

R. C. S. No. 28 of 2017

ORDER BELOW EXH. NO. 34.

(Sudhakar Taru and Ors. Vrs. Rupesh Kamble and Ors.)

Plaintiffs are filed present application for the appointment of District Inspector Land Record, Satara under Order XXVI, Rule 9 of the Code of Civil Procedure, 1908 for the measurements of the suit properties bearing gut nos. 401, 400-A, 395, 396, 397 as described in the clause 1-A to 1-E in the plaint.

02. Read application. Perused documents on record filed by both the parties and say filed by the defendant nos. 4 and 5 vide Exh. 37. Heard Ld. advocate for both sides. Perused the record.

03. From the perusal of the record it appears that plaintiffs are filed R.C.S. No. 28 of 2017 against defendants for declaration, perpetual and mandatory injunction regarding the suit properties mentioned in clause 1-A to 1-E of the plaint. Ld. advocate for plaintiffs is submitted that all the suit properties are purchased by defendant nos. 1 to 3 on 08.12.2012 by registered sale deeds bearing registration nos. 3852/2010 and 3853/2010. The suit properties in clause nos. 1-D and 1-E are situated adjacent to the suit property in clause 1-A which is owned by plaintiffs. Plots owned by defendant nos. 4 and 5 are also situated adjacent to the suit properties in clause nos. 1-D and 1-E. One common road is situated in the suit property gut no. 400 and the said road is used by all plaintiffs and defendants.

04. However, defendant nos. 4 and 5 have constructed one

wall at the southern side of their house on the said road. Moreover, defendant nos. 1 to 3 are constructing multistory-ed building in the suit properties mentioned in clause 1-D and 1-E without having any permission of Shirwal Grampanchayat. Defendant nos. 1 to 5 are creating obstacles in the easementary rights of plaintiffs over the said common road situated in the suit property bearing gut no. 400 by carrying on the construction. Therefore, plaintiffs are prayed for the appointment of District Inspector of Land Records, Satara for carrying out the measurements of gut nos. 401, 400-A, 395, 396 and 397 and the local investigation and inspection of the all aforesaid gut numbers.

05. Defendant nos. 4 and 5 are strongly objected the application and contended that the description of the suit properties - gut nos. 401, 400-A, 395 and 396 noted by plaintiffs in the plaint is not appropriate. Plaintiffs have filed the present application merely for collection of evidence and the use of said evidence in the present civil proceedings. The description of the said properties is not in consonance with their measurements and area given in the map. Plaintiffs have not produced the documents regarding the original measurement of city survey number, suit properties and the map of the all suit properties. Defendants are prayed for the rejection of the application.

06. Ld. advocate for plaintiffs is relied upon the following citations in support of the application preferred by plaintiffs for the measurement of all the suit properties -

i) In the case of Mayuresh Subhash Sonawane V/s.

Yashwant Babu Bhoir and Ors., Writ Petition No. 6236 of 2021,

The Hon'ble High Court of Bombay is cited that on perusal of the above averments, it cannot be said that the appointment of the Court Commissioner will, in the facts and circumstances of the present case, be for collection of evidence. In the decision relied upon by the Petitioner i.e., Writ Petition 1196 of 2019 the suit that was filed was only for an injunction against the defendants therein, and not for declaration as is the present case. In that suit, it was averred that in the year 1986-1987, the suit land was levelled, and thirteen plots were made out of the suit land and each such plot had a separate water chamber. It was averred by the respondents in the that case that the petitioners therein had obstructed the respondents' property. It is for this reason that the responders approached the civil court and sought an interim injunction and the appointment of a court commissioner to prove the existence of the plots and the water chambers. However, this Court declined the appointment of a court commissioner as the Court felt that existence of the plots and separate water chambers could be adequately proved by documentary evidence such as NA permissions, water bills, etc. and appointment of Court Commissioner was not warranted.

ii) In the case of **Suleman Khan s/o. Mumtaj Khan and Ors. V/s. Bhagirathibai w/o. Digmaber Asalmol and anr., 2014(4)Mh.L.J.,** in which it is held that in case to determine encroachment, it is always desirable to have disputed suit property measured by competent surveyor to find out encroachment and its extent. Oral evidence cannot prove such contentious issue conclusively. In a suit where parties are disputing boundaries of property and one of the parties alleges encroachment made by

another party to the suit inside suit property. In such case the plaint map as evidence in respect thereof is vital document for to expressed opinion about eh necessity of duly drawn measurement plan/map in any suit in which there is a boundary dispute. The trial Court as well as 1st Appellate Court which are Court of Facts, are duty-bound to ascertain that a map is drawn to the appropriate scale by competent Government official from the office of TILR or DILR, as the case my be, so that measurement of suit property is carried out in presence of the parties after due notice to them or even if they are absent, so as to ensure that the suit property is properly measured, boundaries are fixed and boundary dispute is finally settled by producing of map in the Court by the plan maker who can prove it genuineness by deposing in support of such plan/map, if it sis so necessary in the absence of admission for exhibiting the map.

