

Order Below Exhibit 115 In Regular Civil Suit No. 31/2001
(Passed on 21-07-2012)

Nature Of The Application

1. This is an application filed by the plaintiff seeking appointment of Court Commissioner for joint measurement.
2. The tenor of the application makes it clear that the plaintiff has filed it seeking appointment of an expert measurement surveyor i.e. Deputy Superintendent of Land Records (for short Dy.S.L.R.) under Order XXVI Rule 10 of the Code of Civil Procedure (for short C. P.C.)

Contents In The Application

3. The plaintiff has contended that he has filed this suit seeking permanent injunction against the defendants in respect of land Survey No. 2 Hissa No.5 admeasuring Hectare 1.48 Are. The plaintiff has amended the plaint and sought relief of removal of encroachment made by the defendants in respect of an area admeasuring Hectare 0.09 Are.
4. The Court Commissioner has filed his report Exhibit 46 as per order below Exhibit 38 dated 06/07/2005. The defendants have made encroachment on an area admeasuring Hectare 0.09 Are, after visit of Court Commissioner and after measurement carried out by Court Commissioner. Then the plaintiff amended his pleading as per order below Exhibit 113.
5. The application Exhibit 79 seeking appointment of Court Commissioner made by the plaintiff after amendment of pleadings is rejected on 20/11/2011 by observing that as there is no prayer of removal

of encroachment it is not tenable. Now the plaintiff has prayed removal of encroachment vide order below Exhibit 113.

6. The report filed by the Court Commissioner as per Exhibit 38 is submitted without conducting joint measurement and the boundaries and marks were noted as shown by the parties and as per record without measuring land. Thus during pendency of this suit the defendants have made encroachment of an area admeasuring Hectare 0.09 Are and are now claiming to be in possession of said area. Therefore, it is necessary to appoint an expert as Court commissioner.

7. On these grounds, the plaintiff has prayed to grant the application.

Contents In the Say Of Defendant Nos. 1 & 2

8. The defendant Nos. 1 and 2 have filed their say Exhibit 117 and strongly objected the application. They have contended that this application is not tenable. This application is filed to collect evidence. Since last ten years the plaintiff is prolonging the matter by filing various applications. The defendants have got measured their land. The Taluka Inspector of Land Records (for short T.I.L.R.) was appointed as per application Exhibit 38 filed by the plaintiff who measured the land of defendant Nos. 1 & 2 on 17/05/2006 and showed Hectare 0.04 Are encroachment made by the plaintiff on the land of defendant Nos. 1 & 2 and also showed Hectare 0.01 Are encroachment made by the defendant No.2 on the land of plaintiff. After this measurement the defendant Nos 1 & 2 made wire fencing to their land towards Eastern side and handed over possession of Hectare 0.01 Are land to the plaintiff. The plaintiff has filed

an application to call T.I.L.R. as his witness on 11/01/2011. Accordingly T.I.L.R. was present on next day but plaintiff has not adduced his evidence. This shows that the plaintiff is interested in delaying the trial.

9. The plaintiff again had filed an application Exhibit 79 seeking appointment of T.I.L.R. as Court Commissioner which is rejected. This is third application filed by the plaintiff which is not tenable.

10. On these grounds, the defendant Nos. 1 and 2 have prayed to reject the application.

The Arguments

11. I have heard Shri. V.V. Shete, advocate for the plaintiff and Shri. H.R. Patil, advocate for the defendant Nos.1 and 2, at length.

12. They argued in consonance with their contentions in the application and say. I will deal with those arguments while discussing reasons on the points taken for consideration.

Points and Findings

13. Upon hearing the following points arise for my consideration and I record my findings thereon as under for the reasons to follow :-

<u>Points</u>	<u>Findings</u>
1. Can the Dy.S.L.R. be appointed as Court Commissioner, as prayed for ?	Yes.
2. What order ?	Application Granted As per final order.

