

MHND260003232017 	RCS No. 44/2017 Madhav Swami Vs. Sidheshwar Swami and others
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Order below Exh. 57

1. This is an application filed by the plaintiff under Order XXVI Rule-9 of Civil Procedure Code praying for appointment of Taluka Inspector of Land Record, Ardhapur as cadastral surveyor.

2. According to the plaintiff, defendant constructed house at Gut No. 200 though the defendant is owner and possessor of land in Gut No. 202 of village Malegaon Tq. Ardhapur. To know whether defendant constructed house at Gut No. 200 or 202 of village Malegaon it is necessary to measure land of Gut No. 200 as well as 202 of village Malegaon through Taluka Inspector of Land Record. Hence prayed to allow the application.

3. The defendant filed say overleaf and opposed this application contending that there is no need to measure the land, present application is moved only to prolong the matter. Hence prayed to reject the application.

4. Following points arose for my determination, to which my findings with reasons thereof are as under:

Sr. No.	Points for determination	Findings
1.	Whether appointment of Taluka Inspector of Land Records, Ardhapur as Cadastral Surveyor is necessary to determine real question in controversy?	Yes.
2.	What order?	Application is allowed.

5. Read application, say and heard learned Advocate for plaintiff and defendants. Since the application is moved under Order XXVI Rule-9 of Code of Civil Procedure one should go through said provision which reads as. **Commissions to make local investigations.** In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

6. Considering judgment of the Hon'ble Supreme Court and Hon'ble High Courts. Name of parties along with ratio laid down by the Hon'ble Supreme Court and High Courts in respective paragraphs are as under : **Payani Achuthan v. Chamballikundu Harijan Fisheries Development Co-operative Society, reported in 1996 SCC OnLine Ker 92 Para No 5 of the judgment reads as.** The main controversy in this case is as to whether the defendants are in possession of 105 acres or in excess of it, by encroaching into the land of the plaintiff. In a suit for injunction to restrain the defendants from interfering with the possession due to alleged encroachment into the land of the plaintiff, one of the methods to find out as to whether or not there is encroachment is to have the local investigation done by a competent Commissioner. In *Ponnusamy v. Salem Vaiyappamalai Jangamar Sangam*, AIR 1986 Mad 33, it is observed as follows:— “The object of the local investigation under O. 26, R. 9 is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but could be taken only from its peculiar nature on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner in effect is a projection of the Court appointed for a particular purpose. In this regard the implication of O. 26, R. 10 cannot be lost sight of When it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. A party has a right to place evidence which he could require to substantiate his case before the Court and it is the duty of the Court to receive such evidence

unless there are other justifiable factors in law to decline to receive it. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under O. 26, R. 9. When the Court declines to issue the Commission asked for to make local investigation that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. Therefore, an order refusing to appoint a Commissioner under O. 26, R. 9 to make local investigation and report is a “case decided” and hence revisable under S. 115”.

7. I agree with the above view. The Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner. Refusal of the request of the party to appoint a Commissioner under O. 26, R. 9, C.P.C. to make a local investigation in an appropriate case amounts to failure of exercise of jurisdiction vested in it. In this view of the matter, I find that the impugned order cannot be sustained. For the reasons stated above, the revision is allowed. The impugned order is set aside. The learned Munsiff is directed to appoint the Commissioner as prayed, at the expense of the plaintiff. **Chintapatla Arvind Babu and another V/s Smt K. Balakistamma @ Bhargavi and another reported in AIR 1992 AP 300** Para No. 5 of the judgment reads as It is for the parties to decide as to what evidence has to be adduced in support of their pleas and it is not for the opposite party or the Court to suggest or to indicate the evidence which has to be adduced. So long as the evidence is relevant and if it is not by way of dilatory tactics, the Court is bound to allow' a party to adduce evidence. Order 26, Rule 9 CPC permits a party to move the Court for appointment of an advocate-commissioner for local investigation if it is requisite or proper for the purpose of elucidating the 'matter in dispute. The report of elucidating the matter in dispute. The report of such Commissioner shall be held as evidence in the suit and it forms part of the record under Order 26, R-10 CPC. When a party complains that the opposite party was attempting to disturb the features, a type of case considered in Ponnuswamy's Case, and applies for appointment of a commissioner under Order 26, Rule 9 CPC, refusal to allow such petition prevents the party from having clinching, evidence in proving the said fact and

