



IN THE COURT OF THE PRL. CIVIL JUDGE AND JMFC.,
MUDIGERE.

DATED: THIS THE 13th DAY OF OCTOBER 2023

Present: Sri. Sachin.D, B.A., L.L.B.
Prl. Civil Judge & JMFC.,
Mudigere.

ORIGINAL SUIT No: 47/2021

BETWEEN :

B.L.Puttaswamygowda,
S/o lat Lakshmana Gowda,
Aged about 64 years,
R/o Bakki Village, Bettagere Post,
Banakal Hobli, Mudigere Taluk,
Chikkamagaluru District. *... Plaintiff*

(By Sri.B.T.Nataraj, Adv.)

AND :

- 1.** B.B.Ahok S/o late Byregowda,
Aged about 58 years.
- 2.** B.B.Surendra S/o late Byregowda,
Aged about 56 years.
- 3.** B.S.Indresh S/o late B.M.Subbegowda,
Aged about 51 years.
- 4.** B.M.Krishnegowda S/o late Manjegowda,
Aged about 74 years.

All are R/o Bakki Village, Bettagere Post,



Banakal Hobli, Mudigere Taluk,

Chikkamagaluru District. ...*Defendants*

(By Sri.Santhosh.B.A, Adv.,)

PARTIES ON I.A.No.5

BETWEEN :

B.L.Puttaswamygowda ... *Applicant*

AND :

B.B.Ashok & Ors. ...*Opponents*

1	Provisions under which the application is filed	Under Order 26 Rule 9 of CPC
2	Relief sought for	Appointment of the Court Commissioner
3	The date on which the application is filed	06.07.2023
4	Number of the application	5
5	The date on which the objection filed by opponents	08.08.2023
6	The date on which the order was passed on the said application	13.10.2023

(Sri. Sachin. D)
Prl. Civil Judge & JMFC.,
Mudigere.

**ORDER ON IA.NO.5**

The plaintiff has filed the present application invoking the provision under order 26 Rule 9 of CPC, when the case was stood for plaintiff evidence, seeking an order of this court to appoint the surveyor as court commissioner to identify and demarcate the accurate boundaries of the suit schedule property as well as the property of the defendants.

2. In the affidavit accompanied to the application, the plaintiff has deposed that he is the owner in possession of the suit schedule property, which has been acquired by him through a unregistered partition deed dated 20.10.1993. After the partition, his name has been mutated in the revenue records as per the mutation Reg.No.27/1998-99. The suit schedule property is cultivated with robusta coffee, pepper, areca and silver oak trees by fencing all around. The defendant No.1 and 2 are the adjacent land owners of the northern side of the suit schedule property. So also the defendant No.3 and 4 are the adjacent land owners of the southern side of the suit schedule property. The defendants are close relatives to the



plaintiff and they have disputed the extent and boundary of the suit schedule property in the written statement. Therefore, it is necessary to identify and demarcate the accurate boundaries of the suit schedule property as well as the property of the defendants. In order to achieve the same, appointment of the surveyor as a court commissioner is absolutely necessary. Hence, prayed for allow the application and appoint the commissioner as prayed in the application.

3. The above application has been resisted by the defendants by filing objection statement. Wherein, it is contended that application of the plaintiff is not maintainable either in law nor on facts and circumstances of the case, as it is filed with sole intention to harass the defendants and the plaintiff sworn the false affidavit. It is further contended that the plaintiff has already got surveyed the suit schedule property as well as the property of the defendants through proper channel. After the survey, the concerned officials have issued the sketch also. Despite of the same, the plaintiff has filed this application without assigning any good reasons and



hence, the application of the plaintiff is not maintainable and liable to be dismissed.

4. It is further contended that pakka-phodi proceedings with respect to suit schedule property has not been done so far. Plaintiff is also not in possession of the suit schedule property. When such being the case, the present application, at this stage, is not maintainable. It is further contended that the very suit filed by the plaintiff itself is not maintainable. Only to collect the evidence, the plaintiff has moved the present application. Hence, if the application is allowed, the irreparable hardship and injury will be caused to the defendants. On the other hand, no prejudice will be caused to the plaintiff. Hence, prayed for reject the application of the plaintiff with costs.

5. In view of the above rival contentions of the both parties, the following points arise for consideration.

1. Whether the appointment of court commissioner is necessary to identify and demarcate accurate boundaries the suit schedule



property as well as property of the defendants?

2. What order?

6. Having heard both side, the court perused the application, affidavit, objection statement, authorities supplied by the plaintiff and other materials made available on record. Now, the findings of the court to the above points are as follows.

