

KADG220002052018



**IN THE COURT OF THE PRL. CIVIL JUDGE & J.M.F.C.,
CHANNAGIRI**

-: PRESENT :-

**Shri. Siddalingayya B. Gangadharamath,
B.Com. LL.B. (Spl),
Prl. Civil Judge & J.M.F.C.,
Channagiri.**

Dated: This the 16th Day of October 2024

O.S.No.45/2018

PLAINTIFFS : Sri. C.L.Siddapa and Others

V/s

DEFENDANTS : M/s. TUMCOS Ltd., and Others

I.A.NO.XXIII

Applicant/Plaintiff : Sri. C.L.Siddapa and Others

V/s

Opponents/Defendants: M/s. TUMCOS Ltd., and Others

1.	Provision under which the application is filed	Under Order 26 Rule 9 R/w Sec.151 of CPC
2.	Relief sought for	Appointment of Court Commissioner
3	Date on which the application is filed	03.01.2024

4.	Number of the application	I.A.No.XXIII
5.	Date on which the objections are filed by different opponents	30.08.2024
6.	The date on which the orders is passed	16.10.2024

ORDER ON I.A.NO.XXIII

The plaintiffs application is under Order 26 Rule 9 R/w Sec.151 of the Code of Civil Procedure praying for an appointment of court commissioner, preferably the surveyor attached to the office of Tahasildar, Channagiri to inspect schedule property, to bring the actual state of affairs including the alleged encroachment, if any, in it. It is filed at the stage of cross examination of DW-1. The same has been kept in abeyance till completion of evidence of parties.

2. SOME AND SUBSTANCE OF THE AFFIDAVIT AS UNDER:

The plaintiff No.1 has sworn the affidavit and wherein he stated that, he visited the schedule property along with Civil Engineer namely, Nandish S/o Kumaraswami in the third week of December 2023. He got measured the property through the said engineer and he came to know that, the defendant No.1 encroached an extent of **East to West 22 feet and North to South 20 feet** towards South Western side of suit schedule property by erecting compound wall without any proper license, in the first week of December 2023. The said encroachment and erection of compound wall is during the pendency of the suit.

3. The deponent further affirmed that, the defendant No.1 had entered into compromise with the deponent and his mother in O.S.No.136/1991, before this court and the compromise decree was passed therein. The defendant No.1 had undertaken to leave 20 feet space towards the Western side of suit schedule site, for the purpose of formation of road. The said road was not formed by the Municipality due to influence of defendant No.1. By taking undue advantage of the same, the defendant No.1, their men have unjustly got constructed the compound wall about 6 inches in width, 7 feet in height, 22 feet East to West, North to South 20 feet in length and thereby blocked the entire access to the said road. On 04.05.2023, the defendant No.1 with the help of the labors dug up the ground to form a drainage having length of 60 feet East to West, in width of 3 feet, North to South and 3 feet in depth. They managed to drain the waste water inside the suit schedule property and by that drainage line the waste water logging and causing serious concern over the landscape of suit property. If the application is allowed no hardship or loss would be caused to the other side. On the contrary, the plaintiffs will be put to irreparable loss and injury. Thus, the plaintiffs pray to allow the application.

4. **STATEMENT OF OBJECTIONS FILED BY THE DEFENDANTS AS UNDER:**

The defendant No.1 denied the entire contents of the affidavit filed in support of the application. It is the specific contention of the defendant No.1 that, the application on hand is filed with an

intention to protract the proceedings. The PW-1, in the cross examination has categorically admitted the actual situation of the spot and the property. The plaintiffs have filed the suit at the first instance for the relief of perpetual injunction and later point of time, that to after the cross examination of PW.1 have got converted the relief. Therefore, the plaintiffs intention is to collect additional evidence through the process of appointment of court commissioner and therefore the application is not tenable in the eye of law. The defendant has submitted that, the commissioner was appointed in O.S.No.136/1991 and submitted the report with actual state of affairs. The same is very much available in the case file. Thus, there is no purpose would be served if the commissioner is appointed and accordingly the defendant No.1 prays to reject the application.