then it will be one of adjudicating about the right of the party to adduce evidence. There may be cases where the matter in dispute can be resolved by appointment of a Commissioner for localising the site in dispute with reference to the title deeds and the boundary dispute in regard to the vacant site is one such case. If the Court declines to appoint a Commissioner, it may result in the perpetration of gross injustice if the relief is denied to the aggrieved litigant where it is most needed. Thus, even before the amendment of Section 115 CPC in 1976, the expression 'case' was construed as including 'a part of proceeding whereby the High Court in exercise of the power of superintendence interferes in such matters: vide S.S. Khanna v. F.J. Dillon, . It is now made specific by the explanation to Section 115 CPC after it was amended by Amendment Act. 1976 ***Shantaram Dattatray Kekan v. Bhausahab Karbhari Kekan*, reported in 2022 SCC OnLine Bom 6466 important paragraph No. 5 to 10 and 13 reads as . 5.** First I proceed to deal with the judgments relied upon by Mr. Kulkarni in which it is held that Court cannot appoint Court Commissioner to collect evidence before parties adduced evidence and that appointment of Court Commissioner can be made only after evidence of both the parties to the suit is recorded:—

- (I) In *Sanjay Namdeo Khandare v. Sahebrao Kachru Khandare*, (2001) 2 Mah LJ 959, the trial Court had appointed Court Commissioner for inspection of the suit property and to submit report regarding actual possession thereof. This Court held that the same would tantamount to Court Commissioner being appointed for collection of evidence regarding possession which is impermissible.
- (II) In *Ramkrishna Santu Kakad v. Reojee Sahadu Kakad*, Writ Petition No. 2749 of 2012 decided on 4-3-2013 [2013 Mah LJ Online 163], Single Judge of this Court, relying on *Sanjay Namdeo Khandare* (supra) held that appointment of Court Commissioner on an application made by defendant even before framing of issues was premature. This Court held in paragraph No. 5 of the judgment as under:

“5. In that view of the matter, in my opinion, the stage of the proceeding for appointment of the Court Commissioner is premature. It is different matter if the Court starts recording the evidence and finds it

difficult to locate the correct position about the questions of controversy involved in the matter and at that stage, by invoking powers under section 26 Rule 9 of the Civil Procedure Code appoints the Court Commissioner. Therefore, in my opinion, the impugned order cannot sustain for the aforesaid reasons. Therefore same is quashed and set aside. However, the parties will have liberty to file an application for appointment of the Court Commissioner at appropriate stage of the proceedings. Setting aside the impugned order will not come in the way of the parties to file an application for appointment of Court Commissioner at appropriate stage of the suit.”

(III) In *Dhondiba s/o Bapu Zaware v. Santosh s/o Paraji Zaware*, Writ Petition No. 4756 of 2014 decided on 8-12-2014 [2014 Mah LJ Online 189], the issue was about encroachment by defendants on the property of plaintiff and the trial Court had appointed Court Commissioner even before framing of issues. This Court, therefore, set aside the order of appointment of Court Commissioner with a liberty to respondents therein to move an application for appointment of Court Commissioner after commencement of the trial.

(IV) In *Arjun Rambhau Dhankude v. Bhanudas Ramchandra Murkute*, (2020) 2 Mah LJ 145, this Court held that before any positive case of encroachment at hands of defendants over definite portion of suit lands being made out, the trial Court could not have directed the appointment of Court Commissioner with further directions to ascertain possession of the parties.