Reasons as to Point No. 1

14. The plaintiff has filed this suit seeking permanent injunction against the defendants in respect of land Survey No. 2 Hissa No. 5 (for short 2/5) admeasuring Hectare 1.48 Are situated at village Ahmedpur and possession of the encroached portion admeasuring East-West – 74 feet and South-North – 123 feet means Hectare 0.09 Are from the defendants.

15. The defendants have denied all the allegations made by the plaintiff contending that they have not made any encroachment on the plaintiff's land, Survey No.2/5.

16. The pleading of the plaintiff makes it crystal clear that he is owner land Survey No. 2/5 admeasuring Hectare 1.48 and defendants are owners of land Survey No. 1 Hissa No. 2 admeasuring Hectare 0.18 (for short defendants land). According to the plaintiff defendants have made encroachment on his land Survey No. 2/5 admeasuring Hectare 1.48 on an area admeasuring Hectare 0.09 Are. It means, in other words heavy burden lies on the plaintiff to prove his claim which in my view is required to be discharged, by bringing on record the measurement of land Survey No. 2/5 admeasuring Hectare 1.48 Are and defendants land.

17. Thus, a serious dispute is raised by the plaintiff and defendants in respect of ownership and possession of land Survey No. 2/5 admeasuring Hectare 1.48 and encroachment made, as alleged by the plaintiff.

18. The plaintiff has specifically alleged that during pendency of this suit the defendants have made encroachment in an area admeasuring

East-West – 74 feet and South-North – 123 feet means Hectare 0.09 Are. The plaintiff has filed this suit seeking permanent injunction and also possession of the said encroached portion from the defendants. The defendants are not admitting the allegations made by the plaintiff in respect of said encroachment. Therefore, I hold that the measurement is necessary to be carried.

19. After going through the rival contentions of both parties and keeping in mind the scope and object of Order XXVI Rule 10 of C.P.C. I am of the considered view that it is not possible for the plaintiff to bring on record the situation pleaded by him in respect of the encroachment, if any, on the land Survey No. 2/5 admeasuring Hectare 1.48 and exact area in possession of the defendants out of land Survey No. 1 Hissa No. 2 admeasuring Hectare 0.18, and so on, by any other means. Therefore, I am inclined to grant this application.

20. The appointment of Dy.S.L.R. as Court commissioner in this matter will not amount to collect evidence in any manner for the reason that if an expert from measurement department is appointed as Court Commissioner he will bring factual situation in respect of the land Survey No. 2/5 admeasuring Hectare 1.48 and of land Survey No. 1 Hissa No. 2 admeasuring Hectare 0.18, on record and nothing more than that.

21. Further, if Dy.S.L.R. is appointed as Court Commissioner it will help this Court to arrive at proper conclusion and to decide the suit on merits by doing justice to both parties. Therefore, also in the interest of justice, I am inclined to grant this application.

22. Above all, if the application is allowed no harm or injustice

will be caused to the defendants but it will help to decide the suit on merit. Therefore, I am inclined to grant this application, as prayed for.

23. After giving thoughtful consideration to the facts of the case and the averments made by the plaintiff in this application I am of the considered view that for just decision of the suit it is necessary to grant this application, as prayed, in order to find out truth in the allegations made by the plaintiff in the suit and defence of the defendants.

24. I am unable to persuade myself with the arguments advanced by Shri. Patil, Advocate for the defendants that the application cannot be granted, for the simple reason the plaintiff and defendants are fighting by tooth and nail to establish their respective pleadings and unless an expert is appointed it is not possible to fix the location or boundaries of plaintiff's and defendant's land and in respect of dispute at hand and in view of my findings, supra .

