

Order below Exh. 37
(Passed on 23rd November, 2022)

1. Instant application (Exh.37) is moved by the plaintiffs for appointing the Court Commissioner directing him to conduct measurement of suit property 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 recovery of the encroached portion of suit land. Plaintiffs further submitted that, the suit property bearing City survey No. 887 admeasuring 124.5 sq.mtr. is the ancestral property of plaintiffs and defendants. After the demise of Hamid Fakir on 08-01-2001 and Hussain Fakir on 16-07-2001 plaintiffs received 62.25 sq.mtr portion of suit property as their share. But, thereafter, defendants have made an encroachment over the share of plaintiffs, i.e., over 62.25sq.mtr. portion which was came to the share of plaintiffs. Therefore, plaintiffs have filed this suit for recovery of the encroached portion from defendants. 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 land measured through T.I.L.R., Chandwad. Plaintiffs are ready to pay the measurement fees to T.I.L.R. Office.

2. Learned Advocate for defendants by filing his Say below Exh. 39 submitted that, the application (Exh.37) is premature and therefore, it is not tenable in the eyes of law. They further submitted that, the application filed by plaintiffs below Exh. 37 is filed only with a view to collect evidence through Court, which is not permissible. They further submitted that, they have constructed a house over their share, i.e., 62.27 sq.mtr. portion of suit property which was came to their share. They further submitted that, they have not made any encroachment over plaintiffs land while constructing their house. They further submitted that, plaintiffs have nowhere stated in their plaint as to what amount of encroachment have been made by defendants. Thus, the entire pleading of plaintiffs is vague and the instant application has been filed only to prolong the matter. Hence, the application (Exh.37) 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 recovery of the encroached portion. 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 lands 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 suit land is essential. Therefore, for elucidating the matter in dispute, measurement of entire suit land 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 suit land i.e., City survey No. 887 situated at Mauje Chandwad, Tal. Chandwad, Dist. Nashik and after measuring that city survey number 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.37 is to be allowed. Hence, I proceed to pass following order.

ORDER

- 1] Application below Exh.37 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 measurement of City Survey No. 887, situated at mauje Chandwad, Tq. Chandwad, Dist. Nashik.
- 4] Court Commissioner, is directed to show the encroachment, if any, on the land 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: 23.11.2022.

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