(V) In *Sanjay Kisan Thorat v. Ramchandra Parsu Thorat*, (2018) 2 Mah LJ 954, this Court held in paragraph Nos. 11 and 12 as under:

“11. Hence, as rightly submitted by learned counsel for the Petitioners, the law in this respect is fairly well settled, as held by this Court time and again and also, in the authority relied upon by learned counsel for the petitioners that of *Dnyandeo Vithal Salke v. Dagdu Kadar Inamdar*, (2017) 3 Mah LJ 314, that, “The appointment of ‘Court Commissioner’, even that of T.I.L.R., to submit the factual

report as regards possession or user of the land is amounting to collection of evidence and it is not permissible in law.”

8. When the Respondents are coming before the Court with a specific case of the existence of their house, bio-gas, toilet, open space, agricultural land, two water chambers, pipeline, trees of Mango and Coconut etc., the burden lies upon them to prove the said existence and their location. They cannot, under the pretext of appointment of T.I.L.R. as a ‘Court Commissioner’, when the measurement of the lands is already done at their instance only and the boundaries are also fixed, seek appointment of ‘Court Commissioner’ to bring on record the factual position at the site, so as to help them in proving their case for interim injunction. The trial Court has not considered this settled position of law and, therefore, the impugned order passed by the trial Court needs to be quashed and set aside.”

(VI) In *Dnyandeo Vithal Salke v. Dagdu Kadar Inamdar*, (2017) 3 Mah LJ 314, this Court held that in a suit filed for injunction simplicitor, order directing appointment of Taluka Inspector of Land Records to submit report on actual possession amounts to collection of evidence which is impermissible in law.

(VII) In *Laxman Sukhdeo Avhad v. Parshram Pandurang Avhad*, Writ Petition No. 2210 of 2019 decided on 11-2-2021 [2021 Mah LJ Online 104], this Court held in paragraph No. 5 as under:

“5. In view of the same, even if the trial Court's order is set aside mainly on the said ground, however, I am informed that the plaintiffs have not examined any witness, so far. In view of the same, the petitioners would be at liberty to file an application for appointment of the Court Commissioner, for which the other side has given no objection, after his evidence is recorded, and upon fling of the same, the trial Court shall decide the said application on its own merits, without getting perturbed by the order on earlier application Exh.26 impugned in this writ petition. Writ Petition is accordingly disposed off. No costs.”

(VIII) In *Chandrakant Kashinath Dike v. Smt. Satyabhama Vishwanath Dike*, Writ Petition No. 8877 of 2013 decided on 17-1-2014 [2014 Mah LJ Online 190], this Court held in paragraph Nos. 4, 5 and 6 as under:

“4. There can not a dispute with the proposition that to appoint the Court commissioner as per section 75 of the Code of Civil Procedure is the discretion 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.

5. The parties have not yet stepped into witness box. The Court commissioner could have been appointed if the Court finds it necessary for the just decision of the case. No doubt, in case of encroachment, dispute with regard to the identity of the property, the assistance of expert such as Cadestral Surveyor to measure the property can be considered by the Court. However, the stage is too premature. Even the application for temporary injunction is not decided. The report of the T.I.L.R. if disputed by either party, is not admissible in evidence unless the T.I.L.R. is examined.

6. At the stage of evidence, from the evidence on record i.e. documentary evidence if the Court finds that the appointment of Court commissioner is necessary, then at that stage a party can file an application for appointment of T.I.L.R. as Court commissioner, which application would be considered by the Court on its own merits.”

(IX) In *Sitaram Suklal Patil v. Vasudeo Suklal Patil*, Writ Petition No. 9626 of 2016 decided on 31-7-2017 [2017 Mah LJ Online 196], this Court followed the decision in *Ramkrishna Santu Kakad* (supra) and *Chandrakant Kashinath Dike* (supra) and set aside the order of the trial Court appointing Court Commissioner even before framing of issues with a liberty to file an application for appointment of Court Commissioner after recording of evidence.

