

MHKO150002882020

**R. C. S. No.36/2020****Mrs. Anuradha Ghevde & Anr.***Versus***Smt. Sushila Kamble & Ors.****Order below Exhibit 41.**

(Passed on 04/12/2020)

01. The plaintiffs have filed this application for seeking relief of appointment of Court Commissioner under Order 26 Rule 9 of Code of Civil Procedure.
02. Perused the application and say at exhibit 47. Heard learned advocate of both sides at length.
03. In view of rival contentions following points arise for determination. The findings and reasons for the same are as under.

<b><u>Sr. No.</u></b>	<b><u>POINTS</u></b>	<b><u>FINDINGS</u></b>
1.	Whether the plaintiff has made out the case for appointment of Commissioner under Order 26 Rule 9 of CPC ?	In the affirmative.
2.	What order ?	The application is allowed.

**: REASONS :**

04. Plaintiffs aver that the defendants No.1 and 2 have raised construction over suit property despite ad-interim injunction order of the Court. They have further averred that defendants have restrained the ingress of plaintiffs by putting stones in block No.837/3. Their is fruit garden and sugar cane crop of plaintiff in block No.867. Plaintiffs are

claiming demarcation of boundaries by this suit and despite ad-interim injunction defendants have put construction material in the way of ingress of plaintiffs. Defendants are denying the fact of measurement as they did not receive its notice. Defendants also stated in their written statement that if the Court finds that they have constructed any building as encroachment they will get it removed on their own cost. Defendants also submitted that while starting petrol pump plaintiffs have fixed their boundaries whereas they have now submitted that plaintiffs have no right to fix boundaries as such. These statements are self contradictory. Hence, it is essential to appoint Court Commissioner for measuring the block Nos.867/2, 867/3 and 1013 to find out their boundaries, the fruit gardens and the construction material lying on the site. This will bring the real fact about encroachment on record. Defendants have submitted that they have no objection to measure the land of plaintiffs but cleverly forgot to mention their land in measurement. The dispute cannot be resolved by leaving any land unmeasured. Hence, it is essential to get all the block measured to fix the boundaries and find out encroachment.

05. Defendants filed their say (Exh.47) and denied all the contentions. They have further stated that the plaintiffs are trying to collect evidence by this application. Plaintiffs are filing such application to prolong the matter and trying to harass and obstruct the defendants from enjoying their property. The hand sketch map in this suit is false and misleading. Plaintiffs have submitted false information on record about block Nos.867/2 ad 867/3. Block No.1013 is adjacent to the Ajara Kolhapur road and defendants are possessing and enjoying it. Plaintiffs are not encroaching upon the land of defendants. Plaintiffs have not approached the Court with clean hands. They are confused about their

own land and hence filing such application without any reasonable cause. The averments of plaintiffs are self contradictory as they have filed suit for block No.867/2 and 867/3 whereas they have stated in the application as block No.867. As per Government record there was no approach road ever from the block No.1013 of defendants. Hence, for the above reasons the application of plaintiffs is not tenable and liable to be rejected.

06. This is a suit for demarcation of boundaries. The plaintiffs contended that they are the owners of block No.867/2 and 864/3 while defendants are the owners of block No.1013. Plaintiffs further averred that they have executed measurement vide Register No.4/23-02-2004, and got the block No.867 divided into three sub-parts. However, the same is not registered with the Revenue Department. Block No.1013 is divided into two parts by a road from Kolhapur to Ajara. Block No.867/2 is situated on the northern side of the block No.1013 and is rented to a third party. Block No.867/3 is situated on the southern side of block No.867/2 and block No.1013 is on the western side of it. Now, the plaintiffs have prayed that block Nos.867 and 1013 be commonly measured by appointment of Court Commissioner and it be decided in which block number the house of defendants, the fruit garden on its eastern side and the proposed construction lies. They also prayed that it be also decided whether the proposed construction lies in block No.1013 or on the Government Road and if found any type of encroachment a specific report be submitted. The defendants by submitting their say clearly stated that they are raising construction in their own land. They are also ready to remove the construction if found illegal. The plaintiffs by this application are collecting evidence. Hence, the application is

liable to be rejected. In such a situation, where the property in question is not clearly mentioned or where the description varies in the plaint itself, in that case, it is a proper course to get measure the property in dispute. The same would elucidate i.e. clarify and explain about the matter in dispute. Such measurement would help in acknowledging the factual position of the spot. Learned Advocate for plaintiffs has relied on the judgment of *Manohar Mahadevrao Pagrut V. Sou. Sunanda Ramdas Tharkar* reported in *2008(2) Mh.L.J. 899*, *Girish Vasant Rao Bhoir V. Nimbaji Bambal* reported in *2009(4) Mh.L.J. 371*, *Kashinath Chanduji Shastri v. Haribhau Nathuji Bawanthade* reported in *2004(2) Mh.L.J. 722* in which it is specifically held that, “*when there is dispute of demarcation of disputed land, it is appropriate for the Court to direct local investigation under Order 26 Rule 9 of CPC*”.

07. Learned Advocate for the defendants have relied on the judgments of *Dhondiram Nivrutti Powar v. Laxman Khashaba Pawar* reported in *2018(3) All M.R. 696* and *Sanjay Namdev Khandare v. Sahebrao Kachru Khandare* reported in *2001(1) All M.R. 653* in which Hon'ble High Court held that, “*machinery of the Court cannot be used for the purpose of collecting evidence, in order to enable the plaintiffs to prove the facts on the basis of which they are claimed relief of interim injunction*”.

08. In view of above said discussion, it is clear that the dispute is about demarcation of boundaries therefore, local investigation is necessary. Hence, the citations relied by the plaintiffs are squarely applicable to the case in hand. Hence, the Court is of view that the

object of local investigation in the present application would not amount to collecting evidence but to clarify the situation helping the Court to adjudicate the matter in its proper prospective with regard to breaching act by the non applicants. Thus, the following order :-

**ORDER**

1. The application is allowed. The T.I.L.R. Ajara is hereby appointed as Court Commissioner.
2. T.I.L.R.,Ajara is directed to carry out the measurement of land in Gat No.867 and 1013 situated at village Uttur, Tal. Ajara as mentioned in the application (Exh.41) and submit his self explanatory report at the earliest.
3. The applicant to deposit necessary commission fee with the T.I.L.R. Office, Ajara.
4. Applicant has to supply copy of the plaint/application and all other relevant documents to the Commissioner.
5. The writ of commission be issued accordingly.

Place: Ajara.  
Date: 04/12/2020.

(D. T. Patil)  
Civil Judge Jr. Division,  
Ajara.