

ORDER BELOW EXH.33 IN R.C.S.NO.159/2015.

This is an application filed by plaintiff under Section 75 along with order XXVI Rule 9 of Code of Civil Procedure for appointment of Commission.

2- Plaintiff submitted that present suit is filed as defendants have obstructed the possession of the suit property. Further defendants in their written statement at Exh.14 stated about the measurement and map took place on 29.04.2014 in M.R.No.2005 in respect of suit property. Further plaintiff submitted that on 18-06-2004 in M.R.No.697 the predecessor of the plaintiff have measured the land and map has been submitted in the present proceeding. But, the Government road has not been mentioned in the map of M.R.No.2005, which is shown in map of M.R.No.697. There is huge discrepancies in both maps. Hence, it is necessary to bring true facts in respect of road before the Court. Further plaintiff submitted that it is also necessary to measure the entire land of Gat No.1448 and fixed the boundaries of plaintiff, so that the encroachment by the defendant can be find out. Hence, the present application.

3- Defendants have submitted that plaintiff has not raised any application regarding measurement at the relevant point of time. Further no share holder from Gat No.1448 has raised any objection in respect of measurement. Plaintiff has recently purchased the land without any inquiry. Further an appeal is pending against the order passed below Exh.5. Present application is filed to prolong the matter. Hence, prayed for rejection of application.

4- Heard both the parties. After going through the rival pleadings, following points arise for my consideration and I have recorded my findings accordingly.

POINTS.

FINDINGS.

- |    |   |     |                          |
|----|---|-----|--------------------------|
| 1. | Whether appointment of commission is necessary to elucidate the matter in controversy ? | ... | No.                      |
| 2. | What order ?  | ... | Application is rejected. |

REASONS

AS TO POINT NO.1.

5- Present suit is filed for permanent injunction. Plaintiff in his plaint never stated about encroachment. Further in the relief plaintiff prayed for perpetual injunction against the defendants. Further plaintiff filed amendment application at Exh.35 wherein he has prayed for amendment in respect of mandatory injunction i.e. removal of construction in the suit property and possession. But, he has never alleged regarding encroachment in the suit property. It is expected that plaintiff should submit the encroached portion and seek its removal. Further the plaintiff has to prove his own case. He cannot avail the court machinery to collect the evidence. In the present application plaintiff is stating about government road. But, in the plaint there is no whisper about measurement of the suit property and existence of government road. Further in absence of pleadings in respect of encroachment in the plaint as well as in the amendment application at Exh.35, the application is not tenable. The plaintiff relied upon verdict of Hon'ble Apex Court passed in Subhaga & Others Vs. Shobha & Others (2006) 5 SCC 466. In

this case Hon'ble Apex Court has observed that it is not always necessary to survey adjacent lands to find out whether an encroachment was made in the land belonging to plaintiff. But, in the present suit plaintiff is not making any pleading regarding encroachment and mentioning area and direction of encroachment. Therefore, the case cited by the plaintiff is not applicable. Considering all these aspects, I come to conclusion that there is no need to appoint commission in the present set of facts. Therefore, I record my findings in negative to point No.1 and pass following order.

ORDER

1. Application is rejected.
2. No order as to costs.

Date:-28/08/2019  
Kavathe-Mahankal

( S.A.Kulkarni )  
Jt. Civil Judge, Junior Division,  
Kavathe-Mahankal.