(X) In *Bharat Vithalrao Bhikane v. Uttamrao Vithalrao Bhikane*, Writ Petition No. 12192 of 2021 decided on 10-12-2021 [2021 Mah LJ Online 105], this Court held in paragraph Nos. 3 and 4 as under:

“3. Suffice for the purpose to observe that this Court has consistently taken a view in catena of cases that the appropriate stage for appointment of Court commissioner could be after a party makes an initial attempt to establish his case which can happen only during the course of recording of evidence. Admittedly, that was not the case when the application was filed by the petitioner for appointment of Court commissioner. One can gainfully refer to the decision in the case of *Sitaram Suklal Patil v. Vasudeo Suklal Patil*, Writ Petition No. 9626/2016 decided on 31-7-2017 [2017 Mah LJ Online 196] and the cases referred to therein.

9. In view of this very ground, the writ petition is liable to be dismissed. However, since some observations touching the merits of the case have been made by the learned Judge of the trial Court while passing the order under challenge in paragraph No. 12, to my mind, it would be prejudging the issue. If the learned Judge was firm in observing that the application was premature, such observations touching the merits of the case are in fact redundant. He could have very well rejected the application for the sole reason of it being premature one. That being not the case, the writ petition can be disposed of keeping open the avenues for the petitioner to move an application for appointment of Court commissioner at an appropriate stage.” (XI) In *Baburao Tulshiram Patil v. Natthu Trimbak Choudhary*, Writ Petition No. 9973 of 2021 decided on 30-8-2022 [2022 Mah LJ Online 31], this Court held in paragraph Nos. 2 and 3 as under:

“2. Having heard the learned advocates for the parties, on merits and after perusal of the impugned order, this Court, at this stage is not inclined to interfere in the impugned order, as the application seeking appointment of Court Commissioner, is filed by the petitioner at a premature stage. This Court has constantly taken a view that application for appointment of Court Commissioner has to be filed after conclusion of oral evidence of both the parties. Admittedly, in the present case, evidence affidavit is filed by the plaintiff and he is yet to be cross-

examined. In that view of the matter, the impugned order need to be interfered at this stage.

3. It is also a settled legal position that in cases of suit for removal of encroachment and recovery of possession, it is desirable to appoint Court Commissioner. In that view of the matter, the writ petition is disposed of with liberty to the parties to file application for appointment of Court Commissioner, after conclusion of oral evidence of the parties.”

10. Para no. 6 reads as. Thus in the aforesaid decisions this Court, has consistently taken a view that appointment of Court Commissioner cannot be done in order to enable the parties to collect evidence. It is further held that, the appointment of Court Commissioner for measurement of the land either for fixation of boundaries or for determination of possession, ideally should be done only after the parties make out a case by recording evidence.

11. Para No. 7 reads as . : (I) In *Sunita Ashok Kachre v. Santram Bapurao Patkal*, Writ Petition No. 6541 of 2017 decided on 6-7-2017 [2017 Mah LJ Online 197], a Single Judge of this Court held in paragraph Nos. 5, 6 and 7 as under:

“5. The learned Counsel for petitioners/defendants argued on law points and also on some factual aspects. The learned counsel submitted that, when application for temporary injunction was not yet decided, it was not proper on the part of the trial Court to appoint Court commissioner as that amounts to collection of evidence. He has placed reliance on observations made by this Court, in the case (2013) 11 LJ SOFT 145, *Ramkrishna Santu Kakad v. Raojee Sahadu Kakad* and observations made by this Court in Writ Petition No. 8877/2013, *Chandrakant Kashinath Dike v. Smt. Satyabhama Vishwanath Dike* decided on 17-1-2014 [2014 Mah LJ Online 190].

6. This Court has carefully gone through the observations made by this Court. The points involved in those matters and facts of the present matter are altogether different. The provision of Order 26, Rule 9 of

Civil Procedure Code shows that, there is no prohibition to appoint Court Commissioner at such stage. This is enabling provision and no stage is fixed in the provision. Further facts of the present matter show that the dispute can be resolved effectively after taking the measurement through Government Surveyor, if such measurement is possible.

