

ORDER BELOW EXH.29 IN RCS No.76/2016
(CNR NO.MHNS160004882016)

01. Present application filed by the plaintiff under Order VI Rule 17 of Code of Civil Procedure.
02. Read the application and say by the defendant.
03. Heard learned advocate for parties.
04. From the rival contentions of the parties, following points arise for my determination, accordingly, I recorded my findings thereon for the reasons given below.

<u>S.NO.</u>	<u>POINTS</u>	<u>FINDINGS</u>
1	Whether the proposed amendment will change the nature of the suit ?	In the negative.
2	Whether the proposed amendment is necessary to determine the real controversy between the parties ?	In the affirmative.
3	What order?	As per final order.

:: REASONS ::

AS TO POINT NOS. 1 to 3 :-

05. The plaintiff contended that, he has filed present suit for perpetual injunction and appointment of Court Commissioner for fixation of boundaries in suit land and taking possession of encroached portion. Plaintiff also filed an application for appointment of Court Commissioner for measurement of suit property Gat No.212 and 213. Said application granted by Court and appointed Court Commissioner. After measurement of suit property by Court Commissioner vide

M.R.No.35/2017, it was found that defendants and other agriculturists have encroached in suit property Gat No.213 owned by plaintiff. Therefore, plaintiff constrained to amend the plaint to insert the portion as prescribed in the application.

06. Per contra, defendant no.1 has objected the application by filing his detailed say below Exh.32. Defendant objected on the ground that, no specific area of alleged encroachment has been mentioned in the application therefore present application is in hollow nature. If the application came to allowed, the very nature of the suit can be changed. Yet report of the Court Commissioner is not duly proved therefore at the instance of same, this application can not be allowed. Matter has stood ex-parte against Defendant No.2 to 18 and relief at the instance of application below Exh.5 is claimed only against Defendant No.1. Therefore, rest of the defendants have not been appeared in the matter. No specific relief has been claimed against rest of the defendants but at the instance of this application, plaintiff amending the plaint for the reliefs against the defendants. Therefore, under such circumstances, this application is required to be rejected. Already the matter was listed for the evidence of the plaintiff. Thereafter, this application can not be allowed. Hence, it is finally prayed to reject the application.

07. Defendant Nos. 8, 10, 12 to 14 & 16 have also filed their detailed say below Exh.36 and they replied that, present application is not maintainable in the eyes of the law. No cause has been occurred to same. Interim injunction application has been rejected and plaintiff has

not been challenged said order in Appellate Court. In such a suit, no evidence can be collected by the aid of the Court. Wrong Court Commissioner report has been filed on record. Hence, finally requested to reject the application.

08. Before moving towards factual aspect, it is imperative to consider relevant provision of law. In view of Order VII Rule 17, Court may at any stage of proceedings allow either party to alter or amend his pleading in such a manner and on such a terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. As per proviso no application for amendment shall be allowed after the trial has commenced, unless the Court comes to conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial. The circumstances on record constrained this Court look in to averments of the plaint.

09. Present suit has been instituted for perpetual injunction and fixation of boundaries of suit property by appointment of Court Commissioner and possession of encroached portion of suit property. It is clear from the record that, after framing of the issue, this application has been filed on record. It is argued on behalf of plaintiff that, in view of report of Court Commissioner, plaintiffs are seeking instance proposed amendment and therefore there is no bar of rider provided under Order VI Rule 17 of Code of Civil Procedure. It is evident that, if after inspite of due diligence before framing of the issues, if the parties

failed to seek proposed amendment then under such circumstances such application can be allowed after framing of the issues on the basis of the evidence as due diligence has been properly taken. This rider is not applicable in present case as the suit property got measured vide report of Court Commissioner and at the instance of same proposed amendment is sought by the plaintiff. In a way, it can be considered as a subsequent event. Under such circumstances, this application can not be rejected squarely on the basis of objections raised by defendants.

