Apex Court in ***Subhaga vs. Shobha***. The Apex Court held that it is not necessary to survey of the adjacent lands to find out whether an encroachment was made in the suit land belongs to the plaintiffs. The following facts were before the Apex Court.

The plaintiff filed suit for mandatory injunction directing the defendants in the suit to demolish further construction put by them. The defendants resisted the suit and claimed that the construction put up by them did not lie in plot which is belonged to the plaintiff. The Trial Court decreed the suit holding that the plaintiff was owner of the suit property which had been identified on the spot. The defendant being aggrieved filed First Appeal. The first appellate Court dismissed the appeal. He filed Second Appeal before the Hon'ble High Court. The suit dismissed on the count that there was no proper identification of the suit property by the plaintiff either in the plaint or at the spot and since the boundaries can not be asserted when serving the adjacent plots, no decree could be granted to the plaintiff. In these facts and circumstances the

Apex Court concluded that the suit plot sufficiently identified and there was not necessary to carry out the measurement of land of the other adjacent owners.

7. In the instant case it is contention of the defendant that the suit property of the defendant and the property of the other holders from in the eastern side of the defendant is part and parcel of the same plot. This fact is not much disputed on behalf of the plaintiffs. It is only contention of the plaintiffs that it is not case of the defendant that any other person made the encroachment upon the suit plot. Having regard to this peculiar facts the circumstances of the present case the principle laid down by the Apex Court in **Subhaga vs. Shobha** is not applicable. In the instant case, the measurement of the suit plot and the plot of the defendant and the adjacent owner is required to be carried out. Hence, the following order.

ORDER

- 1) The application stands allowed.
- 2) DILR Shirol is hereby appointed as Court Commissioner. He is directed to secure public record regarding City Survey number of the suit property, City Survey number of 123/B and adjacent other owners.
- 3) He is directed to assertion undisputed or settled boundaries measured both and if necessary, surrounding City Survey numbers.

- 4) He shall prepare map and show encroachment if any made thereon and by whom.
- 5) The plaintiffs are directed to deposit requisite fees in the office of DILR Shirol and file their receipt on record.
- 6) The commissioner shall filed his report within one month from the receipt of the notice.

Sd/-

(Rajesh U.Nagargoje)

Date: 23/06/2017

Jt.Civil Judge, Jr. Dn., Jaysingpur.

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

Name of the Stenographer	Shri.R.L.Mane.
Name of Court	Jt.C.J.J.D.& J.M.F.C., Jaysingpur.
Date of Dictation.	23/06/2017.
Judgment/order signed by the PO on	23/06/2017.
Judgment/order uploaded on	15/07/2017.