7. This Court has gone through the copies of sale deeds produced by both sides and property card of CTS No. 87. To take care of the grievance of the petitioner/defendant, the property purchased by the defendants under the two sale deeds can be measured first, and then it can be ascertained as to whether any space from the aforesaid city survey number was left which could have been purchased by the plaintiff. After that, it can be ascertained as to whether there is encroachment. As this way the measurement can be taken, there is no scope for grievance to the petitioner/defendant. In the result following order is made.”

Thus this Court held that there is no specific prohibition in the Code to appoint Court Commissioner at a particular stage.

- (II) In *Balkrishna s/o Gangabishanji Zawar v. Azmat Khan s/o Suban Khan*, Writ Petition No. 8608 of 2012 decided on 27-9-2016 2016 Mah LJ Online 203], learned Single Judge of this Court held in paragraph No. 10 as under:

“10. In the case of *Ramkrishna Santu Kakad* (supra), cited on behalf of the petitioner, it is observed that the Court Commissioner cannot be appointed for collecting evidence. In that case, the dispute was relating to the existence of way. In the present case, the dispute is not in respect of existence of way. It relates to the alleged encroachment by the petitioner over plot No. 13 belonging to respondent No. 1. For resolving such type of disputes, the local investigation by the City Survey Officer would be very useful for deciding the controversy between the parties finally and effectually. Moreover, in the case of *Ramkrishna Santu Kakad* (supra), reliance was placed on the case of *Sanjay Namdeo Khandare v. Sahebrao Kachrau Khandare*, (2001) 2 Mah LJ 959, wherein the appointment of the Court Commissioner was

sought for the purpose of finding out as to who was in actual possession of the suit land. In that view of the matter, it was held in that case that the Court Commissioner cannot be appointed for collecting evidence. In the present case, the appointment of the Court Commissioner has been sought to ascertain the boundaries of the plots of the parties and to verify whether the petitioner has encroached upon plot No. 13. In view of these distinguishing facts, the judgment in the case of *Ramkrishna Santu Kakad* (supra) would be of no assistance to advance the case of the petitioner.”

12. This Court thus distinguished the judgment in *Ramkrishna Santu Kakad* (supra) and held that since the Court Commissioner was appointed for ascertaining boundaries of the plots of parties and to verify whether there was any encroachment it cannot be stated that the appointment of Court Commissioner was for collection of the evidence. The decision, however, does not deal with the issue of the stage at which the appointment of Court Commissioner can be made.22.(III) In *Mayuresh Subhash Sonawane v. Yashwant Babu Bhoir*, 2022 Mah LJ Online 32 : 2022 DGLS (Bom) 119, learned Single Judge of this Court held in paragraph No. 12.6 as under: “12.6. In the present case, the suit has been filed by the Respondent, who is the owner of the land adjoining the Petitioners. A specific case has been made out that due to construction carried out by the Petitioner and the consequent encroachment, the approach road to the Respondents property is closed. This fact itself is required to be ascertained by the Court at this interim stage so as to enable the trial Court to pass any interim order pending the trial.”

Thus in this decision, this Court has held that the appointment of the Court Commissioner is warranted even in order to enable the trial Court to decide the application for temporary injunction. Of course, this finding is recorded in the light of the unique facts of the case where approach road to the property was alleged to be blocked on account of ongoing construction and by the time this Court upheld the order of appointment of Court Commissioner, the suit remained pending for

substantial time and therefore, this Court directed final disposal of the suit itself.

(IV) In *Govardhan v. Sai Baba Estates*, 2022 Mah LJ Online 33 : 2022 DGLS (Bom) 854, this Court considered the entire case law on the subject of the stage at which Court Commissioner can be appointed for measurement of lands and held as under:

“It is not disputed that the respondent-plaintiff has given description of the suit property along with the boundaries in the plaint. The petitioner-defendant has disputed the boundaries and denied the very existence of the suit property. The measurement carried out by the respondent-plaintiff through cadastral surveyor on 14-8-2018 is also denied by the petitioner-defendant. The application Exhibit-5 filed by the respondent-plaintiff for temporary injunction is already rejected by the trial Court. It appears that many litigations including criminal complaint are going on between the plaintiff and the defendant. The trial Court has recorded a finding that for deciding the suit on merit, it is necessary to carry out measurement of the suit property along with other properties to trace out exact location of the suit property. By appointing Court Commissioner, no prejudice is likely to be caused to the defendant. In the case in hand, application Exhibit-5 is already decided and the trial Court, considering the pleadings of the parties, was of the view that to identify the suit property, the existence of which is denied by the defendant, it is necessary to appoint Court Commissioner. Similar view is taken in the other citations relied on by the petitioner.”

