



**Reg. Civil Suit No. 480/2001**  
**Vitthal Vs. Tukaram & ors.**

**ORDER BELOW EXH.70**

1. This is an application filed by the plaintiff under the provisions of Order XXVI Rule 9 read with section 75 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code” for the sake of brevity and convenience) seeking for appointment of cadastral surveyor of DSLR office as court commissioner for the joint measurement of suit property and the property of defendants.

2. In brief, it is the contention of the plaintiff that he has instituted the instant suit and thereby sought for reliefs of recovery of possession of encroached portion and for perpetual injunction. He is the owner of 93R land from and out of survey No.16/3 situated within limits of village Janapur (Shirol), Tal. Udgir, Dist. Latur. According to the plaintiff, the defendants have encroached upon the suit property to the extent of 68R land from Northern side. It is specifically submitted by the plaintiff that to get exact portion of the encroachment the properties of the litigating parties needs to be measured. The plaintiff is ready to bear the charges of cadastral surveyor. Hence, the present application seeking for joint measurement of the suit property and the property of the defendants.

3. The learned advocate for the defendants No.4 and 5 has filed their say (Exh.72) and at the outset he has stated that they never encroached upon the land of the plaintiff. Their land is not located adjacent to the land of the plaintiff. It is specifically stated that from the application itself it is not getting clear that which defendant has encroached upon the suit property. By way of this application the plaintiff intents to collect evidence

and which is against the very spirit of appointment of commissioner. Ultimately, he has prayed for rejection of the application.

4. Heard learned advocate Shri. R.M. Patil for the plaintiff and learned advocate Shri. L.S. Madhware for defendants No.4 and 5 at considerable length. Perused the record and documents relied upon by the respective parties.

5. Following points arise for my determination along with findings thereon for the reasons therefor are as under :

<u>Sr. No.</u>	<u>Points</u>	<u>Findings</u>
1)	In the facts and circumstances of the instant case, issuing of commission to cadastral surveyor is required for the purpose of elucidating the matter in dispute ?	Yes.
2)	What order ?	: The application is allowed with costs.

### **REASONS**

6. Before advertng to the facts of the instant application, I would like to mention the settled position of law on appointment of court commissioner. The power of Court to appoint court commissioner is traceable to section 75 read with Order XXVI Rule 9 of the Code. The law is fairly settled that commission may be issued to appropriate authority or person to elucidate any matter in issue. Issuance of commission in the suit where boundary dispute is contested, or in a suit for recovery of possession of encroached portion, is necessary. Further the report of commissioner should not result into collection of evidence, except the suits for boundary disputes and recovery of encroached portion. To issue commission is a discretionary power of the Court. The said discretion is not an unregulated discretion, but is a judicial discretion which has to be exercised as per the judicial norms.

**AS TO POINT NO. 1 :-**

7. In the instant suit by way of present application, the plaintiff has sought for appointment of cadastral surveyor as commissioner so as the properties of the litigating parties could be jointly measured. The said application is combated by defendants No.4 and 5 on the ground that their properties are located far off the suit property and therefore no issue as to encroachment upon the suit property arises. Thus, the facts and circumstances in the instant suit and rather this application needs to be gone through.

8. Upon perusal of record it goes to clear that the instant suit is filed for recovery of possession of encroached portion along with mesne profits. Perusal of the record reveals that the plaintiff has examine in all two witnesses and thereafter moved the instant application. The learned advocate for the plaintiff has submitted that he do not want to examine witnesses anymore. He further submitted that since in the instant suit they have sought for recovery of encroached portion and as it is their substantive relief, in such circumstances joint measurement of the lands of litigating parties warranted. On going through the record it goes to clear that out of 93R land from and out of Sy. No.16/3, 68R land pleaded to be encroached at the instance of the defendants from northern side. The defendants No.4 and 5 also shown their readiness to get measured their land.

9. I have considered the application vis-a-vis arguments advanced by the rival parties. Perusal of the record reveals that the suit is for recovery of possession. Further the plaintiff has led his evidence by examining two witnesses. From the evidence of these two witnesses it appears that to elucidate the matter in issue the assistance of expert in measurement of lands needs to be taken. Learned advocate Shri. Patil appearing for the plaintiff has submitted with vehemence that the properties

of defendants hearing are located within Sy.No.16 itself. He went on to argue that now Sy.No.16 is converted into various block numbers and the properties of the defendants have been given block No. 22, 24 and 25. Ultimately, he has submitted that the properties of the defendants herein also needs to be measured alongwith the suit property. Per contra, Shri. Madhware, learned advocate defendants No.4 and 5 has submitted that even he has no objection if the properties of the litigating parties are measured conjointly. I have given my thoughtful consideration to the arguments advanced by the rival parties. Considering the arguments advanced in juxtaposition with the factual matrix of the instant case, to be more specific, since the prime dispute touches to the encroachment and recovery of the encroached portion vis-a-vis location of the suit property, I hold that the properties of the litigating parties needs to be jointly measured. With these considerations, the instant application needs to be allowed. Hence, I answer point No.1 in the affirmative and record my findings accordingly.

**AS TO POINT NO. 2 :-**

10. It is most important to mention here that the instant matter was instituted way back in the year 2001 and since then lingering for one or the other reason. It needs to be disposed off as soon as possible and within a span of three months. In the event, the suit is not disposed of as earliest it would be a bypass to the directions issued by the Hon'ble Supreme Court in the case of **Yashpal Jain Vs. Sushila Devi 2023 SCC OnLine SC 1377** and the sacrosanct object of speedy trial would result into meaningless. Hence, the commissioner needs to be directed to undertake his work within a month and file report accordingly. At the same time the plaintiff needs to be directed to pay the commissioner charges within 2 to 3 days as well. With these directions, in answer to point No.2, following order is passed :

**ORDER**

1. The application stands allowed with costs.
2. The Dy. Superintendent of Land Record, Udgir is hereby appointed as Court Commissioner to undertake the joint measurement of land in Sy.No.16/3 admeasuring 93R located within limits of village Janapur (Shirol), Tal. Udgir, Dist. Latur alongwith lands of defendants located within block Nos.22, 24 and 25 of same village, on depositing the necessary charges by the plaintiff in the present suit.
3. The DSLR is at liberty to measure the adjoining lands to arrive at clear and just measurement. More specifically, he should measure entire Sy.No.16.
4. The plaintiff is hereby directed to deposit necessary charges within 3 days from today itself and deposit the payment receipt in the Court accordingly.
5. The Dy. Superintendent of Land Record, Udgir is directed to submit the Report regarding the measurement along with the map showing encroachment (if any) before this Court within one month from today itself.
6. The parties are directed to submit the necessary documents with the Dy. Superintendent of Land Record, Udgir and comply with the order.

7. Commissioner Writ be issued to the Dy.  
Superintendent of Land Record, Udgir  
accordingly.
8. Parties to take note.

Date : 22.01.2025.  
Place : Udgir.

(Bhalchandra R. Zende)  
4<sup>th</sup> Jt. Civil Judge (J.D.),  
Udgir.