

Order below Exh. 50

(Passed on 26th October, 2023)

1. Instant application (Exh.50) is moved by the plaintiffs for appointing the Court Commissioner directing him to conduct joint measurement of suit properties bearing Gat No. 381, 338 & 340 and after measuring the same, submit measurement-sheet along with his Report & Map, before the court. Plaintiffs submitted that, they have filed this suit for appointment of Court commissioner, removal of encroachment and perpetual injunction, wherein, defendants have filed their written statement (Exh.26). Plaintiffs further submitted that, they are the owners of Gat No. 381 and defendants are the owners of Gat No. 338 & 340. Defendants have no concern with Gat No. 381. Plaintiffs further submitted that, defendants have made an encroachment of almost 13R upon Gat No. 381. Furthermore, unless and until the joint measurement is done, it is not possible to decide as to how much encroachment has been made. Therefore, for deciding the instant suit it is necessary to bring all these facts before the Court. Plaintiffs 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, plaintiffs 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, plaintiffs

finally submitted that, to prove the encroachment of defendants it is necessary to get suit lands jointly measured through T.I.L.R., Chandwad. Plaintiffs also submitted that, he is ready to pay the charges of measurement.

2. Learned Advocate for defendants by filing their Say (Exh.52) to this application submitted that, the application (Exh.50) is not tenable in the eyes of law, as it has been filed at premature stage. They further submitted that, the application filed by plaintiffs below Exh. 50 is filed only with a view to collect evidence through Court, which is not permissible. Furthermore, plaintiffs had made the same kind of application in this suit below Exh.31 and it was rejected by court. Hence, the application (Exh.50) 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 plaintiffs for removal of encroachment and perpetual injunction. On perusal of the pleadings of the plaintiffs, 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 plaintiffs, it appears that, unless and until the boundaries of agricultural field of plaintiffs 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. 381, 338 & 340 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. 381, 338 & 340 at Mouje Wadnerbhairav, 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.50 is to be allowed. Hence, I proceed to pass following order.

ORDER

- 1] Application below Exh. 50 is 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 joint measurement of Gut Nos. 381, 338 & 340, situated at mauje Wadnerbhairav, Tq. Chandwad, Dist. Nashik.
- 4] Court Commissioner, is directed to show the encroachment, if any, on the field of plaintiffs.
- 5] Plaintiffs shall deposit the Commissioner fees directly to the office of Taluka Inspector of Land Records, Chandwad, Dist. Nashik.
- 6] After payment of Commissioner Fees, issue Commissioner writ.

Date: 26.10.2023.

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