

ORDER BELOW EXH.111.

This is an application filed by plaintiffs for appointment of Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908.

02- I have perused record. It is seen that, plaintiffs filed this suit for removal of encroachment and declaration that, they are owners of the suit property. Plaintiffs averred in the plaint that, plaintiff Anil and Santosh are owners of suit property bearing Survey No.87, Gat No.134 to the extent of 09 R and 17 R respectively. It is also contended that, the plaintiff Surekha, Yashwant and Shital are being heirs of deceased Ramkrushna are owners of suit property to the extent of 16 R.

03- The defendant nos.2 to 5 did not appear in the suit, so suit proceeded ex-parte against them. The defendant nos.1, 6 and 7 resisted the suit claim by filing written statement below Exh.21 and contended that, the entire suit is false, fictitious and concocted one. They strongly denied the alleged encroachment. They submitted that, from Gat No.134 43 R land was acquired by the State for Sonpeth-Shelgaon-Gangakhed Road. The plaintiffs already withdrawn its compensation amount. Due to rival contentions of parties, issues were framed below Exh.26. Thereafter, plaintiffs adduced oral evidence and examined 03 witnesses. Defendant no. 1, 6 and 7 examined 01 witness. On 24/01/2020, the matter posted for final arguments. Thereafter, plaintiffs filed written notes of arguments below Exh.108. As the controversy in the suit is based on the alleged encroachment to the extent of 42 R land, therefore, for proper and effective adjudication of the matter this Court by an order below Exh.01, dated 04/08/2020, directed the plaintiffs to adduce measurement map, report etc. of the disputed land, if any till next date i.e. 11/08/2020. Thereafter, the plaintiffs moved the instant application seeking

appointment of Taluka Inspector of Land Records, Sonpeth as Court Commissioner to carry out the measurement of the disputed land.

04- Defendant nos.1, 6 and 7 opposed the application by filing say below Exh.112. Defendants submitted that, plaintiffs filed this application after direction issued by this Court, dated 04/08/2020 regarding filing of measurement map, report etc. if any. It is also submitted that, the evidence of both party has been concluded, plaintiffs filed written notes of arguments and matter is at the door of pronouncement of Judgment. Therefore, this is a belated stage to entertain the application. In fact, plaintiffs did not mention in the plaint itself that, after measurement, they have come to know regarding alleged encroachment by defendants. It is further submitted that, the plaintiffs executed registered sale-deeds Exh.52, 53, 54 in favour of defendants. In those sale-deeds they did not mention their remaining portion in the boundaries of such sale-deeds. Therefore, due to uncertainty of the existence of suit property mentioned by plaintiffs, the application is not tenable and question of this measurement does not arise. Therefore, defendant nos.1, 6 and 7 prayed to reject the application.

05- Considering the submissions of both parties following points arise for my consideration. I have recorded its findings for the reasons mentioned thereon.

SR.NO.	POINT	FINDINGS
1-	Whether Taluka Inspector of Land Records, Sonpeth to be appointed as Court Commissioner for measurement of suit land i.e. Survey No.87 and Gat No.134, ad-measuring 07 H 07 R of village Dahikhed, Tq. Sonpeth, Dist. Parbhani ?	...In the affirmative.
2-	What order ?	...As per final order.

AS TO POINT NOS.1 & 2 :-

06- I have perused application, say thereon and record. Heard learned advocates of both parties at some length.

07- Learned advocate for plaintiffs submitted that, defendants made encroachment over suit property to the extent of 42 R. Therefore, the proper authority for measurement of land is Taluka Inspector of Land Records. It is submitted that, for just decision of the matter, the alleged encroachment shall have been brought on record through measurement by concern office. Therefore, he submitted for grant of application and appointment of T.I.L.R., Sonpeth, as Court Commissioner.

08- On the other hand, learned advocate for defendant nos.1, 6 and 7 submitted that, the plaintiffs filed this application at the stage of pronouncement of Judgment, therefore, application is not tenable in the eye of law, which deserves to be rejected.

09- I have gone through the provision of commission for local investigations enumerated under Order XXVI Rule 9 of the Code of Civil Procedure, 1908. On minute reading of said provision, it is seen that, 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, then Court is empowered to issue commission. In the present suit, the matter in controversy is whether defendants made encroachment on the suit property to the extent of 42 R land. Obviously, the above provision of issuance of commission is a discretionary relief. While exercising discretion, the Court must apply its judicial mind.

