


<b>MHKO160006152018</b> 	<b><u>R.C.S. No. 122/2018</u></b> <b><u>(Dadu Vs. Aba Mahadev)</u></b>
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**ORDER BELOW EXH. 28**

( Date : 06.02.2020)

This is an application filed by plaintiff under Order 26 Rule 9 of the Civil Procedure Code for appointment of court commissioner for inspection and measurement of Gat No. 715 admeasuring 0-32-51 R situated at village Altur, Tal.Shahuwadi, Dist.-Kolhapur.

2. It is contentions of plaintiff that, he filed this suit for perpetual injunction. Suit property Gat No.715 is ancestral property of plaintiff and defendant. He and defendant are having 1/2 share in Gat No. 715. Defendant is trying to make encroachment of 3.5 feet land from East side, 10 feet land from South side of share of plaintiff's and he also trying to made encroachment of East-West length of 20-5 feet and North-South width of 20 feet's land in Gat No.715. He further contended that, properties which are mentioned in para 1 of plaint were already partitioned between plaintiff and defendant. As per mutation entry No. 440 they have mutated their names in 7/12 extract of their respective share. Therefore, plaintiff wants to appoint an Advocate as a court commissioner to inspect whether defendant made encroachment over the suit property Gat No.715 or not and submitting report. Hence prayed to allow said application.

3. Defendant filed his say and denied all the contention of plaintiff. He further contended that, he has constructed house in house property No.125. He never constructed house in suit property. Therefore, plaintiff intentionally prolonging this matter, hence he prayed to reject the application.

4. Heard Ld. Advocate for plaintiff. He submitted that in order of Exh.5 this Court has mentioned that plaintiff having liberty to measure Gat No. 715 to see whether there is encroachment or not. Heard Learned Advocate for defendant.

5. From above discussion it is clear that, plaintiff filed this simplicitor suit for perpetual injunction. They filed copies of 7/12 extract of suit properties and mutation entries.

6. As per Order 26 Rule 9 of Civil Procedure Code "*in any suit court can appoint a court commissioner for local investigation for elucidating matter in dispute*".

7. Here, subject matter in dispute is Gat Nos.715 situated at village Altur, Tal.Shahuwadi, Dist.-Kolhapur which is on the name of defendant, but plaintiff has not filed any document on record which shows that, he also having share in Gat No.715. After perusal of mutation entry No.440, it appears that Gat No.125, 382, 461, 462, 471, 565, 578, 646, 709 and 712 were divided into two shares i.e. half share of plaintiff and half share of defendant. In this mutation entry Gat No. 715 is not mentioned as ancestral property of plaintiff and defendant. As per mutation entry No. 440 Gat No. 715 was not divided into two parts. Therefore, prima-facie it appears that, plaintiff has no share in Gat No.715. If he is not co-sharer or co-owner in Gat No. 715 and adjacent owner of Gat No. 715 then, there is no question of encroachment made by defendant in Gat No. 715 in respect of plaintiff's share. So, inspection of Gat Nos. 715 is indirectly inspection of factum of possession. It is well settled principle of law, that commissioner can not be appointed for inspection of factum of possession, it amounts to collection of evidence. If plaintiff is owners and possessors of half share of suit property, then he has to prove his possession by adducing evidence not by appointing court commissioner. Perused the order passed below Exh.5. It appears that my learned predecessor has been specifically mentioned that plaintiff has liberty to measure Gat

No.715, house property No. 125 and 126. It does not mean that present application is maintainable as per rule. In such situation as per order passed below Exh.5 it is not binding on this Court to allow this application. Advocate is not expert to measure and fix the boundaries of land so as to appoint him as Court Commissioner for measurement of suit property. Therefore, said application is liable to rejected. Hence, I pass following order:-

**O r d e r**

1. Application is rejected.
2. Cost in cause.

Date : 06.02.2020.

(Smt.R.A.A.Khatib)  
Civil Judge Jr. Division,  
Malkapur-Shahuwadi.

**CERTIFICATE**

I affirm that the contents of this [P.D.F.](#) File judgment are same, word to word, as per the original judgment.

Name of the Stenographer	Sou. A. S. Kagale
Name of Court	Smt.R.A.A.Khatib, C.J.J.D & J.M.F.C. Malkapur-Shahuwadi.
Date of Dictation	06/02/2020
Judgment signed by the P.O.on	06/02/2020
Judgment uploaded on	06/02/2020