Point No.1 : ***In the Negative***

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

REASONS

7. POINT No.1: The plaintiff has filed the present suit for the relief of permanent prohibitory injunction to restrain the defendants and their agents or anybody claiming on their behalf from trespassing into the suit schedule property, remove the fence and to cause any acts of waste and damage and also interfering his peaceful possession and enjoyment over the same. The plaint averments clearly establishes that plaintiff has pleaded that the suit schedule property has been acquired by him through a unregistered partition dated 20.10.1993



and consequent that his name has been mutated in the revenue records as per the mutation Reg.No.27/1998-99. Therefore, he is in peaceful possession and enjoyment over the suit schedule property. Further, plaintiff has alleged that the defendants No.1 to 4 without having any right, title and interest tried to interfere with his peaceful possession and enjoyment over the suit schedule property. Therefore, constrained to file the present suit.

8. On the other hand, the defendants in their written statement have denied the plaint averments and contended that the Sy.No.40 is the ancestral property of the plaintiff and defendants. The said property has been partitioned and wherein, 2 acres 30 guntas was fallen to the share of father of the defendant No.1 and 2 and another 2 acres 30 guntas was fallen grand father of the defendant No.3. Further, it is specifically contended that now the defendant No.3 is in possession of 2 acres 30 guntas and the survey authorities have surveyed the said property and prepared sketch as per the possession of the defendant No.3. It is further contended that



the plaintiff is in possession of only 3 acres 15 guntas including 15 guntas kharab.

9. It is the contention of the plaintiff that the defendants in their written statement have disputed the extent and boundary of the suit schedule property as well as the property of the defendants. Therefore, the appointment of the court commissioner is necessary to identify and demarcate the accurate boundaries of the properties of the plaintiff and defendants. The plaintiff in support of his contention has relied upon the decision of the **Hon'ble High Court of Karnataka, in WP.No.201274/2022 (GM-CPC), dated 24.02.2023, between Sri.Shadaksharappa Veranna V/s Kumri Vijayalakshmi.** Wherein, the Hon'ble High Court of Karnataka, at para No.10 to 15 held as follows:-

10. The above-referred view can also be justified from another perspective. Under Order XXVI Rule 10, as noticed above, the report of the Commissioner and the evidence taken by him is a piece of evidence. The word evidence is not defined either under the Code or under the Indian Evidence Act. However, the Indian Evidence Act, among others, deals with oral and documentary evidence. The report of the court



Commissioner would be documentary evidence under the Indian Evidence Act. The party to the suit is entitled to produce the documentary evidence in support of his case, subject of course, to the relevancy of the document. In that view of the matter also, the contention that the appointment of a Commissioner for local inspector, or scientific/forensic investigation, amounts to collection of evidence and for this reason the application is maintainable is not a valid, not contention. On the other hand, the party to a suit in an appropriate proceeding is enabled under the law to prove his case through the report of the Commissioner. Thus, in a given case that calls for the appointment of a Commissioner, if the application is rejected, the same amounts to a denial of permission to lead evidence.

11. The appointment of a Commissioner for local inspection, or scientific/forensic investigation,/expert's opinion is indeed to secure the evidence and the same is not only permissible but also desirable in certain cases. The report, given the intrinsic complexities of matter in a case, may go a long way in arriving at a just decision or assisting the court to appreciate the other evidence on record or fact situation in a proper perspective. If the report of the Commissioner is nothing to do with the subject matter in dispute, then there cannot be an order appointing the Commissioner. Order appointing a Commissioner can be made only if the Commissioner's report becomes a relevant piece of evidence. That being the position, the contention that the appointment of court Commissioner amounts to collection of evidence has not merit.



12. Under the provisions applicable for local inspector what is impermissible is the delegation of adjudicating power. To cite an example, if both parties claim to be in possession of the disputed property, the local inspection by the Commissioner cannot be ordered to ascertain the possession. The question of possession is to be decided by the court. However, if one party alleges 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. The report based on local inspection will be a handy tool to decide the case relating to encroachment. In the case on hand, the petitioner to prove his assertion of encroachment, instead of leading oral evidence of witnesses has applied for local inspection, and the same is not only permissible but also desirable.

13. the next question is, at what stage of the proceeding in a suit, the application can lie? As could be easily noticed from the provision, the provision is not 'stage' centric. Thus the provision can be invoked either application is filed before the commencement of the trial, the court having regard to the pleadings and record may allow such application before the commencement of the trial. For example, in a give case, if the report is necessary for consideration of an application seeking some interim measure, before the commencement of the trial, the Commissioner can be appointed, if the case is made out for a such appointment. On the other hand, again, having due regard to the pleadings and records, if the court finds that



there is every likelihood that after recoding the evidence of the parties, the need to appoint the court Commissioner may not arise or that the court is of the view that it can take a call on the application, only after recording the evidence, then it may defer the order on the application till such time. Thus the decision as to when the report of the Commissioner is to be secured must be taken having due regard to the facts and circumstances.