5. Based on the rival claims setforth by both the parties in application as well as objections statement, the following points would emerge for my consideration;

POINTS

1. Whether the appointment of court commissioner is essential to elucidate the facts in issue?
2. What order?

6. Heard the learned counsels appearing for the plaintiffs and defendants. Perused the documentary as well as oral evidence which

are already on record. On perusal of the same my findings to the aforesaid points would be:

POINTS

Point No.1 : In the Affirmative,

Point No.2 : As per final order,

for the following;

REASONS

7. **Point No.1:-** Plaintiffs filed the suit for the relief of declaration the title to suit property, mandatory and perpetual injunction against the defendants. The suit schedule property is a part of layout formed by one Kampalappa S/o Dhurugappa Kampalappa. The same was sold to one K.Siddappa and K.Lakkappa, who are the son of Aane Siddappa. These two brothers partitioned the property on 02.11.1970 and in it the suit schedule site was allotted to the share of K.Lakkappa. After his death, the legal heirs succeeded the same and the property records are standing in their name. The Southern boundary of the suit schedule site is 3 feet width drainage and thereafter the property of defendant No.1, comprised under Sy.No.77/3 is situated. The defendant No.1 is registered body, representing by the Managing Director. There was litigation amongst plaintiff and defendants under O.S.No.136/1991 and the same came to be ended in compromise decree dated 24.09.2004. The sketch was prepared in the said suit and it was annexed to the compromise decree and therefore the Hon'ble Court was treated the said sketch as part and parcel of compromise decree.

The plaintiffs laid a foundation over the suit schedule site in the year 1991. The defendants removed the same in the last week of January 2018, misusing the absence of plaintiffs, as plaintiff No.1 and 2 are residing at Shivamogga. The plaintiff No.3 is being younger brother of plaintiff is at Channagiri, who is mild and poor man. As the defendants attempted to encroached suit site with a view to built superstructure thereof on 10.08.2018, thus, the plaintiffs filed the suit for declaration. On that cause of action the plaintiffs approached this court for the relief of declaration and permanent injunction.

8. Resisting the claim, the defendant No.1 filed the written statement. Admitted the compromise decree passed in O.S.No.136/1991. The defendant No.1 denied the allegations of encroachment and the removal of foundation. The defendant No.1 is contesting the matter on the grounds that, the rough sketch filed by the plaintiff is created and is not in accordance with law, the actual state of affairs of property and the comprise decree. The said suit was filed by one Siddamma and 6 others. Wherein, the schedule property was described as site No.24 comprised in Sy.No.77/2A of Channagiri. The measurement of the property was shown thereunder as East to West 60 feet, North to South 30 feet and was bounded by East : property of first defendant, West : 20 feet road and properties of Sri.Kampalappa, North : building site No.20 feet, South : water drain. In present suit they schedule property described as Sy.No.77/2A-P16 situated at opposite main bus stand, Channagiri and the boundaries described as East : property of Kallappa in

bearing Sy.No.77/P1, West : road having 20 feet width, North : site No.23 in land bearing No.77/2A, South: 3 feet drainage and after the property belonging to the defendant No.1. Thus, the suit schedule property description is absolutely wrong one and for that the defendant No.1 prays to dismiss the suit.

9. Having regards to the pleadings of the party and the oral as well as documentary evidence, it appears that, initially, the plaintiff filed the suit for the relief of declaration and perpetual injunction against defendant No.1. The plaintiff has categorically mentioned in the application that, in the month of December 2023, the defendants did drainage line and also put up the compound wall on the side of suit property and according to plaintiffs they encroached the portion of suit property to certain extent on the South Western side. As per the said allegations, the plaintiffs amended the pleadings and incorporated the prayer for mandatory injunction to demolish the alleged constructed portion. In the affidavit filed in support of the application, they affirmed that have got measured their property through the Engineer namely, Nandish S/o Kumarswami in the month of December 2023. Thereafter, they came to know the alleged encroachment in the suit schedule property and as such filed the instant application.