iii) In the case of *Arunrao Jagannatrao Deshmukh V/s. Rajabhau s/o Manikrao Deshmukh, 902 Second Appeal No. 294 of 2017*, The Hon'ble High Court of Bombay is observed that initially in Kashinath Ramkrishna Chopade Versus Purushottam Tulshiram Tekade and others, reported in 2005(6) Bombay CR 267, wherein it was observed that, "It is clear that under Order XXVI, Rule 9 of the Code of Civil Procedure, the Court has the discretion to order local inspection or not. The object of the local inspection is not so much to collected evidence which can be take in Court, but to obtain evidence which from its peculiar nature can only be had on the spot. The cases of boundary disputes and disputes about the identification of lands are instances, when a Court should order a local investigation under Order XXVI, Rule 9 of the Code of Civil Procedure. 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."

iv) In case of *Kshinath s/o. Ramkrishna Chopade V/s. Purushottam Tulshiram Tekade and Ors., 2005(4) Mh.L.J.,* in which it is held that Civil Procedure Code, O. 26, R. 9, Specific Relief Act (47 of 1963), S. 34 and Evidence Act, S. 83 - Plaintiffs filed a suit for declaration that the suit site is owned by them and defendants be restrained from interfering with their possession over suit site. The house and the open land in front of the decree. The presumption of accuracy of the map was not established. Neither city surveyor nor any expert had been appointed for the purpose of making local investigation. Matter therefore, remanded to the trial Court to appoint Commissioner or Surveyor.

07. From the rival contentions of both parties regarding the area and boundaries of the suit properties, it is seen that there is a dispute between plaintiffs and defendants regarding the area, boundaries and measurements of the suit properties and common way situated available to all persons having their easementary rights over the suit properties.

08. It appears that, in the view of the provision of Order XXVI, Rule 9 of the C.P.C. - In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the exact areas, boundaries and measurements of all the suit properties and common way situated thereon the measurement of all the suit properties is necessary. It is pertinent to note that the ratio given in aforesaid

citations filed on record by plaintiffs are applicable to the present case as the dispute regarding the boundaries and measurements is existed between the parties to the present suit. Plaintiffs are averred that the activities of encroachment by constructing on the common way situated in the suit property gut no. 400 are going on by defendant nos. 1 to 5 and it creates obstacles in the easementary rights of plaintiffs. Thus, it is seen that for the determination of the point of encroachment, variations of opinions of both parties to the suit regarding the boundaries, areas and measurements of all suit properties, the measurement of suit properties by District Inspector of Land Records, Satara is necessary.

09. In the present matter, both parties have contended the different areas, different boundaries and measurements of all the suit properties. Both parties are submitted that they are having the ownership and possession of their respective properties mentioned in the present suit as the suit properties. Hence, in such circumstances it appears that the measurement of the area and the determination of four boundaries of the suit properties is important to decide the rival controversies between the parties regarding the detailed inspection and determination of the definite measurements of the suit properties. Hence, the application is deserved to be allowed in the interest of justice. Considering aforesaid reasons and necessity of the appointment of D. I. L. R., Satara, I allow the application and pass the following order accordingly.

ORDER

1. The application Exh. 34 is allowed.

2. The D. I. L. R., Satara is appointed as a Court Commissioner to measure the boundaries and area of suit properties bearing registration gut nos. 401, 400-A, 395, 396 and 397 situated in the District Satara.
3. Both parties are directed to remain present alongwith their Ld. counsels at the spot of the measurement without failure on the date and time fixed by the D. I. L. R., Satara.
4. Plaintiffs are directed to pay requisite fees for the measurements of the aforesaid suit properties.
5. The D. I. L. R., Satara is directed to submit the report of measurements of aforesaid suit properties alongwith the demarcation map of the same on or before 29.09.2023 accordingly.
6. Issue writ accordingly.

Khandala.
Date : 14.07.2023

(A. K. Damate)
Civil Judge Junior Division, Khandala.