

ORDERS ON I.A.NO.XXVIII FILED BY THE PLAINTIFF
UNDER ORDER XXVI RULE 9 OF CPC

1. This is application filed by the plaintiff under order 26 rule 9 of CPC requesting the Court to appoint Court commissioner in order to measure the suit property and show the shed constructed over the suit property and to submit report by Commissioner in the present case.

2. It is stated in the affidavit filed in support of application that, the plaintiff has filed the present suit against the defendants for the relief of mandatory injunction and to remove temporary shed constructed in the backyard belonging to the plaintiff. Plaintiff is the owner of the property bearing GP No.125 of Kednuru Village and the said property consist house as well as

backyard. The total measurement of the suit property is 37X15 feet. Eastern side of the plaintiff's property consists his brother's property and it is situated and the said property is equal to the plaintiff's property. The plaintiff has installed Gobar Gas and Cow Dung Pit and some space is kept as open space. However, the defendants were trespassing over the suit property and illegally removed the Gobar Gas and closed the Cow Dung Pit with mud. Even though plaintiff protest the Act of the defendant, they did not obliged. The defendants have encroached the suit property and removing Gobar Gas and Cow Dung Pit as illegally. Hence it is necessary to appoint any advocate as a Court commissioner to carry out the measurement of property. If present application is not allowed, he will be put to great loss and injustice. Hence this application.

3. On the other hand, defendant filed counter contending that, the application filed by the plaintiffs is false, frivolous and contrary to the law. To dragging the case unnecessarily without any valid reasons plaintiff is purposefully filed the present application. At this juncture appointment of Court Commissioner is against the law since earlier the plaintiff had file more applications seeking to appoint commissioner. The said area was never in possession of the plaintiff and the defendant was in his

possession and ownership from the past several years. Hence prays to reject the said application with heavy cost.

4. Heard, the learned counsels for the parties before the Court and perused materials placed before the Court.

5. The following points arises for my consideration.

1. Whether plaintiff show that, there exists sufficient ground to appoint Court commissioner as prayed for?

2. What order?

6. My answers to the above points are as follows:-

Point No:1. In the Affirmative.

Point No:2. As per final order, for the following:-

REASONS

7. **Point No:1 :-** The present application filed by the plaintiff on the ground that, in order to elucidate the matter in dispute between the parties, it is necessary to appoint Court commissioner to measure suit schedule property. On the other hand it is contention of the defendants that, already plaintiff has filed so many applications for appointment of Court Commissioner and

non possession of the plaintiff and defendant over the suit property and further, intention of dragging the matter by the plaintiffs. Hence there is no need to appoint Commissioner as prayed for.

8. On perusal of records it could be seen that, plaintiff has filed present suit for mandatory injunction and injunction to remove temporary shed over the suit property. At the time of arguments the counsel for plaintiff has argued that the plaintiff has not filed so many applications for appointment of commissioner, instead of only one application for measure the suit property to appoint a Court commissioner. Further, argued that as per order on the application of the Court commissioner on I.A.No.25, the Court has observed that after trial was ending on both side, while necessity of the Court commissioner is required and the said application could be considered on that occasion. Apart from the counsel for plaintiff argued and tried to attention of the Court with regarding encroachment that the defendant has disputed the encroachment of the suit property and encroachment of the defendant has reflected in photos and Ex.P35. In this regard perusal of Ex.P35 the Panchayath has clearly observed that the suit property was encroached. Now after conclusion of trial the plaintiff come up with present application. Under such circumstances Court has to verify whether available material on record is sufficient for

adjudication of dispute between the parties effectively and conclusively or is there any necessary to appoint Court Commissioner as prayed for or not.

9. The learned counsel for the defendant based on record itself is sufficient to decide the dispute effectively and conclusively. On the other hand learned counsel for the plaintiff has argued that, when there is serious dispute between the parties with regard to encroachment of the suit property it is necessary to appoint Court Commissioner in order to elucidate the matter between the parties effectively and conclusively.

10. On going through the material placed before the court it can be held that, there is serious dispute with regard to encroachment of property between the parties. The defendant only contending the drag the matter and possession of the suit property. If consider the same of the defendant, it is difficulty to adjudicate the matter as completely. Further there is also serious dispute with regard to parties have to prove alleged encroachment over suit property. Taking into consideration of all these disputed facts, no doubt there is material on record but in order to appreciate the same in better manner, if Court commissioner is appointed, would not amount to collection of evidence. Further the report submitted by the Court commissioner would help the Court in order to appreciate the evidence with regard to above mentioned disputed facts. Hence even at this stage I am of the

opinion that, if Court commissioner is appointed, his report would help the Court to appreciate the evidence already on record in order to decide the case effectively and conclusively. Further it is to be noted that, if there is serious dispute with regard to encroached area in question, non appointing of Court commissioner results in serious miss-carriage of justice. This my view is supported by ratio laid down in decision reported in 2009(4) KCCR 3003 in case of N Swamygowda V/S Ramegowda and others. Hence, I answer point No.1 in **the affirmative.**

11. Point No:2:- On above made discussion on points No:1, I proceeded to pass following:-

ORDER

I.A. No.XXVIII filed by the plaintiff under order 26 rule 9 of C.P.C is hereby allowed.

To suggest name of the counsel for appointed as a Court commissioner to visit the suit property, measure the same and submit report thereon along with sketch by plaintiffs and defendants.

The Court Commissioner fees tentatively fixed as Rs.2,000/-. Later on the counsel for plaintiff has filed memo of instruction and other side copy.

For memo of instruction of the defendant.

Call on 13.06.2022.

Sd/-

(NAGARAJ BARKI)

III Addl. Civil Judge and JMFC
Belagavi.