

### **Order on I.A. No.6**

The plaintiff/applicant filed an application under order 26 Rule 9 of Code of Civil Procedure in order to appointment of the Engineer of the Taluk Panchayath, Kadur Taluk, as a Court Commissioner to measure the property of plaintiff and property of defendant and find out the encroachment area by the defendant and submit report.

2. In the accompanying affidavit, which is enclosed I.A. No.6 wherein he stated that, he has filed suit for declaration and possession along with mandatory injunction. According to plaintiff the plaintiff has encroached the 'B' schedule property. On the other hand, the defendant had denied the same. Hence, it is necessary to appoint commissioner. Accordingly prays for allow the application.

3. On the other hand, the learned counsel for the defendant filed objection to the application and contended that, the application filed by the plaintiff is not maintainable and the father-in-law of defendant constructed the R.C.C. house and commercial shops an extent of East-West 36½ feet, North-South 40 feet and left the vacant space on East-West 30½ feet North-South 40 feet. Further it is stated that, the application is prematured. Accordingly, prays to reject the application.

4. Heard arguments on both sides and perused materials available on record. It is alleged that, the defendants have encroached the property of the plaintiff and put up construction over the 'B' schedule property.

5. On the other hand, the defenants have denied the case of the plaintiff and contended that he has not encroached the any property as alleged stated by the plaintiff.

6. Before advertng the pleadings of the parties this Court glance the provisions of under order 26 Rule 9 of C.P.C.

**“9. Commissions to make local investigation.-** *In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court.*

*Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rule”.*

**“10-A. Commission for scientific investigation.-** *(1) Where any question arising in*

*a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the Court.*

*(2) The provisions of Rule 10 of this order shall, as far as may be apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under Rule 9”.*

7. It is clear from the above that during pendency of the trial and before the judgment if the Court finds that any issue requires clarification or elucidation, this Court may suo-moto appoint commissioner to submit the report for which no application is required.

8. The absent of local investigation is not so much to collect the evidence which can be taken in Court, but to obtain evidence, which from its particular nature can only be had on this part. Cases of encroachment is instance, when a Court should order a local investigation under Order 26 Rule 9. In

order to determine whether there has been an encroachment it is always desirable to set the fields measure by any expert and find out the exact area encroached upon. Oral evidence cannot conclusively prove such an issue.

9. This Court has relied upon a decision reported in 2014(2) KCCR 1652 in the case of Bhimappa Rayappa Chowgala Vs. Srikanth, wherein the Hon'ble High Court of Karnataka pleased held that, **“the suit is in one for possession and injunction. The plaintiff claims the defendant have encroached upon his property. Only if the plaintiffs are able to show that the defendant have encroached upon their property, they would be entitled to the reliefs. Any amount of oral evidence is not a substitute or sufficient to prove the encroachment. To cut short the litigation to reduce recording evidence, the trial Court in its wisdom, thought it fit to appoint the commissioner even before the commencement of the trial. That is how the duration of the litigation could be curtail and speedy disposal of the civil matter could achieved”**.

10. The said authority aptly applicable to the present case on hand, such circumstances this Court feels that the appointment commissioner is much necessary for adjudicating

the matter on issue. Accordingly this Court proceed to pass the following;

**ORDER**

The application filed by the plaintiff under Order 26 Rule 9 of C.P.C. is hereby allowed.

The Assistant Executive Engineer, Taluk Panchayath, Kadur is appointed as a Court Commissioner.

The commissioner fee fixed Rs.4,000/-.

Both parties are directed to file memo of instructions.

The plaintiff is directed to deposit the commissioner fee as stated above.

Call on 01.07.2022.

Sd/-

1<sup>st</sup> Addl. Civil Judge & JMFC,  
Kaduru.