(V) In *Kalyan Santram Kawade v. Khanderao alias Khandu Ganpati Kawade*, (2015) 4 Mah LJ 429 : 2014 DGLS (Bom) 186, learned Single Judge of this Court upheld the order of appointment of Court Commissioner even before framing of issues. However, it must be added here that the learned Single Judge of this Court (R.V. Ghuge, J :) subsequently on 8-12-2014 held in *Dhondiba s/o Bapu Zaware* (supra) that Court Commissioner cannot be appointed before issues could be cast and the trial Court commences recording of evidence. In *Dhondiba*

s/o Bapu Zaware (supra), the learned Single Judge followed the decision in *Sanjay Namdeo Khandare* (supra) and *Ramkrishna Santu Kakad* (supra) which apparently were not cited while deciding the case in *Kalyan Santram Kawade* (supra).

(VI) In *Satish Prakash Mane v. Dhanraj Abhangrao Mane*, Writ Petition No. 2873 of 2017 decided on 22-11-2017, this Court considered the decisions in *Dhondiba s/o Bapu Zaware* (supra), *Chandrakant Kashinath Dike* (supra) and *Ramkrishna Santu Kakad* (supra) and held in paragraph No. 7 as under:

23. “7. Learned counsel for the petitioners relied upon the aforesaid cases to demonstrate that it is not desirable to allow such an application seeking appointment of the Court Commissioner before commencement of the trial. However, this Court consistently taken said view on the backdrop that if an application for issuance of the temporary injunction is pending, such order should not be passed by taking recourse to the provisions of section 75 of the Civil Procedure Code. In the instant case, as discussed above, I do not find any prejudice likely to be caused to the petitioners/defendants. It is well settled that in a case wherein relief is claimed for removal of the encroachment, assistance of an expert is required to fix the boundaries for the just disposal of the case and to resolve the controversy between the parties.”

13. Para no. 8 reads as After having considered the provisions of Code under which Civil Court is empowered to appoint Court Commissioner as well various decisions of this Court on the subject it is clear that, there is no hard and fast Rule that Court Commissioner can be appointed only at a particular stage. This Court in few decisions has permitted appointment of Court Commissioners even before commencement of trial and in some cases appointment of Court Commissioners before commencement of trial is held to be erroneous. In my view, the decisions are rendered in facts of each case. However, common thread that runs through all the above decisions is as regards the principle that a Court Commissioner can never be appointed in

order to enable parties to collect evidence. It is on account of this principle that in most of the cases this Court has held that even before a party adduces his evidence, he cannot seek appointment of Court Commissioner. However, if the facts of a particular case requires the Court to ascertain the physical status of the land, the Court's power to appoint Court Commissioner at any stage does not appear to be circumscribed. It all depends upon facts and circumstances of each case.

14. Para No. 9 reads as . Having discussed the broad principles relating to the power of the Civil Court to appoint Court Commissioner for measurement of land or fixation of boundaries thereof, I now advert the facts of the present case to examine whether appointment of Court Commissioner at this stage is warranted.