10. The plaintiffs have included the relief of Mandatory Injunction through the application under I.A.No.XXIV filed under Order 6 Rule 17 of CPC with the specific allegation that, the defendant No.1 did encroachment of the suit property to the extent of

East to West 20 feet and North to South 22 feet towards South Western side of suit schedule property by erecting the compound wall without any proper licence. The plaintiffs have affirmed in the application as well as in the pleadings that, the said encroachment was in the first week of December 2023 and which has come to the knowledge of plaintiffs when they measured the suit property through a private engineer in the last week of December 2023. This court having considered the subsequent developments of the facts in issue, allowed the application filed by the plaintiffs on 15.02.2024. Before that application, the application on hand was filed by the plaintiffs at the stage of cross examination of DW.1 and which is kept in abeyance by observing that the same will be considered after the completion of evidence of both the parties.

11. It is needless to point out that, in the cases of encroachment and construction in excessive area cannot be regarded on the basis of oral as well as documentary evidence, unless the physical inspection of the alleged encroachment. In order to ascertain such fact, the appointment of court commissioner is essential. Under such circumstances, it is of the opinion that, whatever the oral as well as documentary evidence placed by the parties on record would not suffice to conclude the alleged encroachment with reference to the relief of Mandatory Injunction is concerned. Therefore, in my considered opinion, the present application needs to be considered to meet the ends of justice and equity. As also to provide the fullest opportunity to the parties to place their possible

evidence before the court so as to conclude the lis completely and effectively.

12. It is in this connection, I would like to refer the decision of the **Hon'ble High Court of Karnataka**, rendered in **W.P. No.201274/2022 (GM-CPC)**, in the matter between **Sri.Shadaksharappa S/o Veeranna v/s The Commissioner City Municipal Council, Sindhanuru**. Wherein, the Hon'ble High Court of Karnataka was pleased to issue certain guidelines for the cases of this nature. The same are extracted for clarity;

“20. In the backdrop of the discussions made above, this Court cannot lose sight of the fact that in a large number of this suit before the Trial Court, the applications are filed for the appointment of 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 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 muto 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, water course, etc.

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

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

13. Having referred the aforesaid ratio of the High Court of Karnataka, it is quint essential point to note that, in the cases of encroachment, the appointment of court commissioner is essential. Moreover, the plaintiffs denied the alleged suggestions against the encroachment and the defendants also denied the same. Any amount of oral evidence and the documentary evidence would replace the necessity of local inspection to get accurate report in so far as the encroachment. The same would not amounts to collection of evidence and it is the assistance to the court by some technical hand to gather and ascertain real state of affairs. Thus, in my considered opinion, the objections raised by the defendants needs no bearing at all to consider the application at hand. With these observations, the **Point No.1** held in the **Affirmative**.

14. **Point No.2:-** As a result, I proceed to pass the following:

ORDER

The I.A.No.XXIII filed U/O.26 Rule 9 R/w Sec.151 of CPC by the plaintiffs is hereby allowed in the following manner.

The surveyor attached to the office of ADLR, Channagiri is appointed as a court commissioner to make local investigation of suit schedule property.

The commissioner shall measure the property of plaintiffs. Point out the alleged

encroachment, if any, in the suit schedule property including approach road to it.

The commissioner fees is fixed at Rs.2,000/-, tentatively. The plaintiffs shall deposit the same on or before 22.10.2024.

The parties shall submit their memo of instruction on or before 26.10.2024 and liberty is given to them to file additional memo of instruction to the commissioner at the inspection place.

The commission work shall be carried out on 30.10.2024 by serving notice to both the parties and their counsels.

The commissioner shall place the report before the court on or before 07.11.2024, in triplicate and serve the copies to both plaintiffs and defendants.

The parties shall place their objections if any to the commissioner report on 11.11.2024.

(Dictated to the stenographer typed by her, corrected by me and then pronounced in the open court on this the 16th Day of October, 2024)

**Sd/-
(Siddalingayya B. Gangadharamath)
Prl. Civil Judge & J.M.F.C.,
Channagiri.**