

**ORDER ON I.A.No.III FILED BY PLAINTIFF
UNDER ORDER XXVI RULE 9 OF C.P.C.**

The plaintiff filed an application under Order XXVI Rule 9 R/w of C.P.C. to appoint survey commissioner preferably a surveyor attached to the office of the Tahsildar, Mudigere to measure and demarcate the plaint 'A', 'B' and 'C' schedule properties.

2. In the affidavit annexed to I.A.No.III plaintiff stated that, she is the owner of the plaint 'A' schedule property and this property fallen to her share in a family partition dated 28/09/1995 and 5/10/1995. After the partition deed khata of the schedule property has been mutated in the name of plaintiff and this land is also phoded. The defendants are the neighboring land holders encroached plaint 'B' and 'C' schedule properties about 2-3 years prior to the institution of the present suit and when he objected the encroachment made, they contended that it is part and parcel of Sy.No. 97, 96 and 101. Though the defendants agreed to hand over the possession after survey it is revealed that plaint 'B' and 'C' schedule properties which is part of plaint 'A' schedule

property. But defendants failed to handover the plaint 'B' and 'C' schedule properties inspite of repeated requests and demands.

3. In order to establish that defendants have encroached plaint 'B' and 'C' schedule properties out of plaint 'A' schedule property and title of plaintiff over plaint 'A' schedule property measuring plaint 'A' schedule property is just and necessary. The plaintiff will be put to great prejudice and injustice, if survey commissioner is not appointed to measure and demarcate the plaint 'A' schedule property and the encroachment made by the defendant in plaint 'A' schedule property. If survey commissioner is appointed no prejudice and injustice will be caused to the defendants. Hence, plaintiff prayed to allow the application.

4. On the other hand defendants filed objection to the IA No. III. In the objection defendants contended that application filed by the plaintiff is not maintainable either in law or on facts and circumstances of the subject matter of the suit. The application is false and frivolous and grounds alleged are false. The plaintiff has filed the suit for declaration and possession. Now the case posted for evidence

of plaintiff. The suit is suffers from lack of documents to prove his case, the filing of application for appointment of survey commissioner only for the purpose of collection of evidence. Defendants contended that plaintiff is not the adjacent property owner of defendants property. The plaintiff herself tried to encroach the defendants property. There is no boundary dispute but the plaintiff herself tried to create dispute and there is no allegation of overlapping of survey number of the suit schedule property. The present application is filed by the plaintiff for collection of evidence through the court commissioner. No grounds are made out by the plaintiff to allow the application. Hence, defendants prays to dismiss the application.

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

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

1. Whether the plaintiff has made out ground to allow I.A.No.III?

2. What order?

7. 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

8. POINT NO.1: Admittedly plaintiff has filed the suit for declaration and possession of the suit schedule property. It is the contention of the plaintiff that defendants have encroached the portion of suit schedule property. When the matter is posted for plaintiff evidence, plaintiff has filed the present application for appointment of court commissioner to measure the plaint schedule property. At this stage counsel for plaintiff prays to allow the application for appointment of court commissioner to measure and demarcate the suit schedule property. On the other hand defendants contended that the application filed by the plaintiff is not maintainable and he has filed the application for collection of evidence. In this 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 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."

9. 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 property 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.

10. **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.III filed by the applicant/ plaintiff U/o 26 Rule 9 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 Taluk Office Mudigere is hereby appointed as court commissioner.

Both the parties are directed to file their memo of instruction without fail by the next date of the hearing.

Call on 05/04/2024

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