

KACM500005242019



1

O.S. No. 56/2019

IN THE COURT OF THE CIVIL JUDGE & JMFC., N.R.PURA
(ITINERARY COURT)

Present : Sri. Jeethu R.S., B.A.L.,LL.M.,
Civil Judge & JMFC., N.R. Pura.

Dated : This the 7th day of January 2026.

O.S. No. 56/2019

Plaintiff/s : Smt. Jayamma, W/o Shivalingappa,
Aged about 48 years, Agriculturist,
R/o Medara Beedhi, N.R. Pura Town,
Chickmagalur District.
Dead by LR.
1(a) Ganesha, S/o Shivalingappa,
Aged about 37 years, Agriculturist,
R/o Medara Beedi, N.R. Pura Town,
Chikkamagalur District.
(Represented by Sri. Chandrashekar, Adv.,)

V/S

Defendant/s : Meharunnisa, W/o Abdul Latheef,
Aged about 68 years, Housewife,
R/o Old Mandagadde Road, Ward No.3,
N.R. Pura Town, Chickmagalur District.
(Represented by Sri. H.A. Saju, Adv.,)

KACM500005242019



2

O.S. No. 56/2019

**ORDER ON I.A. NO. 17 FILED UNDER ORDER 26 RULE 9 R/W
SECTION 151 OF C.P.C.**

The applicant/plaintiff has filed this application with a prayer to appoint the taluk surveyor as court commissioner for local inspection and measure the suit schedule property and submit the report regarding any encroachment.

2. It is submitted in the affidavit filed in support of the application that the plaintiff has brought the suit against the defendant seeking for the declaration and possession and that the plaintiff has applied to Taluk Surveyor, N.R.Pura to survey the suit schedule property and survey was conducted by the Taluk Surveyor with respect to the land in Sy.No. 118 and later a sketch was prepared and submitted to the concerned authorities on 29.8.2016 and the sketch with description shows that the defendant is in unauthorized occupation of land in Sy.No. 118. It is further case of the applicant that the above defendant has appeared through her counsel and filed the written statement and has taken specific contention that the survey sketch is false and incorrect and disputed the survey sketch and stated that the suit

KACM500005242019



3

O.S. No. 56/2019

schedule property absolutely belongs to government in her written statement and now in order to ascertain that, whether the suit property belongs to government or plaintiff, it becomes just and necessary for the appointment of taluk surveyor as court commissioner to conduct the spot inspection and measure the suit schedule property. Further submitted that though the surveyor has submitted his report that the defendant has encroached 0.4 guntas of land which belongs to the plaintiff, but the defendant is not handing over the said encroached land. Hence, for the proper adjudication of the case and for the clear report, the taluk surveyor is to be appointed as court commissioner to conduct the local inspection. Hence, prays to allow the application.

3. Per contra, the defendant filed objection contending that the defendant has no objections to measure the suit schedule property as it is. However defendant and her family is residing in the suit property since more than 80 years, wherein the defendant's grandfather has constructed the Mangalore tiled house thereon which is more than 80 years old. It is further alleged that in order to assess the age of house which is in possession of defendant through a PWD Engineer along

KACM500005242019



4

O.S. No. 56/2019

with the surveyor is just and necessary to prove the defense of the defendant. Hence, prays to depute PWD Engineer along with the surveyor and to submit his report which enable to adjudicate real dispute between the parties.

4. Upon going through the contentions of both the parties in the above I.A. and respective objections for the said I.A. the following points arise for my consideration:

1) Whether the I.A. 17 filed by the plaintiff under order 26 rule 9 R/w section 151 of CPC is deserves to be allowed?

2) What order?

5. My answer to the above points for consideration is as under:

Point No. 1 : In the affirmative.

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



REASONS

6. **Point No. 1:** The plaintiff has instituted the above suit for the relief of declaration. In the affidavit annexed to the above application the plaintiff has stated that the surveyor sketch submitted to the concerned authorities on 29.8.2016 discloses that the defendant is in unauthorized occupation of land in Sy.No. 118 for an extent of 0.4 guntas. But, after appearing of the defendant before the court in the above suit, has disputed the said sketch and report. It is further stated that the defendant has refused to hand over the encroached portion of the disputed land to the plaintiff and as such, prays to allow the above application.

7. Per contra, the counsel for the defendant has filed his objections and has contended that the defendant is residing in the house situated in the disputed property and the said residential house is more than 80 years old. As such, the defendant does not have any objection to allow the above application, but seeks to take the assistance of PWD Engineer for assessing the age of the house.

KACM500005242019



8. On careful perusal of the plaint, written statement and records before the court, the plaintiff has sought to declare the plaintiff as absolute owner of the suit schedule property, which includes a Mangalore tiled house constructed therein. It is further case of the plaintiff that her father M.Krishnappa had acquired the suit schedule property by virtue of compromise decree in O.S. No. 37/2001 on the file of this court. After the demise of the plaintiff's father the plaintiff has become the absolute owner and in possession of the suit schedule property. During 2016 survey was conducted and at point of time the plaintiff noticed the encroachment made by the defendant over the suit schedule property. It is also pleaded that another suit O.S. No. 4/2019 is pending before this court filed by the defendant herein against the plaintiff, wherein the defendant has contended that she is residing in a house constructed in the site property measuring 110 X 36 which is none other than the suit schedule property. It is relevant to refer the judgment of Hon'ble High Court of Karnataka in Shadaksharappa V/S Kumari Vijayalakshmi reported in 2023 Live Law Kar. 56 and the relevant



portion of the judgment is herewith reproduced:

“20. In the backdrop of the discussions made above, this Court cannot lose sight of" the fact that in a large number of suits before the Trial Court, the applications are filed for the appointment of a Commissioner. In other words, this is one of the frequently invoked provisions of the Code. For this reason, this Court deems it desirable to summarise the broad guidelines that can be followed while exercising the power under Order XXVI Rules 9 and 10 [of the Code of Civil Procedure](#).

