

ORDER BELOW EXH.21 IN RCS NO. 142/2018

This is an application filed by plaintiff under order 26 rule 9 of C.P.C. for directing Deputy Superintendent of Land Records, Pen to measure the the entire suit property along with construction over suit property. Defendant has filed his say below **Exh.23** and strongly opposed the application.

2. It is contended by Ld. Advocate for plaintiff that, defendant has encroached upon suit property by way of construction. However, in the written statement defendant has denied his encroachment. In such situation it is necessary to appoint DSLR to get the exact condition of suit property in order to decide the suit on merit. Hence, Ld. Advocate for plaintiff prayed to allow the application. In support to the application Ld. Advocate for plaintiff has relied upon *Kolhapuri Bandu Lakade Vs. Yallappa Chinappa Lakade (2011(3) ALL MR 599)*, *Haryana Waqf Board Vs. Shanti Sarup and Ors. (AIR 2008 SC (Supp)616)*, *Kashinath Chindhuji Shastri Vs. Haribhau Nathuji Bawanthade (2004 (2) Mh. L. J. 722)*, *Kisanlal Maniklal Rathi Vs. Dinkar Yashwant Patil (2004 (1) Mh. L. J. 138)* and *Payani Achuthan Petitioner Vs. Chamballikundu Harijan Fisheries Development Co-operative Society and others (AIR 1996 KERALA 276)*. I have gone through all the citations.

3. Ld. Advocate for defendant strongly opposed the

application and contended that defendant has never encroached upon suit property. Plaintiff is not confirmed about the encroachment at suit property since he has filed the same suit against one Prema Vilas Mhatre vide RCS No.143/2018. In the said suit also the contention of encroachment of suit property at the hands of that defendant i.e. Prema Vilas Mhatre is made. In such situation plaintiff is not confirmed about his contention. Defendant has never encroached upon suit property. In fact by way of such application plaintiff is trying to collect the evidence in his favour since he don't have documents strengthening his ownership. Hence, Ld. Advocate for defendant prayed to reject the application.

4. Perused the application and say. Heard both sides.

5. The suit is for declaration and removal of encroachment along with perpetual and mandatory injunction. The present matter is at the stage of filing evidence in chief affidavit by the plaintiff side as issues are framed on 15.03.2022. But till date plaintiff has not filed his evidence on record but now he has filed the present application for appointment of DSLR. I have gone through all the above citations filed by Ld. Advocate for plaintiff. In all those citations Hon'ble Courts have given directions regarding when and how to appoint surveyor. However, the facts of all the above citations are totally different from the facts of present case. Therefore, this citations are not helpful to the case of plaintiff.

6. While deciding the application for appointment of court commissioner the scope of order 26 rule 9 of C.P.C. needs to be

considered. The court can in any suit in which local investigation is required or proper for purpose of elucidating any matter of dispute may appoint of commissioner. It is settled law that, the parties are required to prove their own case by way of evidence, therefore, it is the duty of plaintiff/defendant to first give evidence in support of their case. After the evidence of parties, if court deem it proper that any issue is requires clarification then the court may appoint a commissioner. The report of commissioner is merely a peace of evidence and not binding on the court. It can be used for the purpose of appreciating the evidence came on record.

7. In the present matter admittedly the stage is to file evidence in chief affidavit by the plaintiff, which is not yet filed. Therefore, the evidence of plaintiff is yet to be started.

8. It is legal principle that, the court commissioner cannot be appointed for the purpose of collection of evidence. Hence, plaintiff is burdened to show the necessity for appointment of court commissioner. The evidence of plaintiff is yet to be started. Hence, at this earlier stage there is no proper reason to appoint court commissioner. Therefore, local investigation through commissioner is not appears essential for purpose of elucidating matter in dispute between parties. Secondly, it is admitted fact that, the same suit in relation with encroachment upon suit property bearing RCS no.143/2018 is pending in this Court and the same application of appointment of DSLR is filed in that matter as well. The contention regarding encroachment over suit property made in the present suit is same by word to word and line to line in that suit too i.e. RCS

no.143/2018. In such situation without adducing the evidence the plaintiff cannot take recourse of appointment of DSLR in order to collect evidence in his favour. Consequently, the application deserves to be rejected. Hence, the following the order.

ORDER

1. Application **Exh.21** is hereby rejected.
2. Cost in main cause.

Date - 03/05/2023
Pen, Raigad.

(Smt. R.N. Mujawar)
Civil Judge, J.D. Pen.

CERTIFICATE

“I affirm that the contents of this PDF file order are same word for word as per original order”.

Name of the stenographer	: Shri. A. A. Nakhawa
Name of the Court	: Smt. R. N. Mujawar Civil Judge, J.D.and J.M.F.C. Pen.
Date of Decision	: 03-05-2023
Order signed by presiding officer	: 04-05-2023
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