

ORDER ON I.A.No.VII FILED BY PLAINTIFFS
UNDER ORDER XXVI RULE 9 R/W SECTION 151
OF C.P.C.

The plaintiffs filed an application under Order XXVI Rule 9 R/w Sec 151 of C.P.C. to appoint Court commissioner preferably ADLR Mudigere or any surveyors attached to the office of the ADLR for local investigation for measuring and demarcating the 'A' schedule property and find that 11 guntas of the plaint 'A' schedule property has been encroached by the defendant.

2. In the affidavit annexed to I.A.No.VII plaintiffs stated that, suit is posted for arguments. Suit is filed for the relief of declaration declaring that plaintiffs are the absolute owner of plaint 'A' schedule property including the 'B' schedule property and also for the possession of the plaint 'B' schedule property from the defendant. Plaintiff stated that, on 10/12/2020, they away from the plaint 'A' schedule property, the defendant encroached 11 Guntas of land. Therefore, it is very much necessary to elucidate that the defendant has encroached plaint 'B' schedule property. Plaintiffs have already got surveyed the plaint 'A' schedule property under the haddubust

survey and during the haddubust survey surveyor has identified the encroachment and same was admitted by the defendant during his cross examination. Hence plaintiffs pray to appoint a Court commissioner.

3. On the other hand defendant filed objection to the IA No. VII. In the objection defendant contended that, application filed by the plaintiffs is false, frivolous and vexatious. Defendant got his hiduvali land in Sy.No.129/5 of Daradahalli village, Mudigere Taluk but the plaintiffs are falsely making allegations that the defendant has encroached 'B' schedule property in Sy.No.129/9 of Dardahalli village, Mudigere Taluk and Sri.. M. Laxmanagowda of Maggalamakki, Mudigere Taluk was encroached an extent of 5 ½ guntas of land in Sy.No.129 of Daradahalli village, Mudigere Taluk. Hence the said M. Laxmanagowda was preferred an appeal before the DDLR., Chikkamagalur for cancellation of phode of above said entire lands situated in Sy.No.129/1 to 129/13 of Daradahalli village, Mudigere Taluk and same is pending. Hence it is not necessary to measure and demarcate the suit schedule properties by appointing a court commissioner. Though there is an appeal is pending the

plaintiffs have filed the present application for appointment of commissioner to measure and demarcate the plaint 'A' or 'B' schedule properties as sought in the application. Defendant further stated that, in order to drag the proceedings and to cause wrongful loss to the defendant, plaintiffs have filed the present application. The plaintiffs have filed the above application for the purpose of collection of evidence. Hence, defendant prays to dismiss the application.

4. Heard both side and perused the materials on record.

5. From the above rival contention, the following points arise for my consideration.

1. Whether the plaintiffs have made out ground to allow I.A.No.VII?

2. What order?

6. My answer to the above points are as under:

Point No. 1 : In the Affirmative

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

REASONS

7. **POINT NO.1:** Admittedly plaintiffs have filed the suit for declare that the plaintiffs are the absolute

owner of the suit 'A' schedule property and for possession of 'B' schedule property and to direct the defendant to deliver the possession of the plaint 'B' schedule property. When the matter is posted for arguments, plaintiff has filed the present application for appointment of court commissioner to measuring and demarcating the 'A' schedule property and find that 11 guntas of the plaint 'A' schedule property has been encroached by the defendant.

8. On the other hand defendants contended that the present application is filed by the plaintiffs only to harass defendant. Defendant further contended that plaintiffs have filed the above application for the purpose of collection of evidence.

9. In the present case there is allegation regarding encroachment of plaint schedule properties. Hence, to adjudicate the matter in dispute the report of court commissioner is very much necessary. With regard to clarify the principle of law for appointment of court commissioner this court relied on the judgment of Hon'ble High Court of Karnataka in W.P.NO.201274/2022 (GM-CPC) BETWEEN: Sri Shadaksharappa vs Kumari Vijayalaxmi and others. It reads as follows:

“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 14 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 : (2014) 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 relating 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. The principle laid down in the above judgment is very clear that there is no bar to appoint court commissioner before concluding trial. To determine the identity of plaint schedule properties the appointment of court commissioner is very much necessary. If the application is allowed no hardship will be caused to the defendant. The commission report will be helpful to the court to determine the identity of the suit schedule property

and adjudicate the matter in dispute. Hence, I answer point No.1 in the Affirmative.

11. **POINT NO.2:-** In view of the above said reasons stated in point No.1, I proceed to pass the following:

ORDER

The I.A.No.VII filed by the applicants/ plaintiffs U/o 26 Rule 9 R/w Sec 151 of C.P.C. for appointment of court commissioner is hereby allowed. The commission fee is tentatively fixed at Rs.2000/-.

The surveyor attached to ADLR Office Mudigere is hereby appointed as court commissioner.

Case posted for filing of memo on instruction and payment of commission fee/P.F.

Call on 04/03/2025

(JAYAPRAKASH V.)
SENIOR CIVIL JUDGE AND JMFC.,
MUDIGERE.