10. In this context, At the outset, it is necessary to consider settled law. Hon'ble Bombay High Court in **Ramchandra S/O Bhikaji Jagtap vs Dudharam Langruji Padvekar Dead 2004 (1) MhLj 278** observed in para 9 that ;

9. I may usefully refer the decision of our High Court in Civil Revision No. 406 of 1952 decided on 28-1-1953 by Justice B. K. Choudhari (as he then was) in *Krishnarao v. Mahadeorao*, 1953 NLJ Note 230 at page 72 wherein it has been observed as under:

"3. The trial Court rejected the application stating that the question of encroachment by the defendant on a particular date is to be proved by positive evidence by the plaintiff and, therefore, it did not think it desirable to appoint a commissioner. It is against this order that the plaintiff has come up in revision.

4. Order 26, Rule 9, of the Civil Procedure Code is as follows :

"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."

5. Under the above rule, the Court has a discretion to order local investigation or not. 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 the identity of lands are instances when a Court should order a local investigation under this rule.**

6. 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 the exact area encroached upon. Oral evidence cannot conclusively prove such an issue. The order of the lower Court refusing to appoint a commissioner amounted to a refusal to exercise jurisdiction. It is set aside. The plaintiffs application under Order 26, Rule 9, of the Civil Procedure Code, for appointment of Commissioner is allowed."

10. I am in respectful agreement with the view taken by this Court in the aforementioned case. It is clear that under Order 26, Rule 9 of the Code of Civil Procedure, the Court has the

discretion to order local investigation or not. The object of the 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. The cases of boundary dispute and disputes about the identity of lands are instances, when a Court should order a local investigation under Order 26, Rule 9 of the Code of Civil Procedure. 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 the area encroached upon. Oral evidence cannot conclusively prove such an issue.

11. Hon'ble Bombay High Court in case namely **Malhar vs Shivaji on 17 October, 2013** observed in para 11 that,

11. I do not find any substance in the present writ petition. It is settled position of law that under Order 26, Rule 9 of the 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. **The disputes regarding the boundaries can be best adjudicated by taking the assistance of the experts such as the T.I.L.R., who on measurement can express his opinion.** The Apex Court in a case of [Haryana Wakf Board vs.](#)

Shanti Sarup and others reported in 2008(8) S.C.C. 671 and the learned Single Judge of this Court in a case of Kolhapuri Bandu Lakade vs. Yellappa Chinappa Lakade (since deceased) through L.Rs. Pooja @ Poojari Y. Lakade and others reported in 2011(3) Bom.C.R. 807 have held that in case regarding boundaries and area, **an expert person** can be appointed as a Commissioner for measurement of the properties. In the present case, the plaintiff has prayed for appointment of Commissioner to measure the property which has been allowed.

12. In view of above settled law, it is settled position of law that, in such kind of the suits, the appointment of Court Commissioner for measurement of suit properties is proper and accordingly, Court Commissioner was appointed and he has filed his report on record and at the instance of said report, as per argument by plaintiff, rest of the defendants have encroached the suit property and therefore proposed amendment has been sought. The objection raised by defendants that, evidence of alleged encroachment can not be sought by the aid of the Court by the appointment of Court Commissioner is not acceptable in present matter as present matter deals to boundary dispute of suit property and encroachment. Therefore, proposed amendment seems to be regarding encroachment shown to be made by rest of the defendants over the suit property and it is just and proper in the interest of justice to allow this application. Therefore, I record my finding to point No.1 in negative and for point No.2 in affirmative and for point No.3, I pass the following order :

:: ORDER ::

1. Amendment application is allowed.
2. Plaintiff is permitted to amend plaint accordingly as prayed and to carry out necessary amendment and file amendment copy on or before next date.

Date : 06.07.2024.
Place: Chandwad.

(Sunil B. Mane)
Jt. Civil Judge (J.D),
Chandwad.