

ORDER BELOW EXH.11 IN R.C.S.NO.191/2017

This is an application, moved by the plaintiff, for appointment of Court Commissioner for carrying out measurement of the suit property, which is specifically described in the claim clause of the plaint and to produce the map and report accordingly.

02. Brief resume of the facts is that, the plaintiff instituted a suit for recovery of possession of the encroached portion upon the agricultural land bearing survey no.37/a, ad-measuring 01 H. 71 R. situated at Ukkadgaon Makta, Tq. Sonpeth, Dist. Parbhani. It is specifically alleged that, the plaintiff is owner and possessor of the suit property. In spite of that, the defendants are without assigning their title encroached upon suit land to the extent of 11 R. Defendants are adjoining land owners and are intruders. It is next submitted that, in order to ascertain the exact encroachment the measurement is necessary. Hence, prayed for allow this application.

03. There is a crucial question involved in the suit i.e. whether the defendants are encroached upon the suit property to the extent of 11R. Therefore, the plaintiff has prayed to appoint the Court Commissioner and he be ordered to produce the map of factual position and submit his report accordingly.

04. The defendants are appeared in the matter, however, failed to file their written statement. Thus, in view of order passed below Exh.01, dated 01/08/2018, suit proceeded without written statement of the defendants.

05. At the outset, it is necessary to look into the provisions contained in Rule 9 and Rule 10 of Order XXVI of the Code of Civil

Procedure. It is contended that, this Court is vested with discretionary powers under the said provisions to appoint the Commissioner for elucidating any point in dispute.

06. At this juncture it will be useful to examine the relevant statutory provisions.

07. Order XXVI Rule 9 of the Code of Civil Procedure provides that -

“9. Commissions to make local investigations.-- 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 measne profits or damages or annual net profits, the Court may issue a commission to such person as it think fit directing him to make such investigation and to report thereon to the Court :

Provides that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

“10.Procedure of Commissioner – (1) *The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*

(2) Report and depositions to be evidence in suit.--- *The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the report; but the Court, or with the permission of*

the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Commissioner may be examined in person.-- *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.”*

08. When issuing a Commission for making local investigation under Order XXVI, Rule 9 the Court shall define the points on which the Commissioner has to report. No point which can conveniently and ought to be substantiated by the parties by evidence at the trial shall be referred to the Commissioner.

09. The point which requires determination in the instant application is as to whether a Commissioner should be appointed to decide a disputed question of fact ?

10. The object of Order XXVI, Rule 9 of the Code of Civil Procedure is not to assist a party to collect evidence where it can get the evidence itself. The object is for elucidating any matter in dispute by local investigation at the spot. Where on the evidence of experts on record, the Court is satisfied that for appreciating the opinion of the expert evidence, it should appoint an expert as Commissioner, it can on the facts and circumstances of the case, appoint a Commissioner. Where the Court is satisfied on the materials available on record that a party is not able to produce the desired evidence for reasonable circumstances, the Court may assist the party to appoint a Commissioner to get the evidence. However, such evidence is not binding on the Court which is to appreciate the same along with other evidence.

11. A perusal of the provisions contained in Rules 9 and 10 and Order XXVI goes to show that this Court is vested with the discretion to appoint Commissioner but such discretion should not be exercised where the point which is required to be referred to the Commissioner can conveniently be substantiated by the parties by evidence at the trial.

12. No doubt, plaintiff ought to have got measure the suit property through D.I.L.R., prior to filing of the suit. Though, the plaintiff has not filed on record map prepared by private survivor. However, in order to ascertain the exact portion of encroachment upon the suit property, the appointment of D.I.L.R. for carrying out measurement is necessary.

13. It is the settled principal of law that, in the suit for recovery of encroached area, it is expected to have the joint measurement to reduce the controversy regarding the measurement. Further, the accuracy of the measurement is attached to the measurement by the Government servant. The evidence of encroachment is a fact, which have had at the spot and can not be easily brought on record by the oral evidence. Hence, I find that, for the final adjudication and to determine the exact encroachment, if any, it is necessary to get measure the suit property through D.I.L.R., Sonpeth. Hence, in the facts and circumstances, I proceed to pass following order.

ORDER

- 1- Application is hereby allowed as follows :
- 2- The D.I.L.R., Sonpeth is hereby appointed as a court commissioner to measure the agricultural land bearing Survey no.37/a, situated at village Ukkadgaon Makta, Tq. Sonpeth, Dist. Parbhani.
- 3- The court commissioner is hereby directed to fix the date of measurement and shall give the written prior intimation about the date of measurement, well in advance to all the parties.

- 4- The court commissioner is hereby directed to measure the entire Survey no.37. Further, he shall measure the sub-divisions/portions/shares, if any, found at the time of measurement in the said survey number.
- 5- The court commissioner shall draw the sketch map of survey no.37 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 panch or persons present at the time of measurement and forward the same with his report.
- 7- The court commissioner shall submit his report within two months from the date of order.
- 8- Plaintiff shall deposit the fees of court commissioner, directly in the office of D.I.L.R., Sonpeth and shall submit the copy of receipt to this court within 15 days from the date of order.
- 9- Plaintiff shall submit all necessary documents, as per the requirement of D.I.L.R., Sonpeth, within 15 days from the date of order.
- 10- If the plaintiff failed to comply with the order, the order shall be automatically stands vacated.
- 11- On depositing P.F. by the plaintiff, issue letter of commission to the D.I.L.R., Sonpeth.

Date :- 26th September, 2018

(Abhay M. Vibhute),
Civil Judge, J.D., Sonpeth.