



RCS No. 91/2022  
Devidas+01 Vs. Sopan + Ors.  
CNR No. MHWS080012992022

**ORDER BELOW EXH-13**

Present application is moved by plaintiffs under Order XXVI Rule 09 of the Civil Procedure Code for appointment of court Commissioner. According to them, they are the member of the joint family. Plaintiff no.02 is the son of the Plaintiff No.01. The Plaintiffs are the owner of the Suit filed Property situated at Village Nandhana within Gat No.225 admeasuring 1H-93R and the Suit Property within Gat No.226 admeasuring 0H-81R. The defendants are the owner of property situated at Village Nandhana having Gat No.227. The land of defendants are towards Northarn side of plaintiffs Suit land.

**02** The Mesurer of T.I.L.R. Risod measured the Survey No. 56 at village Nandhana. He started measurment by fixing points and measured whole Survey No.56, i.e. Gat No.218, 220, 221, 225, 226, 227, & 228 on dated 07.02.2022 to dated 09.02.2022 and fixed the Boundary Mark. 7/12 Extract of all the owners are seen by measurer. The measurement sheet of Gat No.227 of defendant shows that, Land of Gat No.226 to extent the area admeasuring 0H-53R showing by letter BCEFB is in possession of defendants and land of Gat No.225 to the extent of admeasuring 0H-52R is in possession of defendant. The defendants encroach on the land of plaintiff to the extent of admeasuring Total 1H-05R land shown by letter GHCBC. The T.I.L.R. Risod issued measurement sheet to plaintiff and it is filed along with the plaint.

**03** After measurement, plaintiff No.01 asked defendants many time to hand over the possession of encroached land. But defendant

avoided it. So plaintiffs have no alternative to file suit for possession. Defendants appeared in suit and stated in Written Statement that, the measure was not sent notice to the Owner of Gat No.227 at any time prior to measurement. Defendants also not rely on Government Map. The field property in Gat No.225 & 226 is in the ownership of Plaintiff. There is no any issue of deference between physical possession and the record of T.I.L.R. Risod. There is Boundary dispute between plaintiff and defendants. But to determine whether there is an encroachment, it is always desirable to measured the fields by an expert and find out exact encroached area. The oral evidence can not conclusively prove such an issue.

**04** So, the appointment of T.I.L.R. or D.I.L.R. as court commissioner is necessary to find out exact encroached area by measuring filed property of plaintiffs and defendants in Gat No. 225, 226 & 227. The object of local investigation is not to collect evidence, but to obtain evidence which from its peculiar nature can only be had on the spot. It is settled position of law that, under Order 26 Rule 09 of CPC, the court has discretion to order local investigation. The fact and extent of encroachment can be done only by carrying out inspection and measurement by appointment of Commissioner. So it is necessary to appoint T.I.L.R. or D.I.L.R. as court commissioner for joint measurement of filed property of plaintiff and defendant in Gat No.225, 226 & 227. He shall prepare authentic measurement map showing the boundaries of suit property with measurement in the map itself and it is directed to file it on record of the case.

**05** On the other hand, learned advocate for defendants opposed the application as it is not legal. They filed their WS below

Exh-11 and the contents of W.S. be taken as say to this application. According to them, plaintiff no. 01 applied for measurement of suit land before T.I.L.R. office. The same is numbered as 941. In that measurement, it is found that there is difference in record and physical possession. Moreover in Sy.No.56, so may time T.I.L.R. officer went for measurement. But found that Tipal Utara is not found and documents are not as per spot. The observation of the measurment officer is अभिलेख व ताबा वहिवाट यामध्ये तफावत गट बदलल्याचे आढळून आले असते वादीने केलेले कागदपत्र नकाशा (मोजणी ) T.I.L.R. हयांनी नमुद केलेले आहे. सबब प्रथम तफावत दुर होण्यासाठी कार्यवाही वादीने करणे आवश्यक आहे.