25. In short, the plaintiff and defendants are not agreeing on the ownership and possession of land Survey No. 2/5 admeasuring Hectare 1.48 and of defendant's land. After going through entire discussion above to find a key to the crux of this dispute between the plaintiff and defendants in respect of the plaintiffs' possession upon land Survey No. 2/5 admeasuring Hectare 1.48 and defendant's land, in my considered view appointment of Dy.S.L.R. who is an expert from the measurement department is must. However, merely after measuring the plaintiff's land the point in dispute cannot be settled. Therefore, in my firm opinion it is necessary to measure the land Survey No. 2/5 admeasuring Hectare 1.48 as per ownership and possession of plaintiff and land Survey No. 1 Hissa

No. 2 admeasuring Hectare 0.18 as per ownership and possession of the defendants. For this view I am buttressed by Hariyana Wakf Board Vs. Shanti Sarup and others, reported in 2008 (8) SCC 671 wherein Their Lordships have held :-

'In cases where the dispute is about location and the boundaries, it is desirable to appoint the court Commissioner and measure the land.'

26. In view of reliance placed by me on 2008 (8) SCC 671, it is not necessary to refer the case law relied by the plaintiff viz. (i) Kishanlal Rathi V/s. Dinkar Patil, reported in 2004(1) Mh.L.J. 138 (ii) Kashinath Shastri V/s. Haribhau Bawanthade, reported in 2004(2) Mh.L.J. 722 and (iii) Manohar Pagrut V/s. Sunanda Tharkar, reported in 2008(3) Bom. C.R. 4.

27. This suit is pending for more than 11 years. Therefore, it is necessary to direct the Dy.S.L.R. to do the commission work within a period of two weeks irrespective of the measurement date generated on E-system.

28. Accordingly, I answer point No. 1, in the affirmative and proceed to pass the following order.

Order

1. The Deputy Superintendent Land Records, Ahmedpur or any measurement surveyor deputed by him on his behalf, is appointed to act as Court Commissioner, in this matter.
2. The plaintiff is directed to deposit requisite amount towards costs and fees of the Court commissioner in the office of the Deputy

Superintendent Land Records, Ahmedpur and produce its deposit receipt in the Court on or before 23/07/2012.

3. The plaintiff is directed to pay requisite process fee and supply all the relevant documents, in the Court on or before 23/07/2012.
4. The Deputy Superintendent Land Records, Ahmedpur is directed to do the commission work on or before 31/07/2012 irrespective of the measurement date generated on E-system. If the Deputy Superintendent Land Records, Ahmedpur finds any difficulty in complying this order he is free to approach this Court, immediately.
5. The Deputy Superintendent Land Records, Ahmedpur or any measurement surveyor deputed by him on his behalf is directed to measure the land Survey No. 2 Hissa No. 5 admeasuring Hectare 1.48 of plaintiff and land Survey No. 1 Hissa No. 2 admeasuring Hectare 0.18 of the defendants situated at village Ahmedpur Tal. Ahmedpur, jointly, as per possession and ownership of plaintiff and defendants and to do the commission work keeping in mind the sale deed, revenue record and the pleadings of both parties and situation shown by both parties or their advocates, if present and to submit his report on or before 31/07/2012, failing which necessary action will be taken against him for disobeying the Courts' order.
6. The Deputy Superintendent Land Records, Ahmedpur or any measurement surveyor deputed by him on his behalf, is also

directed to see the lacuna remained after receiving the Commission Writ i. e. Commission letter such as deficit fee, documents and as like, if any and shall inform this Court without fail on or before 24/07/2012 so as to enable this Court to get its compliance from the plaintiff concerned, which will enable him to file his report as ordered; failing which he will be held responsible for causing delay and dereliction in his duty.

7. The Assistant Superintendent is directed to issue necessary letter to the Deputy Superintendent Land Records, Ahmedpur in order to receive commission fee. The plaintiff is directed to collect the letter personally and comply order, failing which the application shall stand rejected automatically.

(Pronounced in Open Court).

Dated: 21/07/2012.

(M. B. Lambe),
Jt. Civil Judge (S. D.),
Ahmedpur.