10- In **Vijay Shende Vs. State of Maharashtra, 2009 (5) Mh.LJ. 279**, the Hon'ble Bombay High Court observed that, “when there is boundary dispute or dispute about identity about the suit property, appointment of T.I.L.R. or D.I.L.R. concern as court commissioner for taking measurement of the disputed land to brought factum of encroachment to the notice of Court by properly drawn measurement map so as to conclusively and finally determine the real controversy between the parties is must”.

11- The Hon'ble Bombay High Court in **Ushabai W/o. Sharadchandra Bannore Vs. Wasudeo S/o. Baliramji Mehare & Ors., 2004 (2) Mh.LJ. 594**, observed that, “in any case in which there is a dispute about an encroachment or dimension of a site, the first essential is to get an agreed map and if the parties can not agree on one, a Commissioner must be appointed to prepare the same and/or subsequent reference to the pleadings or Judgment to place the mark on a map should be referred to this map which must be attached to the decree and signed by the Judge. In the absence of such a map, the decree is probably meaningless and execution means virtually starting the case over all again”.

12- In the case of **Krishnarao Vs. Mahadeorao, 1953 NLJ Note 230 at page 72**, the Hon'ble Bombay High Court observed that, “under Order XXVI 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 pecuniary 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 XXVI 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 can not conclusively prove such an issue”.

13- In **Sulemankhan S/o. Mumtajkhan & Ors. Vs. Bhagirathibai wd/o. Digambar Asalmol & Ors., 2014 (4) Mh.LJ. 250**, the Hon'ble Bombay High Court in para no.9, observed that, “in cases to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence can not prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by another party to the suit inside suit property. In such case the plaint map has evidence in respect thereof is vital document for to decide real controversy between the parties finally. This Court has time and again expressed opinion about the necessity of the duly drawn measurement plan/map in any suit in which there is a boundary dispute. The Trial Court as well as first Appellate Court which are Court of facts, are duty bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of T.I.L.R. or D.I.L.R., as the case may be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing map in the Court by the plan maker who can prove its genuineness by deposing in support of such plan or map, if it is so necessary in the absence of admission for exhibiting the map”.

14- In the present matter, the plaintiffs alleged that, defendants made encroachment on their 42 R land, but they did not contend that, out of 7 defendants, which defendant have made encroachment upto what

extent of area. The plaintiffs oral evidence is not sufficient enough to elucidate the alleged encroachment. No doubt, plaintiffs already submitted their written notes of arguments and defendants also advanced their most part of arguments and the matter is five years old and is at concluding stage, but considering the nature of suit and allegations of encroachment, I am of the considered opinion that, measurement report and map of the Court Commissioner will assist the Court for passing of proper and effective decree. However, as an abundant precaution to curtail further delay to the litigation, necessary directions are liable to be issue to the Court Commissioner and plaintiffs. Therefore, in the light of observations of Hon'ble Bombay High Court, which is discussed above, I recorded the finding as to point no.1 in the affirmative and accordingly in reply of point no.2, I proceed to pass following order.

ORDER

- 1- Application stands allowed as follows :
- 2- The T.I.L.R., Sonpeth is hereby appointed as a court commissioner to measure the agricultural land bearing Survey No.87, Gat No.134 of village Dahikhed, Tq. Sonpeth, Dist. Parbhani.
- 3- The court commissioner is hereby directed to fix the date of measurement and shall give the prior written intimation about the date of measurement, well in advance to the parties to the suit.
- 4- The court commissioner is hereby directed to measure the entire Survey No.87, Gat No.134. Further, he shall fix the boundaries and measure the sub-divisions/portions/shares and the encroachment made, if any found at the time of measurement in the said Survey/Gat Number.
- 5- The court commissioner shall draw the sketch map of said Survey number/Gat number separately, and shall precisely show the area hold by each sharer in the sketch map by different colour to identify the separate holding.
- 6- The court commissioner may record panchnama in presence of panchas or persons present at the time of measurement and forward the same with his report.

- 7- The matter is five years old, therefore, court commissioner shall take utmost endeavor to submit his report within two months.
- 8- Plaintiffs shall deposit the necessary fees of measurement in the office of T.I.L.R., Sonpeth within 15 days and shall submit the copy of receipt to this Court on next date i.e. 10/09/2020.
- 9- Plaintiffs shall submit all necessary documents, as per the requirement of T.I.L.R., Sonpeth, within 15 days.
- 10- If the plaintiffs failed to comply with the order, the order shall automatically stands vacated.
- 11- Concern clerk is hereby directed to issue writ of commission to the T.I.L.R., Sonpeth accordingly.

Date :- 25/08/2020

(S.S. Khirapate),
Civil Judge, Junior Division,
Sonpeth.