14. The discretion, though lies with the court, as to appoint the Commissioner before the trial or after the trial, the decision must be taken with due regard to the possibility of reducing or eliminating the need to record the oral evidence of witnesses to prove an issue which could be effectively decided with the aid of the report. More often than not, in disputes relating to the existence of pathway, stream, pond, well, or disputes relating to the boundary between adjoining holders, encroachment, easement of air and light, construction of building in violation of setback rules, or relating to the authenticity of a document, signature/thumb impression to name a few by way of illustration, a report secured before the trial may cut short the trial in as much as the party relying upon the report may not examine multiple witnesses to prove the matters covered by the report. The party may simply rest his case based on his evidence and the report. In a given case, the appointment of the Commissioner before the commencement of the trial may facilitate a focused trial. In the case of Bhimappa Rayappa Chougala v. Shrikant, 2014 SCC OnLine Kar 12277 : (2004) 2 KCCR 1652 at



page 1653, the Co-Ordinate Bench of this court has held as under:

“ 4. xxx Only if the plaintiffs can show that the defendants have encroached upon their property, they would be entitled to the relief. 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 a Commissioner even before the commencement of the trial. That is how the duration of the litigation could be curtailed and speedy disposal of the civil matter could be achieved.”

15. For the reasons stated above, this court is of the view that the dispute between the parties is one regarding to alleged encroachment, the trial court could not have rejected the application on the premise that the trial is not complete. Considering the nature of the case, this court is of the view that an order rejecting the application, with the liberty to file an application for local inspection after the trial is nothing but placing the cart before the horse.

10. In view of the above decision of the Hon'ble High Court of Karnataka, now the present application on hand has to be considered. Admittedly, the plaint averments clearly established that the plaintiff has pleaded that he is in possession of the suit schedule property and the defendants have interfered without having any right, title and



interest over the same. On careful reading of the written statement of the defendants, it makes clear to the court that the defendants have not disputed the boundaries. On the other hand, they have contended that the plaintiff is not in possession of full extent of the suit schedule property. Thus, by reading the pleadings of the both parties, it can be seen that there is no encroachment issue and the boundary dispute in the present case on hand.

11. It is pertinent to note that as already observed above, the present suit is filed by the plaintiff for the relief of permanent injunction. Therefore, the court has to ascertain that whether the plaintiff is in possession of the suit schedule property as on the date of suit and the alleged interference of the defendants. Hence, in order to decide the aforesaid two facts, the survey of the suit schedule property and property of the defendants and the commissioner report is not required. Therefore, if the commissioner is appointed and his report secured, it will no way helps to the court to decide the matter in issue between the parties.



12. The counsel for the defendants vehemently submitted that the plaintiff has already got surveyed the suit schedule property as well as the property of the defendants and therefore, appointment of the surveyor is absolutely not necessary. In support of his contention, he has relied upon the documents submitted to court on 29.10.2021. On careful perusal of the aforesaid documents such as notice issued by the ADLR, Mudigere, report of the ADLR, Mudigere, application for Thathkal phodi, sketch and other reports. It makes very clear to the court that on 31.08.2020 and 14.02.2020, at twice the plaintiff himself has applied to the survey authorities to survey the suit schedule property as well as the property of the defendants. On 10.12.2020, when the surveyor has visited to the spot to survey, as per the consent parties, the application was kept pending. Further, on another day, the survey has been conducted by the surveyor and stated in the report that the extent stated in the RTC as well as the possession are not matching each other and therefore, the sketch has been prepared as per the possession of the parties. The learned counsel for the plaintiff has argued that the previous sketch and



survey which has been done by the ADLR, Mudigere, has been challenged before the competent authority and same has been set-aside. But in order to substantiate the same, no documents are produced before the court. Therefore, the above documents are clearly established that before institution of the suit, the plaintiff himself has made application before the survey authority and got surveyed the suit schedule property.

13. As already observed above, the present suit is filed by the plaintiff for the relief of permanent injunction. No encroachment and the boundary dispute are involved in the present case on hand. When such being the case, absolutely at any angle, the appointment of the surveyor to identify and demarcate the boundaries of the suit schedule property doesn't arise at all. If the court commissioner is appointed and he identify the suit schedule property as well as the property of the defendants with accurate boundaries, it nowhere helps to decide the issues involved in this suit. Therefore, it is the considered opinion of this court that the appointment of court commissioner is not at



all required. Hence, this court answer **point No.1 in the Negative.**

14. POINT No.2: In view of the above findings on point No.1, this court proceed to pass the following.

ORDER

***The IA.No.5 filed by the plaintiff
under order 26 Rule 9 of CPC is hereby
rejected.***

No order as to costs.

(Directly dictated to the stenographer, typed by him on computer, corrected and then pronounced by me in the open court on this the 13th day of OCTOBER, 2023)

(Sachin. D)
Prl. Civil Judge & JMFC,
Mudigere.

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