

KABG040000492019



**IN THE COURT OF THE IV ADDL. CIVIL JUDGE &
JMFC, BELAGAVI**

Dated this 2th day of December, 2024

PRESENT

**Smt. Geeta. B.A.LL.B (Hon's) LL.M.,
IV Addl. Civil Judge and JMFC, Belagavi.**

ORIGINAL SUIT NO.34/2019

BETWEEN:

1. Smt. Sunanda W/o Laxman Parit,
Age: 77 Years, Occ: Household Work,
R/o: H. No. 219, Parit Galli, Angol, Belagavi.

Since Deceased By her L.R's

- 1a. Sri Raju Laxman Parit
Age: 54 Yeras, Occu: Service
R/o :H.No 219, Parit Galli, Angol, Belagavi
- 1b. Smt Surekha D/o Laxman Parit
Age: 48 Yeras, Occ: Household
R/o: H.No 219, Parit Galli, Angol, Belagavi.

.....Plaintiffs

(By Sri. V. G. Kulkarni,Advocate)

AND:

1. Sri. Sunil S/o Irappa Surekar,
Age: 50 Years, Occupation: Business,
R/o: H. No. 218, Parit Galli, Angol, Belagavi.
 2. Sri. Vijay S/o Irappa Surekar,
Age: 43 Years, Occupation: Business,
R/o: H. No. 218, Parit Galli, Angol, Belagavi.
 3. Sri. Deepak S/o Irappa Surekar,
Age: 41 Years, Occupation: Business,
R/o: H. No. 218, Parit Galli, Angol, Belagavi.
-Defendants**

(By Shri. S. R. Kulkarni Advocate)

I.A.No.X

**Applicants/ Defendants : Shri. Sunil Irappa
Surekar and others**

-Vs.-

**Respondent/plaintiff : Smt. Sunand W/o
Laxman Parit and since
deceased by her Lrs.**

ORDERS ON I.A.NO.X

The defendants have filed I.A.No.X under order 26 Rule 9 and 10 R/w Section 151 of C.P.C praying to appoint city survey officer Belagavi, as court commissioner, for the purpose of

taking actual measurements of the suit property i.e., House no. 219 or CTS no. 5284, indicating the actual location of the well situated between, indicate the location of the walls separating the two properties by considering the existing city survey maps and submit his report thereon in the interest of justice and equity.

2. In the affidavit, defendant no.2 contended that plaintiffs have filed present suit for the relief of perpetual injunction seeking to restrain the defendants from disturbing their peaceful possession and enjoyment of suit property i.e. house no. 219 measuring 1032 square feet or 95.88 sq. meters. The claim of the plaintiff is that the defendants are trying to encroach upon the suit property and the well situated between two properties respectively bearing CTS No. 5284 and 5285. The defendants have filed a detailed written statement denying the allegations of the plaintiff and contested the matter. The defendants specifically denied the measurement of the suit property, location of well between the two properties and walls separating the two properties. The defendant No. 2 examined as DW1 and got marked documents. The said documents falsifies the claim of plaintiff

as to the measurements of suit property. However, the allegations are that of encroachment by the defendants on the suit property and on the well and wall. It is the specific contention of the defendants that the well is common to both parties and it is located right in the middle of two properties. The well is meant for common use and the defendants specifically denied the encroachment on the suit property and the well and wall. This being the facts, it is important to appoint court commissioner in order to ascertain the truth or otherwise of the allegations made in the plaint against the defendants and documents marked at Ex.D1, D2 and D4 by taking the actual measurement of suit property and indicating the exact location of well located between the two properties and status of wall separating the suit properties. The report will definitely proves the encroachment by the defendants and also it will enable the court to adjudicate the matter and dispose of the same effectively. With these contentions the defendants prayed to allow the application.

3. The plaintiff filed objection to the application contending that the application filed by the defendants to appoint Court Commissioner at the stage of cross-examination

of DW1 is untenable and deserves to be rejected. The defendant, by filing I.A. no. 10 is trying to collect evidence in the hands of Court Commissioner and same is not permissible under law. The contents of the affidavit are false, incorrect and the specific contention taken by the defendants in the affidavit that well is common between both parties and meant for common use is not admitted by the plaintiffs. Both wall and well is owned and possessed by plaintiffs and plaintiffs have completed their evidence and defendant has not stepped into witness box for his cross-examination. However, evidence of defendant is also necessary to decide and adjudicate the matter in dispute and hence the application filed at this stage is liable to be dismissed. The plaintiff contended that application filed by the defendants is deserves to be rejected and if the application is allowed, the defendants will succeed to collect the evidence through the hands of Court Commissioner and the plaintiff will be put to hardship and loss. With these contentions, the plaintiff prayed to reject the application.

