

**ORDERS ON IA NO.IX**

The present application is filed at the stage of arguments. The defendant No.1 has filed the present application under Order 26 rule 9 of CPC seeking appointment of Court Commissioner preferably surveyor or an Advocate to make local inspection and to submit report as to whether the 'B' schedule road in O.S.No.106/2017 is in existence or not as shown in the sketch.

**2.** The defendant No.1 has contended that he and his brothers are in possession, occupation, cultivation and enjoyment of plaint 'A' schedule properties in O.S.No.106/2017. In order to cultivate the said lands and also to reach the residential house in item No.3 property, they have to use the 'B' schedule road marked as 'C' to 'N' in the sketch and the said road is mud and motorable road but the plaintiff and his brothers are trying to obstruct the usage of said road and also they are making attempts to destroy its existence. As such the appointment of Court Commissioner to inspect about the existence of said road is necessary.

**3.** Learned counsel for plaintiff has filed his statement of objections contending that the application is belated and filed for collection of evidence. Similar application was filed in O.S.No.106/2017 which came to be dismissed. There is no dispute as to existence of road maintained by the plaintiff in his land. The question whether the defendants have got right by way of easement of prescription over the road situated in the plaintiffs property cannot be ascertain by appointing Court Commissioner

the defendants have recently closed small road situated in their land in order to create false evidence. When the facts regarding existence of road could be seen from the record, the appointment of the Court Commissioner is not necessary. The defendant No.2- H.V.Rajendra in O.S.No.106/2017 in his separate statement of objection has contended that the defendants have established that there is alternative road for the plaintiff/defendant No.1 herein and he is not the adjacent land owner of the land belonging the defendants in O.S.No.106/2017. The brothers of defendant No.1 i.e., plaintiff in O.S.No.106/2017 has not come forward seeking right of usage of road. On these grounds the plaintiff and so also the defendant No.2 in O.S.No.106/2017 have sought for rejection of present application.

**4.** On basis of the above contentions, the following points do arise for consideration:

- 1) Whether the defendant No.1 has made out sufficient grounds that the appointment of Court Commissioner to conduct local inspection and his report is just and necessary to decide the matter in controversy?
- 2) What Order?

**5.** Heard both side and also perused the entire materials available on record. Now, this Court answers the above points as follows:

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

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

**REASONS**

**6. Point No.1:** This suit is clubbed with the suit in O.S.No.106/2017 wherein the defendant No.1 herein is the plaintiff and the plaintiff herein is the defendant No.1 in the said suit. As could be seen from the records, the present suit is the main suit. This suit is filed by the plaintiff against the defendants seeking permanent injunction with respect to the suit property i.e., the land to an extent of 6 acres 20 guntas in Sy.No.24/43 of Talagodu Village. The defendant No.1 herein has filed O.S.No.106/2017 seeking for declaration regarding usage of 'B' schedule road to reach his properties at 'A' schedule property. As per the case of defendant No.1 the road marked as 'C' to 'N' in the sketch starts from Balehole-Basarikatte road and ends in Sy.No.24/38. The defendant No.1 has further contended that the said road runs through the land in Sy.No.24/43 and other survey numbers.

**7.** Since this suit is clubbed with the suit filed by the defendant No.1 claiming usage of road which states to have run over the suit schedule property in the present suit, this Court finds no impediment in appointing the Court Commissioner by passing orders in the present suit being the main suit. The grounds urged by the defendant No.1 is that the plaintiff herein and so also the defendants in O.S.No.106/2017 are obstructing the plaintiff in using the road marked as 'C' to 'N' which starts from Balehole-Basarikatte road and runs through the land belonging to plaintiff and also the defendants in O.S.No.106/2017. The defendants in O.S.No.106/2017 have contended that they have established that the defendant No.1 in the present suit has got alternative road.

**8.** It is germane here to refer the recent decision of our Hon'ble High Court in the case of **Sri. Shadaksharappa Vs Kumari Vijayalakshmi & Ors in W.P. No. 202174/2022 (GM-CPC)** D.D. 24.01.2023 wherein issued guidelines for consideration of application for appoint of Court Commissioner and it has been held as under:

***“... the report under Order XXVI of the Code, in an appropriate case, is an effective tool available to the court and the party to the proceeding. The party to the proceeding, may use this tool for proving his/her case and the court to unravel the mystery surrounding the case.”***

**9.** Keeping in view the above decision of Hon'ble High Court, if the dispute between the parties are looked into, the defendant No.1 claims that he is having right to use the road marked as 'C' to 'N' in the sketch produced along with the plaint in O.S.No.106/2017 whereas the plaintiff and other defendants have denied the same and contended that the defendant No.1 has got alternative road. The circumstances being thus, appointment of qualified Surveyor is necessitated to obtain the report regarding existence of road as described under 'B' schedule in the plaint in O.S.No.106/2017 which would aid in full and final adjudication of the dispute between the parties. Hence, the Point No.1 is answered in **Affirmative**.

**10. Point No.2:** In view of the reasons recorded on Point No.1, this Court considers it fit to allow the above application. Hence, the following:

**ORDER**

I.A.No.IX filed by the Plaintiff under Order XXVI Rule 9 R/w Section 151 of Code of Civil Procedure is hereby allowed.

ADLR, Mudigere Taluk is hereby directed to appoint qualified surveyer to conduct Commission work to hold local inspection so as to ascertain whether the 'B' schedule road in O.S.No.106/2017 as shown in the sketch, is in existence or not.

Issue Commissioner Warrant accordingly by enclosing the copy of sketch produced in O.S.No.106/2017 which shall be furnished by the defendant No.1 in the due course. Commissioner fee is tentatively fixed at Rs.2,000/-.

Both parties in the respective suits are hereby directed to submit their respective memo of instructions to the Court Commissioner and they are also directed to co-operate with the Court Commissioner so as to enable the Court Commissioner to submit his report on or before 09.02.2024.

SD/-

**(VISHWANATH.A)**  
**ADDL. CIVIL JUDGE & JMFC.,**  
**MUDIGERE**