

Order below Exh. 46

(Passed on 25th January, 2023)

1. Instant application (Exh.46) is moved by the plaintiff for appointing the Court Commissioner directing him to conduct measurement of suit properties bearing Gat No. 35/1, 35/2, 33, 37, 38, 39, 41 & 42 and after measuring the same, submit measurement-sheet along with his Report & Map, before the court. Plaintiff submitted that, he has filed this suit for perpetual injunction, wherein, defendants have filed their written statement (Exh.20). Plaintiff further submitted that, the suit properties bearing Gat No. 35/1 & 35/2 are owned and possessed by him & his brothers. Defendants have no concern with such properties. Defendants are the owners of Gat No. 37, 39, 41 & 42. Plaintiff further submitted that, defendants are trying to encroach upon Gat No. 35/1 & 35/2. Furthermore, they are illegally restraining plaintiff from entering into his field. Therefore, plaintiff has filed this suit for perpetual injunction. For deciding the instant suit it is necessary to bring all these facts before the Court. Plaintiff further submitted that, for bringing the real position before the court and for proper adjudication of this suit, it is necessary to appoint a court commissioner who shall inspect the area and prepare the map and report after the inspection. Therefore, plaintiff finally submitted that, a court commissioner may kindly be appointed and he be directed to inspect the area and prepare map and

submit his report. Therefore, plaintiff finally submitted that, to prove the encroachment of defendants it is necessary to get suit lands measured through T.I.L.R., Chandwad.

2. Learned Advocate for defendants by filing his Say on the overleaf of this application submitted that, the application (Exh.46) is not tenable in the eyes of law. They further submitted that, the application filed by plaintiff below Exh. 46 is filed only with a view to collect evidence through Court, which is not permissible. Hence, the application (Exh.46) is devoid of any merit and it is liable to be rejected.

3. Perused the application and Say filed thereon. Heard the learned Advocates of both the parties.

4. The present suit is filed by plaintiff for perpetual injunction. On perusal of the pleadings of the plaintiff, it appears that there is a boundary dispute between the parties. **In Yashwant Bhaduji Ghuse Vs. Vithobaji Laxman Ladekar, 2010 (3) Mh.L.J. 956, Hon'ble Bombay High Court** has held that, *"It is settled position of law that under Order 26, Rule 9 of Code of Civil Procedure, the Court has discretion to order local investigation. The object of local investigation is not so much to collect evidence which can be taken in Court, but to obtain evidence which from its peculiar nature can only be had on the*

spot. Cases of boundary disputes and disputes about identity of lands are instances when a Court should order local investigation under Order 26, Rule 9 of the Code. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out exact area encroached upon, Oral evidence cannot conclusively prove such an issue”.

5. In the present suit, considering the above pleading of plaintiff, it appears that, unless and until the boundaries of agricultural field of plaintiff and defendants are not determined, it is not possible to decide the fate of this suit. It is settled position of law that, for ascertaining encroachment, measurement of the entire Gat numbers is essential. Therefore, for elucidating the matter in dispute, measurement of Gat Nos. 35/1, 35/2, 33, 37, 38, 39, 41 & 42 is essential. Hence, I am of the view that, this is a fit case to appoint Commissioner by virtue of Order 26 Rule 9 of C.P.C., directing him to measure entire field Gut Nos. 35/1, 35/2, 33, 37, 38, 39, 41 & 42 at Mouje Dongargaon, Tal. Chandwad, Dist. Nashik and after measuring that Gat numbers submit measurement-sheet alongwith his Report and map, before the court. Hence, considering the discussion made above, I am of the view that the application below Exh.46 is to be allowed. Hence, I proceed to pass following order.

ORDER

- 1] Application below Exh.46 is partly allowed.
- 2] Taluka Inspector of Land Records, Chandwad, is hereby appointed as Court Commissioner in the matter.
- 3] Taluka Inspector of Land Records, Chandwad, shall conduct measurement of Gut Nos. 35/1, 35/2, 33, 37, 38, 39, 41 & 42, situated at mauje Dongargaon, Tq. Chandwad, Dist. Nashik.
- 4] Court Commissioner, is directed to show the encroachment, if any, on the field of plaintiff.
- 5] Plaintiff and defendants shall deposit the Commissioner fees jointly directly to the office of Taluka Inspector of Land Records, Chandwad, Dist. Nashik.
- 6] After payment of Commissioner Fees, issue Commissioner writ.

Date: 25.01.2023.

(Prasad B. Joshi)
Civil Judge (Jr.Dn.), Chandwad.