

Order below Exh.34 in RCS No.426/2025**CNR No.MHST180032222025**

This application is filed by the plaintiffs for the appointment of the Advocate as a Court Commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 1908.

02. It is contended by the plaintiffs that they have filed this suit for removal of encroachment, mandatory and perpetual injunction together with the relief of declaration. The suit property bearing Gat No.4 (old Gat No.1269) originally belonged to Savaji Gaikwad. Said Savaji had two sons namely, Bhau and Rama. He died long back and his two sons Bhau and Rama divided the suit property orally in the year 1960. Accordingly, they have separate possession over the suit property. As per the oral partition, the plot map of Gat No.4 is attached to the plaint in which over the Southern side, with the help of red ink, a common way attached to the village is shown. The said way is admeasuring 10ft. After excluding the said 10ft way, the remaining land on East and West admeasuring 150ft and South-North 415ft is given to Rama. The remaining land on the Western side was given to another brother Bhau. In this way, the suit property came to be divided by metes and bounds. Accordingly, both the brothers have been in possession of the suit property. Plaintiffs have no other way of access to go to their shares of the suit property. Under such circumstances, defendant No.1 raised dispute with plaintiffs regarding the use of said way.

03. It is further contended that since last eight days, he has called JCB machines over the suit property for the purpose of digging work for the construction of RCC building. He is trying to encroach

upon the said common way. Plaintiffs met defendant No.1 and asked him about the said encroachment and also requested him not to make such construction. But defendant No.1 did not pay heed. On the contrary, he said that there is no record in respect of the said way, hence, he will not admit the existence of the said way. The said disputed way has been used by all of them since last 50 years. Now, defendant No.1 is trying to make construction over the said way. He has dug holes and also brought the construction material. Hence, by filing this application, plaintiffs are praying that any advocate be appointed as a Court Commissioner in order to measure the respective lands plaintiffs, defendants, the construction carried by the defendant No.1, its measurement and the factual position on the spot along with the map and report.

04. Defendants No.1 to 4 have filed their say to this application at Exh.36. It is contended that by filing this suit, plaintiffs are trying to bring into existence way which is not in existence earlier. There is no such way running in the suit properties since last 50 years. The rough map provided by the plaintiffs is false. The written statement filed by the defendants, be treated as a say to this application. Defendants have also provided a map of the suit property, which should be taken into consideration. On one hand, plaintiffs say that the suit property is divided, on other hand, they are trying to create a new way which is not in existence. The plaint is not maintainable in the present form. Plaintiffs are not entitled to claim the relief of appointment of Court Commissioner. The said application is filed for the collection of evidence. Hence, defendants No.1 to 4 have prayed for rejection of this application.

05. Heard learned advocate on both the sides at length.

06. Plaintiffs have filed this suit for removal of encroachment, mandatory injunction in respect of the construction made by encroaching upon the access way, and also for perpetual injunction to restrain the defendant No.1 from carrying out any further construction over the disputed way. It is the specific pleading of the plaintiffs that except the said disputed way, there is no other way available to him to go to his suit property. It is admitted by the defendant No.1 that they are carrying out the construction. The photographs filed on record also shows that the construction is going on. Admittedly, there is no such record of disputed way. Under such circumstances, in order to see whether any such way is in existence or not and regarding encroachment, it is necessary to appoint the Court commissioner, who can visit the spot and help the Court to bring on record the factual position of spot. Under such circumstances, the appointment of Court commissioner will help the Court to arrive at a just decision rather helping the plaintiffs to collect the evidence. Hence, I pass following order:

ORDER

1. Application at Exh.34 is hereby allowed.
2. Any advocate from the Vaduj Advocates Bar is appointed as a Court Commissioner. Both the parties to suggest the name of the Advocate together.
3. The Court Commissioner shall measure the properties of plaintiffs, defendant No.1, the measurement of construction

being carried out on the suit property, the factual position of the disputed way whether it is in existence or not and submit his report along with map within one month from today.

4. Plaintiff shall pay the Court Commission fee of Rs.3,000/- to the Court Commissioner.
5. Plaintiff shall supply the copy of this order with application, all documents of suit property for issuing commission Writ immediately.
6. Before conducting the measurement of the suit property, the Court Commissioner shall issue notices to both the parties as per the rule.
7. Both the parties and their Advocates to take note of this order.

Date: 25.03.2026
Vaduj.

(F. B. Baig)
I/c. 2nd Jt. Civil Judge Sr. Div,
Vaduj.