

Order below Exh.39 in
R.C.S. No. 22/2016
CNR-MHSN-12-000097-2016
(Popat Aitwade Vs. Raghunath Kambale ors.)

This is an application filed by the plaintiff for appointment of TILR, Palus as court commissioner to ad-measure block nos.1000/A, 1000/B and 1002 situated at village – Bhilwadi, Tal.-Palus, Dist.- Sangli.

2. It is the case of plaintiff that plaintiff has filed the suit for partition, for fixation of boundaries as well as for removal of encroachment. According to plaintiff, plaintiff has purchased 0H 7R land out of block no. 1000/A (suit property 1A) and also purchased 0 H 20 R land out of block no. 1000/B (suit property 1B) and also purchased 0H 22 R land out of block no. 1002 (suit property 1C). All the suit properties are situated at village- Bhilwadi. Plaintiff has purchased suit properties by registered sale deed dt. 30/06/2006 bearing registration no. 2156/2006. Plaintiff is the owner of suit properties. But, after purchasing suit properties plaintiff came to know that the area of suit properties which he is holding is less than what he has purchased. Hence, he came to know that defendant no. 1 to 7 have made encroachment and therefore, he filed suit for fixation of boundaries as well as for partition and separate share and accordingly, sought perpetual injunction regarding suit properties.

3. According to plaintiff measurement of entire block numbers is essential for determining the factor of encroachment. Hence, TILR, Palus be appointed for measurement.

4. Defendants no. 1 to 5 and 7 have filed the say and strongly opposed the application. According to them, application is devoid of merit. Allegations made in the plaint are vague and suit

properties are not partitioned and therefore, possession of every co-owner is joint. In other words, possession is common possession of all. Sale deed executed by plaintiff is illegal and hit by provisions of Fragmentation Act. Plaintiff is not entitled for holding separate possession of suit properties. Plaintiff is not having possession over the suit properties. For all these reasons, application is liable to be rejected.

5. Remaining defendants have failed to file their say hence, application is proceeded without their say.

6. Heard the learned advocate for plaintiff. He argued that there is allegation of encroachment and oral evidence is not sufficient to prove factor of encroachment and for that purpose measurement by expert like TILR is essential. In this regard, he relied upon following case laws.

**1) Manohar Mahadeorao Pagrut Vs. Sunanda Ramdas Tharkar
2008(3) Bom. C.R. 4.**

**2) Vijay Shravan Shende and Ors. Vs. State of Maharashtra,
2009 (5) Bom. C.R. 306.**

7. The aforesaid case laws discussed the principle of appointment of court commissioner in case of encroachment by taking into consideration provision of Order 26 Rule 9 of C.P.C.

8. On the other hand, learned advocate for defendant no. 1 to 5 and 7 strongly opposed the application stating that unless and until partition takes place, purchaser is not entitled for separate share. He has right to ask for partition. In this regard he relied upon case of **Gajra Vishnu Gosavi Vs. Prakash Nansaheb Kambale Ors. 2009 (6) All MR , 983**. Wherein the Hon'ble Bombay High Court has held that a purchaser of co-parcener's undivided interest in the joint

family property is not entitled for possession of what he has purchased and he has right to sue and ask for allotment of share in the suit property and possession cannot be handed over to vendee unless property is partitioned by metes and bounds.

9. The learned advocate for the defendants no. 1 to 5 and 7 argued that, at the most it can be said that possession of plaintiff is nothing but common to that of defendants and plaintiff is not entitled for separate possession and application if allowed will amount to collection of evidence and court commissioner cannot be appointed for collection of evidence. Hence, he prayed for rejection of application.

10. After perusal of plaint as well as application it appears that suit is filed for fixation of boundaries and there is allegation of encroachment and suit is also filed for separate share. It is well settled that purchases can ask for his share and for that purpose he can avail appropriate remedy available as per law. So also, it is well settled that whenever there is allegation of encroachment oral evidence cannot sufficiently prove it and for that purpose appointed of court commissioner is always just and proper. Therefore, there is no merit in the submission of learned advocate for defendants no. 1 to 5 and 7 that if the application if allowed it will amount to collection of evidence. Ratio laid down in *Gajra Vishnu Gosavi* case is not helpful for defendants no. 1 to 5 and 7 as argued by them. Accordingly, I pass the following order.

ORDER

1. Application is allowed.

2. T.I.L.R. Palus is hereby appointed as a Court Commissioner and he is directed to ad-measure the entire land of block nos.1000/A , 1000/B and 1002 at village-Bhilwadi, Tal.-Palus, Dist.-Sangli and submit his report along with the detailed map showing the encroachment if any, within six months from the date of this order.
3. Plaintiff is hereby directed to deposit the whole commission fee in the office of T.I.L.R. Palus, as per rules.
4. Plaintiff is hereby directed to file xerox copy of the receipt of deposit of commission fee in the court within four weeks from the date of this order.
5. T.I.L.R., Palus is directed to issue previous notice to all adjacent land holders before making the measurement. T.I.L.R. Palus is also directed to show further things in the map such as house, electric poles, well, trees and other essential things which he deems fit.
6. Issue commission writ to T.I.L.R. Palus, accordingly. The T.I.L.R. Palus shall carry out the commission work as per the provisions of survey manual.

Date : 15/03/2022
Place : Palus.

(N.D. Rudrabhate)
Jt.Civil Judge Jr.Dn., Palus

CERTIFICATE

I affirm that, the contents of this P.D.F. file are same, word to word, as per the original.

Name of Stenographer : Pravin G. Sabale

Court : Jt. C.J.J.D. & J.M.F.C., Palus

Date : 15/03/2022

Signed by the Presiding Officer on : 15/03/2022

Uploaded on : 15/03/2022