



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

DATED: THIS THE 18th DAY OF DECEMBER 2024

Present: Sri. Vishwanath A., B.B.A., L.L.B.
C/c Addl. Civil Judge & JMFC.,
Mudigere.

ORIGINAL SUIT No: 102/2023

BETWEEN :

1. Smt.Gopamma,
Aged about 85 years,
W/o late M.D.Duggappagowda.
2. Sri.M.S.Cheluvayya,
Aged about 77 years,
S/o late Sheshaiah,
Agriculturist.

Both are R/o Malemane,
Malemane Village,
Javali Post, Balur Hobli,
Mudigere Taluk.

Plaintiff No.2 for himself and
as GPA holder for plaintiff No.1.

.... Plaintiffs

(By Sri.M.V.Jayaraj, Adv.,)

AND :

Smt.Vishalakshi,
Aged about 45 years,
W/o late Annappa,
R/o Malemane,
Malemane Village,
Javali Post, Balur Hobli,



Mudigere Taluk.

.... Defendant

(By Sri.K.M.Prashanth, Adv.,)

PARTIES ON I.A.NO.II**BETWEEN :**

Smt.Gopamma & Anr.

... Applicants

AND :

Smt. Vishalakshi

... Opponent

i	Provision under which the application is filed	Order 26 Rule 9 of CPC
ii	Relief sought for	Appointment of Court commissioner
iii	The date on which the application is filed	27.05.2024
iv	Number of the application	VIII
v	The date on which the objections are filed by different opponents	11.06.2024
vi	The date on which the orders were passed on the said application	18.12.2024

(Vishwanath A.)C/c Addl. Civil Judge & JMFC,
Mudigere.**ORDERS ON I.A.NO.VIII**

The present application is filed at the stage of hearing on IA.No.1 and 3. The plaintiffs have filed the present application under Order 26 rule 9 of CPC seeking appointment of Court Commissioner



preferably an Advocate to visit and inspect the suit schedule property, the disputed road and to submit report in that regard.

2. In support of the present application, the plaintiff No.2 has filed his affidavit wherein contended that the land of defendant is situated adjacent to plaint 'A' schedule property. In order to reach plaint 'A' schedule property, there is a road described under plaint 'B' schedule. The said road is used ever since the time of predecessors, but the defendant is obstructing user of said road. Hence, the commissioner report regarding local inspection is necessary. On the above grounds, the plaintiffs have sought for allowing the application.

3. The defendant has filed her statement of objections to the present application contending that there exist no road as alleged. If the Court cannot decide the suit on basis of pleadings, documents and evidence adduced by the parties, then the Court commissioner be appointed. No such circumstances do exist at this stage. The plaintiffs have filed the present suit to collect evidence. No reasons are made out in support of the application. Advocate commissioner is not a technical person and the application is devoid of merits. On the above grounds the defendant has sought for rejection of the application.

4. Having heard the learned counsel for respective parties, this Court has carefully perused the entire materials on record. The points that arise for consideration is as under



1. Whether the plaintiffs have made out sufficient grounds to appoint the Court Commissioner as sought for?

2. What order?

5. The answers of this Court on the above points are as under:

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

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

REASONS

6. POINTS No.1: The plaintiffs have filed the present suit for permanent injunction restraining the defendant not to obstruct in usage of plaint 'B' schedule road in order to reach plaint 'A' schedule property. On the other hand, the defendant denying the existence of plaint 'B' schedule road, has filed counter claim against the plaintiffs. As per the plaintiffs, they are in possession of plaint 'A' schedule property and in order to reach the said property, there is a road which deviates from Javali-Malemane, which reaches the plaint 'A' schedule property. Whereas, the defendant has contended that the plaintiffs can directly enter their land from Javali-Malemane road, but the plaintiffs have obstructing in usage of her property in which she is making use of strip of land to reach her house from Malemane-Javali road. On consideration of these aspects along side the boundaries mentioned to the plaint schedule property as well as the counter claim schedule property, it could be seen that no road is shown to the either side of plaint schedule property which



admittedly situated towards western side of counter claim schedule property and the Javali-Malemane road is situated towards northern side of the counter claim schedule property. Thus, the parties are at dispute with respect to plaint 'B' schedule road which as per the defendant, is not in existence.

