

ORDER BELOW EXH – 26 IN RCS NO. 08/2022

The plaintiff has filed the present application by invoking the provision under Order 26 Rule 9 of Code of Civil Procedure, 1908. (*herein after called as Code for the sake of brevity.*)

Brief Facts of the Plaintiff's Case is as under :-

2. The suit property is her self acquired property and she possessing and enjoying the same. The husband of the plaintiff inherited the share in suit Gat Number by virtue of partition on 05/06/1995 out of which the plaintiff has purchased the area ad-measuring 0.60 R from her husband by registered sale deed dated – 26/08/2010. Till today, after the 12 years of such sale deed, objection has not been taken by any one in respect of such sale deed. Further, by virtue of partition, the share inherited by the defendant no. 1 in Gat No. 426/1 was further divided into his sons by him. Therefore, the defendant no. 1 has not raised any objection with regard to above said partition. The defendant no. 1 has destroyed the marks of previous measurement in suit property. The defendant no. 1 is encroaching upon the land of plaintiff towards the southern side of plaintiff's land. Further on 20/08/2021, the defendant obstructed the proposed measurement in suit property. Therefore, the measurement of the land could not be done. For the above said reasons, the suit property is required to be measured by appointing the Deputy Inspector of land Records as Court Commission. The defendant will not cause any prejudice by such measurement. To settle the boundary dispute between plaintiff and defendant no. 1 finally, such measurement is necessary. Therefore, considering the above facts and circumstances, the application may be allowed.

3. The defendant no. 1 has filed his reply vide Exh – 31 and objected to the same. It is the contention of the defendant no. 1 that the present application is pre – mature one. The suit is not filed for the relief of removing an encroachment. There is no contentions in the plaint as to the encroachment. The boundary marks have not been mentioned in sale deed dated – 26/08/2010 executed in favour of the plaintiff. Therefore, such area can not be identify. Further, there is discrepancy in the description of property in sale deed and that of in plaint. The plaintiff has filed the suit for fixation of boundary marks and for perpetual injunction. The relief at the end of final hearing, can not be granted at the interim stage. Therefore, considering the above facts, the application may be rejected.

4. On the basis of the facts alleged, documents filed on record and submissions made by parties, following points arise for my determination to which I recorded my findings along with reasons thereto which are as under -

Sr. No.	POINTS FOR DETERMINATION	FINDINGS
1.	Does plaintiff prove that the Court Commission is necessary to elucidate the matter in dispute between parties ?	.. YES
2.	What Order ?	Application is Allowed.

R E A S O N S

POINT NO. 1

5. Application is duly supported with affidavit.

6. Perused the application, reply and the documents on record. Heard the Ld. Advocates for both parties. They argued as per their respective contentions.

7. In support of contentions, the plaintiff has relied on the documents filed vide list of documents at Exh – 3, 29 and 36.. The plaintiff has filed written notes of arguments vide Exh - 30.

8. The defendant, in defence, has produced documents vide Exh – 25 and 33.

9. Perused the sale deed dated – 26/08/2010 produced by the defendant no. 1 vide Exh – 33/1. It appears that the husband of the plaintiff has executed the registered sale deed in favour of plaintiff in respect of area ad-measuring 0.60 R out of Gat No. 426 / 1. Accordingly, name of the plaintiff was entered upon the 7/12 extract of Gat Number by mutation entry no. 1835. Till today the defendant no. 1 has not challenged such sale deed and mutation entry therein.

10. In defence, it is the contention of the defendant no. 1 that the suit property is not described as per the sale deed dated – 26/08/2010. Further, boundaries were not described in the sale deed. Therefore, the area of the plaintiff is not able to be identify.

11. From pleading of the parties, it further appears that the defendant no. 1 has not objected to the name of the plaintiff's husband standing upon the 7/12 extract of Gat Number – 426 /1, the area specified against his name and his possession over it. Out of the

area inherited by the husband of plaintiff, sale deed dated – 26/08/2010 in respect of 0.60 R had been executed to the plaintiff. Therefore, at this stage, in the background of above facts, it can be infer that the defendant no. 1 is well within the knowledge of the possession of the plaintiff over suit property.

12. The plaintiff has filed the present suit for fixation of boundary marks and for perpetual injunction. The plaintiff is contending that the defendant no. 1 is causing obstruction to the possession of the plaintiff by encroaching upon the land of the plaintiff towards southern side. Therefore, it necessitates the land of the plaintiff to be measured by appointing the Court Commission. In support of above contentions, the plaintiff has relied on the principle laid down in following rulings of Honourable Bombay High Court.

(A) P. N. Wankudre V. C.S. Wankudre & Others reported in 2002 (3) Bom.C. R. 21

(B) Ramchandra Jagtap V. Dudharam Padvekar dead through L. R's & Others reported in 2003 BCI 81

(C) Nagaraj V. Kalluramma reported in ILR 1995 KAR 1114

(D) Malhar s/o Ganpat Bokephod & Others V. Shivaji s/o Vishwanath Pawal decided on 17 October 2013 in Writ Petition No. 7094 of 2013

(E) Changdeo Katore & Others V. Trimbak Kathore & Others decided on 21 September 2018 in Writ Petition No. 10180 of 2018

13. I carefully gone through the above said rulings. The principles laid down in **P. N. Wankudre (supra)** as to necessity of registration of family arrangements, can be taken into consideration at the final

hearing. However, the principles laid down in other rulings are in support to the present facts of the plaintiff's case. The common principle laid down in above said rulings can be narrated summarily as follows – In **Ramchandra Jagtap's case (supra)**, the Honourable Bombay High Court in para no. 10 has been held that “ *Now it is well settled that under Order 26 Rule 9 of the Code, the Court has the discretion to order local investigate 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 peculiar nature can only ber 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 26 rule 9 of the Code. 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*”.

14. Though it is also settled that the final relief can not be granted at the interim stage, still the present facts of the case necessitates the granting of such order. By measuring the land of the plaintiff and that of defendant no. 1 only, the matter in dispute between parties can be able to ascertain and adjudicate. Further it will assist the Court to adjudicate the suit on its merits. Therefore, in this context, causing of prejudice to the defendant no. 1 does not arise. However, instead of measuring the land of plaintiff only, measuring the land of the defendant no. 1 too, will meet the ends of justice. Therefore, considering the above facts and circumstances, I hold that the plaintiff has proved that Court Commission is necessary to elucidate the matter in dispute between parties. In result, I answer point no. 1 in affirmative.

POINT NO. 2

15. In view of discussion as to point no. 1, I pass the following order.

O R D E R

1. Application is hereby allowed.
2. Deputy Inspector of Land Records, Kavathe Mahankal is hereby appointed as Court Commission.
3. The Court Commission (D. I. L. R) is hereby directed to measure the land of plaintiff (i.e. suit property) and that of the land of defendant no. 1 in Gat Number 426/1 and submit the report of measurement along with map showing the area of encroachment, if any within two months from the date of receipt of this order.
4. The parties are hereby directed to remain present at the time of commission.
5. The plaintiff is directed to deposit the necessary commission fee as per rules.
6. Issue writ to the concerned authority accordingly.

Date – 15.02.2023

Priyanka J. Ligade

Place – Kavathe Mahankal

Jt. Civil Judge Junior Division.