15. Para No. 10 reads as The plaintiffs/respondents have instituted Regular Civil Suit No. 186/2016 against defendants/petitioners seeking removal of possession of encroached land admeasuring 20R of suit property and injunction from creating any encroachment by defendants. In prayer Clause (D), plaintiffs have also sought relief for measurement of the land and for fixation of boundaries. The defendants filed written statement raising various defences including *res judicata* on account of decision of suit involving same issues in Regular Civil Suit No. 222/2005 decreed in their favour on 31-10-2007. The issues are framed in the suit and the plaintiffs were directed to file list of witnesses. Before filing list of witnesses, plaintiffs moved an application at Exhibit-23 for appointment of Deputy Superintendent of Land Records, Kopargaon as Court Commissioner for measurement and fixation of boundaries of the suit land. The defendants resisted the application. The trial Court proceeded to allow the same by its order dated 23-11-2021 appointing Taluka Inspector of Land Records, Kopargaon as Court Commissioner to carry out joint measurement of suit properties and to fix boundaries after giving advanced notice to both the parties. The Court Commissioner has been directed to specify whether any encroachment is

found in the suit property. The defendants are aggrieved by the order of the trial Court dated 23-11-2021 and have filed present petition.

16. Para No. 13 reads as In such circumstances, the issue that arises is whether plaintiffs can seek appointment of Court Commissioner for the purpose of establishment of alleged encroachment over the suit property by defendants even before elucidating their case by production of evidence. The defendants contend that, their possession over the suit property is already established in RCS No. 6/2008. The plaintiffs have ascertained the exact area of encroachment as 20R and have prayed for removal of encroachment of the ascertained portion in the suit. The plaintiffs are yet to adduce evidence in support of their claim that land admeasuring 20R has been encroached by defendants. Therefore, seeking appointment of Court Commissioner at this stage would definitely amount to collection of evidence. Also there is a substantive prayer for measurement of suit property, which is virtually granted by directing appointment of Court commissioner. Furthermore, in the light of previously concluded litigation between same parties over the same land would raise the issue about maintainability of the suit itself. I do not wish to record any findings on this aspect as issue involved in the present petition is limited. However, in my view considering the peculiar facts and circumstances of the present case, appointment of Court Commissioner for measurement of land and fixation of boundaries atleast at this stage before plaintiffs adduced their evidence is not warranted.

17. E. Achuthan Nair v. P. Narayanan Nair, (1987) 4 SCC 71 at page 73 important Para No.2 of the judgment reads as. The only question argued before us by the learned Counsel for the appellant was that a suit for demarcating the boundary of a property was not maintainable when the plaintiff himself was uncertain about the precise boundary. He placed reliance upon a judgment of the High Court of Bombay in *Kavasji Jamsetji v. Hormasji Nassarvanjishet* [ILR 29 Bom 73] and a judgment of a learned Single Judge of the Kerala High Court in *Rayappan v. Yagappan Nadar* [1958 Ker LT 955] . In these two cases, the learned Judges purported to follow the

statement of Lord Keeper Henley in *Wake v. Conyers* [1759 (I) W & TLC (7th Edn.) 170] decided in 1759 where he had said “the court has, in my opinion (and if parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud, or confusion, where one party has ploughed too near the other, or the like; nor has this Court a power to issue such commissions of course, as here prayed”. We do not think that we will be justified in importing into our jurisprudence the technicalities of English law and the distinction made by the English courts between legal estates and equitable estates. In India, the question whether a suit is cognizable by a civil court is to be decided with reference to Section 9 of the Civil Procedure Code. If the suit is of a civil nature, the court will have jurisdiction to try the suit unless it is either expressly or impliedly barred. A dispute regarding identification of boundary between two adjacent land owners is certainly a dispute of a civil nature and it is not barred either expressly or impliedly. In the judgment under appeal, Poti, J. pointed out:

18. “We can also state from our experience at the bar that this type of suits are not unfamiliar to this part of our country. In fact in several areas of the State suits for determination of boundaries when the boundaries between the holdings are disputed are a matter of common occurrence and the maintainability of such suits, have not, till recently, been doubted.... It is not necessary to further go into this question since we see no warrant to follow the English law based, as it is upon its peculiar historical background. The question in the Indian context is not whether any equitable consideration has to be shown before a plaintiff in a suit gets the relief and, therefore, what was said in the decisions of the English courts on this particular form of action may not have relevance here. As we pointed out earlier in this judgment, the only question that may be relevant to the issue in a suit of this nature in the courts in India is whether the suit is one of a civil nature. Once it is shown that it is, no other question would arise and the courts will have to entertain the suit and try it on the merits. The decision in *Kavasji v. Hormasji* [ILR 29 Bom 73] which has also been referred to by Varadaja Iyengar, J. in *Rayappan v. Yagappan Nadar* [1958 Ker LT 955] has simply purported to follow the

English cases without considering how far the law should be applicable to this country. We, therefore, are of the view that the decision in *Rayappan v. Yagappan Nadar* [1958 Ker LT 955] has not laid down the correct law and has therefore, to be overruled.”

