

**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 20th day of April, 2023

O.S.No.935/2013

Plaintiff : Sri. D.V Seethakumar and others

V/s

Defendant: Smt. Shakunthamma and nothers

PARTIES IN I.A. NO.V

**Applicant/
defendant No.2:** Smt. Yashodara

-V/s-

**Opponent/
plaintiff :** Sri. D.V Seethakumar and others

ORDER ON I.A. No.V

The plaintiff has filed I.A. No.V 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, defendant No.2 has affixed an affidavit with application and he stated that, plaintiffs have filed this suit against defendant seeking relief of permanent injunction and declaration, after partition of our properties as per partition deed executed in the year 1993, there are variations in extent and boundaries in respect of properties bearing Sy. No. 292 measuring 24 guntas, Sy. No. 290 measuring 1 acre 27 guntas including 2 guntas kharab, whereas in Sy. No. 292 is erroneously shown as 23 guntas including 2 guntas and also erroneously shows the extent in Sy. No.290 as 1 acre 28 guntas which are quite contrary to the actual and factual extents, there are excess and less extents shown in pursuance of the said partition took place in the year 1993, whereas there were extents and boundaries correct prior to partition deed, 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 plaintiffs have resist application filed by the defendant No.2 and stated that, application filed by defendant is not maintainable either under law or on fact, the survey has been conducted by the survey department and

accordingly the said suit property is left for road and the same as been numbered as Sy. No.292/2 and Sy. No.290/5 and same is been accepted by the defendants and plaintiffs and accordingly the suit schedule property is used by the plaintiffs and defendants as road as per the partition which took place in the year 1993 and said phodi is been acted and accepted by plaintiffs and defendants and the same has to been challenged by either of the parties and same is acted upon. Hence prays to reject the application.

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 declaration and permanent injunction against the defendants seeking declared that 3 gunts of land is reserved for road and also seeking permanent injunction,

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.

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.**

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

ORDER

I.A. No.V 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.V.

Commissioner fee is tentatively fixed at the rate of Rs.5000/-.

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.

(Dictated to Stenographer directly on computer by him, same is corrected and pronounced by me in the open court on this the 20th day of April. 2023.)

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

