

**IN THE COURT OF THE PRINCIPAL CIVIL JUDGE AND
JMFC.,AT DEVANAHALLI**

Present: Sri. PRATHAP KUMAR. N.,B.A. L.L.B.,
Prl. Civil Judge & JMFC.,
Devanahalli.

Dated this the 6th day of January, 2023

O.S.No.17/2017

Plaintiff : Sri. George Sebastian

V/s

Defendant: Sri. C. Shashikdahr

PARTIES IN I.A. NO.IV

**Applicant/
Plaintiff** : Sri. George Sebastian

-V/s-

**Opponent/
defendants** : Sri. C. Shashikdahr

ORDER ON I.A. No.IV

The plaintiff has filed I.A. No.IV Under Order 26 Rule 9 of C.P.C., seeking for appointment of Court commissioner for inspect and measuring and submitted report with respect to suit property.

2. In support of the application, plaintiff has affixed an affidavit with application and he stated that, plaintiffs have filed this suit against defendant seeking relief of permanent injunction by way of easement, after disposal of writ petition before Hon'ble High Court of Karnataka, Bengaluru, defendant herein and his agents were blocked the access by dumping mud in schedule C property and putting compound slabs to access of C schedule property which is connecting to schedule A property, this activities of defendant is clearly shows that defendant changing the nature of schedule C property by way of blocking plaintiff ingress and access over C schedule property which is inly connecting way A schedule property, hence that the court commissioner spot verification and report of court commissioner is very much necessary and required to above suit. Hence, on these grounds, they are sought for allowing the application.

3. On other hand, defendants have not resist application filed by the plaintiff

4. Heard both the counsels.

5. Upon hearing arguments and on perusal of materials placed on record the following points that would arises for my consideration.

1) **Whether the appointment of commissioner for local investigation is necessary for ascertaining encroachment and the purpose of elucidating the matter in dispute?**

2) What order?

6. My findings to the above points are as under:

Point No. 1 : In the Affirmative

Point No. 2 : As per order for the

following:

REASONS

7. **POINT No.1:** Admittedly the plaintiff has filed this suit for easementary right against the defendants restraining them from closing the entrance or in any way obstructing the plaintiff's from using the schedule B property. The plaintiff is seeking permanent injunction and mandatory injunction by contending that, defendant not to change nature of schedule C property, which is common road in between schedule A and B properties.

8. It is contended that, appointment of court commissioner can be made only for the purpose of

elucidating any matter in dispute or for local inspection or for ascertaining property. It is also well-settled legal principle that court commissioner cannot be appointed to ascertain who is in possession, location and identification, encroachment of the suit property.

9. In the instant case, plaintiff has sought for appointment of court commissioner to ascertain the location inspection, measurement and encroachment of the suit property. Hence, appointment of court commissioner is necessary in the interest of justice. On careful perusal pleadings of both the parties it is clear that, appointment in dispute between the parties centers around encroachment. At this juncture, it is useful to refer the ratio laid down by Hon'ble High Court of Karnataka in **ILR 2001 Karnataka 5013 (Anil Kamalakar Shirodkar versus Dhudappa Santu Patil and another)** it is held that;

(Civil Procedure Code 1908), O.26 R.9 plaintiffs application for appointment commissioner to survey and measure property was allowed and in revision held in suit for injunction wherein parties alleged encroachment of property, were correct extent and boundaries of the property are in dispute. It is just and necessary that survey has to be conducted and boundaries of the properties are

to be identified. In such a situation appointment of court commissioner could not be mistaken for collecting evidence.

10. The ratio laid down in the above referred decision is tenable to the present facts of the case. The plaintiff alleges encroachment by defendants. In such a situation it is necessary to appoint court commissioner to ascertain the factum of encroachment. In the above referred decision, it is made clear that, appointment of commissioner to ascertain the encroachment does not amount to collection of evidence. Hence, considering all these aspects of the case I answer **point No.1 in the Affirmative.**

11. **POINT No. 2:** In view of the reasons assigned above, I proceed to pass the following:

ORDER

I.A. No.IV filed by plaintiffs Under Order 26 Rule 9 of C.P.C., is hereby allowed.

Taluka Surveyor Devanahalli is appointed as court commissioner as sought in I.A. No.IV.

Commissioner fee is tentatively fixed at the rate of Rs.3000/-.

Plaintiff is hereby directed to deposit the commissioner fee in the court.

Both Parties are directed to furnish memo of instruction.

No order as to be cost.

(Sri. Prathap Kumar. N)
Prl. Civil Judge and JMFC.
Devanahalli.