**06** According to them, this application is not legal. The Case is fixed fee evidence of plaintiff. Only to prolong the matter this application is filed. Commissioner cannot be appointed the collection of evidence. The plaintiff must prove his case on his own docuements. He cannot take the benefit of T.I.L.R. office. Hence they prayed for rejection of the application with cost.

**07** Learned advocate for plaintiffs relied upon **Yashwant Bhanduji Dhuse V/s Vithobaji Lazman Ladekar 2010(3) Bom. C.R. 373** stating that it is settled position of law that under Order XXVI Rule 09 of the CPC, the court has discretion to order local investigation. The object of 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 be had on the spot. Cases of boundary disputes and disputes about identity of lands are instances when a court should order local investigation under Order XXVI Rule 09 of CPC. In order to determine whether there has been an encraochment, it is always desirable to get fields measured by an

expert and find out exact area encroachment upon, oral evidence cannot conclusively prove such an issue.

**08** They also rely upon **Vijay Shrawan Shende and Ors V/S State Maharashtra and Ors 2009(5) Bom.C.R.306** stating that if any party to suit proves the act of encroachment, but fails to prove extent thereof by legal evidence, it will not be open to the court to astutely dismissed the suit. It will be proper to conduct local enquiry and render a fresh report under Order XXVI Rule 09 of CPC and secure on record report of legal evidence as to fact of matter about encroachment. The question of encroachment should be ascertained and proved only on the basis of appointment of commissioner. If the commissioner failed in proving exact measurement, instead of dismissing the suit, the court direct the another commissioner for fresh measurement.

**09** Heard both the sides. Perused the record. It appears that, the present suit is filed on dated 10.08.2022. The defendants appeared and filed W.S. vide exh-11 on dated 18.11.2022. The issues were framed at Exh. 12 on dated 17.04.2023. Since then the matter is kept for evidence of plaintiffs. This application is filed on dated 05.07.2023. Learned advocate for defendant filed say on dated 19.08.2023. Arguments were heard at length.

**10** Record also reveals that plaintiffs filed some documents below list Exh. 04 at serial number 01 to 03 three measurement sheets of Gat no. 227 dated 07.02.2022, Gat no. 225 dated 08.02.2022 and Gat no. 226 dated 07.02.2022 respectively is filed on record. All the three measurements are conducted by the TILR Office Risod. Similarly defendants also filed three measurement map vide

list of document below exh. 15 such as measurement Map dated 14.02.2018, dated 22.02.2018 and dated 02.07.2020 in respect of related Gat numbers. So there are six measurement maps on record filed by both the parties.

**11** Record also shows that, the discrepancies highlighted by the defendants in their W.S. and in say to this application is also arose at the time of measurement. There is a difference in respect of possession, cultivation and the record available with the office. Those discrepancies are not covered under the concept of local inspection or measurement. This is not the case where no any measurement is carried out and plaintiff claiming for measurement through expert by appointment of court commissioner. Already various measurements of various Gat Numbers are came on record.

**12** Considering the various measurement maps on record, I think, the citations relied by learned advocate for plaintiffs with due respect of those citations are not suitable to the case in hand. Thus, considering the above discussion, nature of suit and several measurement maps filed on record and the anomaly brought on record I think it would not be proper to again conduct measurement by appointment of TILR as court commissioner. Hence, I pass following order.

**ORDER**

Application is hereby rejected at this stage.

Sd/-

**(Yogesh D. Koinkar)**

Civil Judge (J.D.), Risod

Date: 02.02.2024

**CERTIFICATE**

I affirm that the contents of this P.D.F. File Judgment/Order are same word to word, as per the original Judgment/Order.

Name of the : H.A.Uchade  
Name of court : C.J.J.D.& JMFC;Risod  
Date : 02.02.2024  
Judgment/Order signed by the  
Presiding Officer : 02.02.2024  
Judgment/Order uploaded on : 02.02.2024

