



CNR NO. MHSI70004452022

**Order passed below Exh. No34
in R.C.S. No. 87/2022**

This is an application under Section 75(b) r.w. O.26 R.9 of the Code of Civil Procedure preferred by the plaintiff.

2. The plaintiff has contended that the present suit is filed for removal of encroachment and restoration of possession. The defendant no. 1 has filed his written statement and denied that alleged construction is not carried out within the suit property. Therefore, in order to ascertain the encroachment, it is necessary to appoint Deputy Superintendent of Land Record and carry out measurement of the suit property. Therefore, prayed to allow the application and appoint the Court Commissioner.

3. The defendant no. 1 and 4 have resisted the application by filing say at Exh.35. The defendants have contended that the present application is preferred to collect the evidence. The court commissioner cannot be appointed for collection of evidence. It is further contended that the present suit is filed for perpetual injunction. Therefore, plaintiff has to prove case on her own leg. Therefore, prayed to reject the application.

4. Heard both the sides. Both the parties have reiterated the contents of the application and say. In order to resolve the aforesaid controversy it is useful to refer observation made by the

Hon'ble Bombay High Court in case of Shri Bhupendra s/o Bhagwat Turkar Vs. Shri Homraj S/o Zituji Meshram 2014 (3) ALL MR 635 it has been laid down that

“Cases of boundary disputes are clearly distinguishable in which identity of land, its measurement and area is needed to be considered on basis of authentic evidence and map of land. Where parties do not agree on map or plan, Court Commissioner can be appointed to prepare the map of suit property to assist the Court. In such cases, there is no question of collecting evidence as to possession. In absence of map or plan, even if decree is passed, it would be meaningless as it may remain inexecutable in absence of authentic map.”

5. In light of submission made by the both the parties, I have gone through the record. It shows that the plaintiff has averred that defendant no. 1 to 3 have committed encroachment upon suit property. On the other hand the defendants have contented that they have not committed any encroachment nor carried out construction in the suit property. From the pleading of the both the parties, it appears that the present dispute is related to the encroachment and location of the construction. Therefore, in order to determine to extent of encroachment and location of the defendant's alleged construction, it is essential to get the suit property measured through the office of Deputy Superintendent of land records. Unless and until suit property is measured, extent of encroachment and location of defendant's alleged construction cannot be ascertained. As per the aforesaid ratio laid down by the Hon'ble Bombay High Court in cases of boundaries dispute or

encroachment, appointment of Court Commissioner do not fall within the ambit of collection of evidence. Thus, the objection raised by the defendants is of devoid of merit and same is liable to be rejected. In light of aforesaid discussion I am of considered opinion that the present application is deserved to be allowed. Accordingly, I pass following order.

-. ORDER :-

- i) Application **Exh.34** is hereby allowed.
- ii) The Deputy Superintendent of Land Records, Malvan is hereby appointed as a Court Commissioner.
- iii) The Court Commissioner is directed to conduct local investigation with respect to the Survey No. 111, Hissa No.A1/15 situated at village Poip, Tal. Malvan, Dist. Sindhudurg and to submit to this Court his complete and detailed report alongwith a measurement map, showing all factual aspects of the suit property; such as, but not limited to, its boundaries, areas, dimensions, Survey numbers and Hissa numbers of aforesaid suit property.
- iv) The Court Commissioner is directed to ascertain whether the alleged construction of the house of the defendant no. 1 and compound is come within the suit

property and also ascertain whether the defendant no. 2 and 3 have committed any encroachment upon suit property.

- v) The Court Commissioner is directed to carry out commission work, as aforesaid, only after giving proper notice to the plaintiff, the defendants.
- vi) The plaintiff is directed to forthwith deposit necessary fees for Court Commission at the concerned office and to file an affidavit before this Court to that effect on or before next date.
- vii) The Court Commission writ alongwith necessary documents be sent to the Deputy Superintendent of Land Records, Malvan accordingly.
- viii) The Court Commissioner is directed to submit his report to this court within a period of two month from the date of receipt of the Court Commission writ.

(Pronounced and dictated in open Court.)

Place : Malvan
Date : 26/08/2024

Mahesh R. Devkate
Civil Judge Jr.Dn., Malvan.