

ORDER BELOW EXH- 26.

Plaintiff has filed this application for measurement of suit property i.e. Plot No. 22. It is contentions of plaintiff that, defendant having Plot No. 23 to the north side of suit property. Plot bearing No. 22 having East-West 60 ft. in length and North-South 14 ft. in total 840 sq.ft. After appearance, defendant vide undertaking below Exh. 15 admitted that, he has constructed new wall at the place of old one from the southern side of Plot No. 23 and not encroached over open space of Plot No. 22. However, despite of undertaking he has encroached over plot no. 22 and completed construction of porch. For deciding encroached area measurement of suit property is just and proper. Further, it settled the boundary dispute between parties. Thus, prayed to appoint T.I.L.R. Ajara to measure suit property.

2. Defendant vide his say at Exh. 27, denied contents of the application in toto. Defendant contended that, he has neither encroached not constructed over open space of suit property. Plaintiff has not adduced documentary evidence about actual area in her possession. On imaginary basis, she has contended area in her plaint and for collection of evidence filed present application. Further, she has not filed documentary evidence about her ownership. He has constructed as per the undertaking and not breach any terms in it. The purpose of present application is merely to collection of evidence. Thus, prayed to reject the application.

3. I have heard both counsels at considerable length. It is submission of for plaintiff that, the plot no. 22 and 23 are ancestral properties and adjacent to each other. Defendant by devolution old wall from the southern side of their plot intentionally encroached over suit property. For deciding exact encroached portion prayed to allow the application. Her counsel to support his submissions place reliance on the Judgment of Hon'ble Bombay High Court in *Kolhapuri Bandu Lakade Vs. Yallappa Lakade (2011 (3) Mh.L.J. 348)* and *Kashinath Shastri Vs. Haribhau Bawanthade (2004 (2) Mh.L.J. 722)*. Herein, both authorities Hon'ble Court observed that, to find out encroachment it is essential to get an agreed man through the commissioner is just and proper.

4. Per contra counsel for defendant vehemently submitted that, without giving evidence of ownership and possession over suit property, plaintiff claimed her right. She having no locus to claim any relief against defendant. Plaintiff through this application, trying to prove her possession over suit property. Further, defendant has not breached any condition of undertaking. Thus, to avoid further delay prayed to reject the application.

5. Herein, pertinent to note that, through undertaking at Exh. 15 defendant admitted that, he has not constructed and encroached over plot no. 22 of plaintiffs. Further, admitted to remove debris collected over suit plot. I think prima-facie above contention is enough to consider that, plot no. 22 is in possession of present plaintiff.

6. The dispute between parties is in respect of boundary marks along with encroachment issue. Plaintiff on oath contended that, defendant by

breaching conditions of undertaking constructed porch from the southern side of plot no. 23 over suit plot. Considering the submission of both parties in regard to the encroachment and boundary marks it can not be settled through their ocular evidence. It is settled law that, in any case of encroachment for elucidate the matter and exact area of encroachment appoint of commissioner is just and proper. The same principle has been observed by the Hon'ble Court in Judgments cited supra.

7. Through this application, plaintiff prayed for measurement of suit plot and ready to bear the expenses. Considering the revolving dispute between parties for final settlement, I think its just and proper to appoint commissioner for measurement of suit plot for deciding actual encroachment as alleged or not. The defendant through undertaking admitted that, suit plot is in possession of plaintiff. Thus, I do not find if this application allowed, it would caused any prejudice to defendant. However, it it rejected the plaintiff having no opportunity to prove her case. Therefore, the appoint of court commissioner for measurement of suit plot is just and proper. Thus, in result of above discussion I pass following order,

ORDER

1. Application is allowed.
2. The T.I.L.R., Ajara is directed to measure suit Plot No. 22 as per description in plaint and submit detailed report in respect of boundaries and any kind of encroachment over it in specific manner and direction within two months.
3. Plaintiff is directed to paid necessary charges as early possible and

filed copy of Challan on record.

4. Both parties are directed to co-operate commissioner by supplying necessary documents, if required.
5. The copy of order this order supply to commissioner along with writ.
6. Issue writ accordingly.

(R. P. Thore.)

J. O. Code 02897

Civil Judge Junior Division,
Ajara.

Date :- 03.09.2024.