

ORDER BELOW EXH.20 IN R.C.S.No.263/2013

Plaintiffs file this application as per O.26,R.9 of the Civil Procedure Code. This suit is for perpetual injunction and recovery of possession of alleged 15R. encroached portion by the defendant No.1 and 2 in Survey No.90/1/D. Defendant No.1 and 2 own and possess land Survey No.90/1/E which is situated towards East of the suit land. Plaintiffs pray joint measurement of these both lands in order to ascertain the exact encroachment which would help to finally settle the dispute between them. Hence, the appointment of Dy. Superintendent of Land Records, Paranda as Court Commissioner for joint measurement of Survey No.90/1/D and 90/1/E, is prayed.

2. Defendant No.1 and 2 file say which is Exh.25. They strongly oppose this application saying that plaintiffs are not original owners of Survey No.90/1/D. Their vendor namely Ramrao Gofane was though owner of 02-Hectare 10-R however he had no possession over the entire area. There is one cart way I.e *Pand* of 10-feet width towards East of the suit land in South-North direction. Plaintiffs suppress material facts as there was oral partition between defendants and their cousin brothers. In the name of measurement and alleged encroachment plaintiffs are trying to make forcible partition which cannot be allowed. Hence, rejection of application is prayed. Defendants No.3 to 6 have supported plaintiffs' case by stating that there is no objection for appointment of Court Commissioner.

3. Heard the learned Advocate for plaintiffs Shri N.S.Madhekar and the learned Advocate Shri I.D.Shaikh for the defendant No.1 and 2 and the learned Advocate Shri. S. R. Kale for the defendant No.3 to 6.

4. Asper Order-26 Rule-9 of the Civil Procedure Code, the appointment of Commissioner can be made for local investigations. Considering the pleadings in the plaint as well as the written statement of the defendant No.1 and 2 it seems that the dispute between the parties is not restricted to boundary dispute or encroachment. The detailed written statement of the defendant No.1 and 2, wherein, the relationship between the parties is described. The common ancestor of the defendant No.1 to 6 was Sakharam Gofane, who has five sons. Sakharam died approximately 75-80 years ago, who had agricultural properties including Survey No.90 ad-measuring 26-Acre 09R. After his demise his five sons became owner of it, they orally partitioned it in which father of the defendant No.1 and grand-father of the defendant No.2 were given Eastern portion of Survey No.90 which was numbered as S.No.90/1/E. There was a cart way i.e. *Pand* towards the western side of their land as it was less productive therefore additional portion was given at the time of oral partition. Oral partition was not reported in revenue record. The ownership of all five brothers was recorded asper *Anewari* in equal shares which has led to filing of this suit.

5. There is no possibility to encroach upon plaintiffs' land as there is huge bund between suit land and land owned by the defendant No.1 and 2. Apart from this there is existence of a cart way i.e. *Pand* in between the land owned and possessed by plaintiffs and the defendant No.1 and 2, which clearly shows that which specific share was allotted to them and their respective possession. Defendants allege that plaintiffs have malafide intention to grab the excess portion which was allotted to them long back in oral partition as it has been irrigated and developed. The defendant No.1 and 2 have already filed a R.C.S.No.243/13 against present defendants and

others, wherein, an application for appointment of Advocate Court Commissioner is prayed. If exact position on the ground is brought on record which would help to know whether present plaintiffs have suppressed material facts. The plaint schedule-A wherein plaintiffs show that there is approximately 00H15R portion encroached by the defendant No.1 and 2. According to defendants there is existing South-North old bund wherein old trees and brambles are grown which are testimony of oral partition which was reportedly taken place and acted upon since 64-65 years.

6. In the light of averments in the written statement of the defendant No.1 and 2 there appears substance in their stand. The registered sale deed dated 12.08.1976 in favour of plaintiffs and entries in 7/12 extract do not confer any right in their favor. There was oral partition of Survey No.90 in between five brothers which is evidenced by its sub-division into 90/1/A to 90/1/E. Whenever there exists dispute between area and boundary the boundaries prevail. Under these circumstances prima facie the appointment of Court Commissioner would be tantamount to establishing right over land which was not possessed by plaintiff's vendor at the time of execution of the sale deed. When the law of limitation bars the remedy to seek possession of alleged 15R or some odd portion plaintiffs appear to have resorted to this way. Plaintiffs project that there is encroachment in the suit land by defendants. However the perusal of the plaint, which seems to have been shrewdly drafted, does not disclose in which month or year the defendant No.1 and 2 encroached on the suit land. There is no earlier measurement then how plaintiffs allege encroachment when they say that the boundary marks were destroyed. If primary report of Advocate Court Commissioner in respect of inspection of ground realities whether there

exists old bund and trees, cart way or destruction of boundary marks is called it would help to decide future course of action. There is no alternative prayer of appointment of Advocate as commissioner therefore present application is not tenable. Defendants i.e. plaintiffs in RCS No.243/2013 have sought prayer to that effect and appropriate order has been passed. In view of this following order is passed.

-ORDER-

Application is rejected.

(K. B. Chougule)
Jt. Civil Judge, (Jr. Division),
Paranda

Date :- 03.12.2013