Justice Viswanatha Iyer who agreed with Justice Poti but added a brief note of his own, stated:

19. “Disputes as regard the location of boundary separating adjacent lands of different owners may arise under ever so many circumstances. One common instance is where portions of survey field are transferred or allotted to different persons without mentioning either the side measurements or other necessary measurements to fix the geometrical shape of the plot at the spot. The area and location alone may have been shown in the transfer deed or the partition deed. Without changing the location, the area conveyed or allotted may be sought to be located in one or more alternative geometrical shape by one owner. This may clash with the claim of the other person to have his area located in a particular geometrical shape. Again, any one party may wish to have the limits of the area belonging to him demarcated so that he may either enclose the area to prevent trespass or to exercise acts of possession without encroaching into the neighbouring plot. If the other party on demand does not cooperate, a cause of action arises to have the limits of his property determined through court. Again the property conveyed or allotted may have been described only with reference to neighbouring properties. Those properties may or may not have been limited in extent and shape to a survey field. In that case, a fixation of the boundary of those properties may be necessary to fix the boundaries of the properties conveyed or allotted. If there is no cooperation in doing that, that may result in a dispute. These instances are only illustrative and not exhaustive. All these disputes are disputes of a civil nature and they can form the subject matter of a suit under Section 9 CPC. There is no express or implied bar under any other law....

20. According to me, whenever there is a dispute between two parties as regards the location of a boundary separating their neighboring

properties and if on a demand to cooperate in fixing that boundary it is not given, a suit will lie at the instance of the demanding party. So I agree with my learned brother that the decision in *Rayappan v. Yagappan* [1958 Ker LT 955] is not correct and has to be overruled.”

21. Perused the record. It shows that previous suit for perpetual injunction was filed. Plaintiff as well as defendants examined their respective witnesses and closed their evidence by filing pursis. This court had heard both parties substantially matter was posted for judgment. On the day of final hearing the plaintiff moved this application praying for appointment of Court Commissioner on the ground that he want to ascertain as to whether the defendant constructed house either on Gut No. 200 or Gut No. 202 of village Malegaon. Considering the nature of dispute in between the parties this court is of the opinion that both Gut numbers of Village Malegaon has to be jointly measure to come at a specific conclusion. Considering all these aspects of the matter my finding to point no. 1 in the affirmative and in answer to point no. 2 I pass following order.

ORDER

1. Application is allowed.
2. The Taluka Inspector of Land Records, Ardhapur is appointed as the Court Commissioner to measure entire land at Gut No. 200 and Gut No. 202 of village Malegaon jointly and file its report within a week after receipt of this order.
3. Plaintiff is directed to deposit the requisite commission fees at the office of the Taluka Inspector of Land Records, Ardhapur, within a week from today failing which this order shall deemed to be infructuous.
4. Plaintiff is further directed to supply copy of plaint and requisite documents to Taluka Inspector of Land Records, Ardhapur.
5. Cost in cause.

Sd/-

Date : 06.04.2024.
Place : Ardhapur

(Q.R. Syed),
Joint Civil Judge, JD, Ardhapur

CERTIFICATE

I affirm that the contents of this P.D.F. file order are same, word to word, as per the original order.

Name of the Jr. Clerk: B. G. Labde

Court of Jt. Civil Judge Junior Division, & JMFC, Ardhapur Dist. Nanded.

Date of pronouncement of Judgment/Order : 06.04.2024

Judgment/Order signed by the Presiding Officer : 06.04.2024

Judgment/Order uploaded on : 06.04.2024