4. Heard both counsels.

5. Now the points that arise for consideration are as under;

1. Whether the defendants have made out grounds to appoint Commissioner ?

2. What order?

6. Answer on above points is as follows;

Point No.1 : In the Affirmative

**Point No.2 : As per final order
for the following;**

REASONS

7. **Point No.1:-** The plaintiff filed this suit for the relief of permanent injunction contending that they are owners in possession and enjoyment of suit property which includes compound wall and well situated therein. The defendants being legal heirs of Irapa Surekar and are owners of Municipal House No. 219 which is situated towards southern side of Plaintiff's property are raising disputes on one or the other pretext and trying to establish claim over suit wall and well situated in the southern side of Plaintiff's property. The defendants have filed several suit seeking the relief of injunction against the plaintiff and said suit was dismissed. Now R.A No.116/2017 is pending before the Hon'ble 2nd

Additional Senior Civil Judge, Belagavi. The plaintiff contended that the defendants without having right, title and interest over the suit property are trying to encroach over the suit wall and well. The defendants denied the contentions of plaintiffs and stated that the plaintiffs by taking advantage of the absence of defendants have constructed wall by encroaching upon the defendants property to an extent of 25 feet and when the defendants requested the plaintiffs to remove the encroachment, the plaintiffs pressurized the defendants to consider said wall as common wall and to execute an agreement to that effect. In the absence of defendants, plaintiffs have constructed wall encroaching upon the defendants property hence, the defendants have filed O.S. No. 30/2002 and 1449/2010.

8. Now the matter is posted for cross-examination of DW1 and defendants have filed this application to appoint Court Commissioner to measure the suit property and defendants property and also to report about encroachment in the suit property and also the exact situation of the wall and well in the suit property by considering survey maps and report the same. The plaintiffs strongly objected to the application filed by the defendants stating that though the

defendant examined as DW1, he has not subjected himself for cross-examination. Therefore, at this stage, the application cannot be entertained. He also contended that the suit wall are owned and possessed by plaintiffs. The plaintiffs also contended that the defendants are collecting the evidence in the hands of the Court Commissioner.

9. The learned counsel for defendants argued that the Court Commissioner can be appointed at any stage of the suit in order to get the report for proper adjudication of the matter. In support of his contention, the defendants' counsel relied on the judgment reported in **Shri Shadaksharappa v. Kumari Vijayalakshmi and others, ILR 2023 KAR 3983**, wherein the Hon'ble High Court of Karnataka held that application for appointment of Court Commissioner cannot be rejected on the premise it amounts to collection of evidence or on the premise that it is not permissible looking into the form of suit. It is also held that when the dispute between the parties is one relating to the encroachment considering the nature of case and if the one party alleged encroachment by another and another party denies such allegation the commissioner can be appointed to ascertain whether there is encroachment or not, in such a situation the commissioner is

appointed to find out the nature of possession. It is also held that appointment of a court commissioner does not merit consideration at all, the burden of proving the alleged encroachment is on the plaintiff. The burden of proving the alleged encroachment is on the plaintiff instead of voluminous oral evidence if the petitioner seeks to prove his contention relating to encroachment through the report of the court commissioner, the prayer for local inspection should be willingly granted unless there are justifiable reasons for the court to take a view that local inspection is a futile exercise.

10. In view of the above referred decision, it is true that when there is dispute with respect to encroachment the court commissioner has to be appointed to know the encroachment if any and also to know the extent of encroachment. It is also true that when a court commissioner is appointed to make local investigation and report the same, it does not amount to collection of evidence. The Hon'ble court held that the considering the facts and circumstances of the case, court commissioner can be appointed at any stage of the proceedings and also any kind of suits. In the present case, the plaintiff is contending that the defendants are trying to

interfere with their possession and defendants contending that the plaintiff has put up wall in the absence of defendants by encroaching upon their property. It shows that the defendants are contending about the encroachment by the plaintiffs. As such the defendants filed this application for appointment of court commissioner when his oral examination-in-chief is completed and before cross-examination of DW.1. The plaintiffs strongly objected that before cross-examination of DW.1 court commissioner cannot be appointed. In order to collect evidence the defendant has filed this application. Now the cross examination of DW.1 and evidence of both parties is completed, at this stage if the Court Commissioner is appointed to measure the suit property and to indicate the location of well and wall, the report of the Court Commissioner will assist the court to arrive at proper conclusion. Further, at this stage appointment of commissioner will not amounts to collection of evidence. Therefore, the application filed by the defendant has to be allowed. **Hence, I answer Point no.1 in the Affirmative.**

11. Point No.2 : In view of discussion on point no.1 and for the reasons stated therein, I proceed to pass the following ;

ORDER

***I.A.No.10 filed by the defendants
U/order 26 Rule 9 and 10 R/w Section
151 of C.P.C is hereby allowed.***

***The Surveyor, City Survey office,
Belagavi is appointed as Court
Commissioner to measure the suit
property i.e., house No.219
corresponding CTS No. 5284 by
considering the existing city survey
maps and indicate the actual location
of the well and the walls separating
two properties and submit the report.***

***The Court Commissioner fees fixed
Rs.2,500/-.***

(Dictated to the Stenographer directly on computer, corrected and then pronounced by me in the open Court on 2nd day of December, 2024).

**(Geeta)
IV Addl. Civil Judge & JMFC.,
Belagavi.**