- a) The power of the court to appoint the Commissioner for local inspection or any other purpose provided in Order XXVI of the Code is discretionary. However, the said discretion is guided by not only Order XXVI Rules 9 and 10 of the Code but also the provisions of the [Indian Evidence Act](#) dealing with relevancy, expert opinion, and the burden of proof.
- b) The discretion to exercise the power under [Order XXVI of the Code of Civil Procedure](#) is not governed by the form of the suit. The Court can appoint the Commissioner in any kind of suit,



provided a report of the Commissioner under Order XXVI of the Code is necessary for elucidating the matter in dispute.

c) The issue framed in the suit, or where the issue is not yet framed, the pleadings which give rise to issue/s and the documents placed on record would be a guide to ascertain the 'matter in dispute' referred in Order XXVI Rule 9 of the Code

d) The power to appoint the Commissioner for local inspection or scientific investigation/expert's opinion can be invoked even suo motu by the court, without there being an application by either of the parties, if the Court deems it appropriate to secure the report of the Commissioner. However, the appropriate reasons must precede the order appointing the Commissioner. And such orders are to be passed only after hearing the parties before it.

e) The Commissioner can be appointed either before or after the commencement of the trial. However having due regard to the nature of the controversy, if the report is essential for



elucidating the matter in dispute, it is desirable to have the local inspection before the commencement of trial as it is likely to reduce the volume of oral evidence in a given case.

f) In addition to the report, having regard to Order XXVI Rule 10 of the Code, the evidence taken by Commissioner reduced in writing can also be taken on record and examined by the court while considering the report.

g) The report of the Commissioner is not conclusive proof of what is stated therein. The report is only a piece of evidence, that the Court has to examine based on the other materials on record.

h) Report of the Commissioner need not be formally marked for being considered as evidence. Once submitted to the court, the report is part of the court record and can be looked into by the court.



- i) The court may in its discretion examine the Commissioner on any matter concerning the report.

There is no compulsion to examine the Commissioner. However, if the objection is filed to the report, and the party filing objection seeks to examine the Commissioner then the Commissioner should be examined. In either case, once the Commissioner is examined, the court having due regard to the evidence, may reject or accept the report in its entirety or in part, provided there are materials to justify such a finding on the report. In appropriate cases, the merit of the report can be considered at the final hearing. While considering the report at the final hearing, if the court finds that the report is erroneous and fresh commission is required, the court may pass appropriate order in this regard.

- j) If the court is dissatisfied with the 'proceedings of the Commissioner' as found in Order XXVI Rule 10(3), it may direct further inquiry depending on the facts. As a matter of caution, it is clarified that examination and order under order XXVI 10(3) are only to verify if the Commissioner has followed the proper procedure while carrying out his task.



k) The person who has filed an objection to the report has the option of cross-examining the Commissioner to substantiate his objections or even without cross-examination, it is open to establish that the report is inadmissible in evidence.

21. Having examined the provisions [referred to 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.



9. Now coming back to the case on hand, it could be seen from the rival contentions of both the parties in the case on hand, the plaintiff asserts that the defendant is the trespasser and has encroached the suit schedule property which contains a Mangalore tiled house and on the other hand, the defendant contends that the defendant along with her family members are dwelling in the house situated in the disputed property from more than 80 years. As such, the plaintiff and the defendant have made out the grounds to allow the above application in order to ascertain the alleged encroachment and also the age of the Mangalore tiled house which is said to be situated in the disputed property. The ratio and the directions given by the Hon'ble High Court of Karnataka in the judgment mentioned supra is applicable to the case on hand. Accordingly, the point No. 1 is answered in the affirmative.

10. **Point No. 2** : For the reasons mentioned above this court proceeds to pass the following;

KACM500005242019



13

O.S. No. 56/2019

ORDER

The I.A. No. 17 filed under order 26 rule 9 R/W section 151 of C.P.C. is hereby allowed.

Accordingly, the Taluka Surveyor is hereby appointed as Court Commissioner to perform the ministerial work by conducting local inspection and mahazer and survey the suit schedule property and submit the report.

Further, the PWD Engineer is also hereby directed to assist the Taluka Surveyor in the above case in respect of the inspection pertaining to the residential house situated in the schedule property.

The Court Commissioner fee is fixed at Rs.3,000/- tentatively.

The office is hereby directed to issue commissioner warrant if the commissioner fee is deposited by both plaintiff and defendant equally along with the memo of instructions.

(Dictation given to the Stenographer directly on system, typed by her, then corrected and then pronounced by me in the open court on this the 7th day of January, 2026)

Sd/-xxx 7/1/2026
(Jeethu R.S.)
Civil Judge & JMFC.,
N.R.Pura.