7. Both the parties have produced revenue documents on perusal of which it discloses that out of the total extent of plaint schedule property, the land to an extent of 4 guntas is classified as 'A' kharab. Further, out of the total extent of counter claim schedule property, the land to an extent of 6 guntas is classified as 'A' kharab. The photographs produced by the parties would disclose a mud road which as per the plaintiffs is the plaint 'B' schedule road and the defendant claims it as a strip of her land which is used by her personally to reach her house. The specific contention of the plaintiffs is that they have got no alternative road other than the plaint 'B' schedule road, whereas the defendant has contended that the plaintiffs can reach their land directly from Javali-Malemane road. In this case, both the parties have sought for temporary injunction against each other alleging obstruction with respect to their respective proprietries and alleged road. If the plaintiffs have got no alternative road and if they are restrained by way of temporary injunction, then irreparable injury will be caused to them. Therefore report of local inspection would aid this Court to do justice at the interregnum till conclusion of trial.



8. Learned counsel for defendant has vehemently argued that when the main prayer itself cannot be granted, then any interim order cannot also be granted. He also argued that there is no necessity of appointment of Court commissioner when the Court is having advantage of looking into the pleadings and evidence of the parties. In support of his arguments, learned counsel for defendant has placed is reliance on the decision of Hon'ble Apex Court in the case of **Cotton Corporation Of India Limited V/s United Industrial Bank Limited & Ors** in **(1983) 4 Supreme Court Cases 625**, and also the decision of our Hon'ble High Court in the case of **Annappa Mestha V/s Mutayya Achari** in **ILR 2002 KAR 3599**. Herein the case, the plaintiffs who have pleaded existence of plaint 'B' schedule road and their right over the same, on proving the said aspect, they will be entitled for the relief as sought for in this suit and it is not the case that the main relief sought by the plaintiffs cannot at all be granted in any circumstances.

9. It is germane here to refer the 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, wherein it is held as under:

"T21. Having examined the provisions referred the above and given the fact that Order XXVI of the Code of Civil Procedure is often invoked in the trial court, this court is of the view, broadly speaking in the following cases, the appointment of an appropriate



Commissioner as provided under Order XXVI of the Code is desirable.

(i) The dispute relating to the easement of air, light, pathway, road, watercourse, etc.

(ii) The dispute relating to the boundary, encroachment;

(iii) The dispute relating to forgery;

(iv) The dispute relating to the existence or otherwise of a stream, pond, drainage, watercourse, road, pathway, pollution, or nuisance.

22. The examples given above are not exhaustive but merely illustrative. The guidelines in this order should not be construed as having exhaustively listed the cases in which the Commissioner can be appointed. Nor the observations should be construed as having diluted or expanded the discretion vested with the trial court in such matters "

In **Sri. Shadaksharappa** supra, our Hon'ble High Court has further 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.."

10. Keeping in view the above decision of Hon'ble High Court, if the case on hand is looked into, it is at this juncture be consider that the parties are in dispute with respect to road; the existence of which is denied by one party claiming it as strip of her land, but the other is claiming the same as only way to reach their property. As noted earlier, both the parties have sought for temporary injunction



against one another. The circumstances being thus, this Court is of view that the commissioner's report with respect to local inspection of the properties subject matter of suit, the road as described under plaint 'B' schedule and any other existing way to reach plaint 'A' schedule property, will aid this Court to draw a proper conclusion either interim or final with respect to the controversy between the parties. However, the Advocate commissioner being not fully expertise in technical aspects in identifying, locate and measuring the properties, this Court is of consideration to appoint of qualified Surveyor to execute the commission work. Hence, the Point No.1 is answered in **Partly Affirmative**.

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

ORDER

I.A.No.VIII filed by the plaintiffs under Order XXVI Rule 9 of Code of Civil Procedure is hereby allowed in part by appointing Taluk Surveyor as Court commissioner.

ADLR, Mudigere Taluk is hereby directed to appoint qualified surveyor to conduct Commission work to hold local inspection so as to measure, locate and



identify the properties subject matter of suit, the road if any as described under plaint 'B' schedule and also any other way in existence to reach plaint 'A' schedule property.

Issue Commissioner Warrant accordingly by enclosing the copy of plaint, amended counter claim and necessary documents which shall be furnished by the plaintiffs in the due course. Commissioner fee is tentatively fixed at Rs.4,000/-.

Both parties are hereby directed to file their respective memo of instructions by: 07.01.2025.

(Dictated to the Stenographer, typed by him on computer, corrected and then pronounced by me in the open court on this the 18th day of DECEMBER, 2024).

(Vishwanath A.)
C/c Addl. Civil Judge & JMFC.,
Mudigere.

VP

Visit ecourts.gov.in for updates or download mobile app "eCourts Services" from Android or iOS.