

**IN THE COURT OF PRL.CIVIL JUDGE AND PRL.JMFC,
DHARWAD**

-: PRESENT :-

**Sri.AVINASH GHALI.,
B.A. LL.B.,
Prl. Civil Judge & Prl.J.M.F.C., Dharwad**

Dated this the 16th day of March - 2026

Original Suit No.704/2025

BETWEEN

Plaintiff : M/s Vaasa Valu Home
Represented by its Managing Partner,
Mr. N.T. Sagar S/o NT. Sadanand

(By Sri.I.K.K., Adv.)

V/s.

Defendant : Sudhir S/o Channappa Tubaki

(Deft. By Sri. S.S.P., Adv.)

PARTIES TO I.A.NO.5

Applicant : M/s Vaasa Valu Home
(Ori. Pltf.) Represented by its Managing Partner,
Mr. N.T. Sagar S/o NT. Sadanand

V/s.

Opponents Sudhir S/o Channappa Tubaki
(Ori. Dft.)

1.	Provision under which the application is filed	I.A No.5 U/o. XXVI Rule 9 of CPC
2.	Relief sought for	Prayer to appoint Court Commissioner
3.	The date on which the application is filed	02-03-2026
4.	Number of the application	I.A No.5
5.	The date on which the objection filed by different opponents	03-03-2026
6.	The date on which the orders were passed on the said application	16-03-2026

ORDER ON I.A.NO.5

The plaintiff has also filed IA No.5 under Order XXVI Rule 9 of CPC, with prayer to appoint the ADLR/Talukka surveyor as Court Commissioner to conduct local inspection of the suit property situated in Survey No.20/15 for ascertaining the existence of 60 feet layout/CDP road alleged to be formed therein, with notings of physical features and measure the same with reference to relevant revenue and survey records and submit detailed report along with the sketch in the interest of justice.

2. In the affidavit annexed with the present application, it is stated by plaintiff that suit is for relief of permanent injunction and the defendant has filed the written statement by denying the existence of the 60 feet layout/CDP road in Survey No.20/15, which is the suit schedule property. It is further stated that the defendant has seriously disputed about existence of said road in Survey No.20/2015. As such, it is necessary to appoint the competent authority for ascertaining as to whether the 60 feet road existed in Survey No.20/2015 and to measure the actual measurements and boundaries with physical pictures on the spot. Further, it is stated that the appointment of court commissioner is necessary and if application is rejected, plaintiff would put a great hardship and injustice. Hence it is prayed to allow the application.

3. The defendant has filed an objection to the present application and contended that the present application is misconceived and not maintainable either in law or facts and same is liable to be dismissed with compensatory costs. It is also contended that the present application is filed without proper and complete double cause title, which is mandatory for all interlocutory applications. As such, the said application renders

defective and not maintainable. Hence on this ground also present application is liable to be rejected.

4. Further it is contented that the contents of affidavit filed with the present application is false, baseless and devoid of merits. The said contents have been created and concocted by the plaintiff with the ulterior motive to file the present false application and unnecessarily delaying the proceedings. The plaintiff has not approached with clean hands.

5. Further it is contended that the suit is for bare injunction and the question of possession and existence of a legal right is the burden on the plaintiff to establish his right of way and lawful possession by leading cogent and oral documentary evidence. The court commissioner cannot be appointed to collect the evidence on behalf of party and also to ascertain the possession and same is seriously disputed. The plaintiff cannot be permitted to fill up lacuna. The alleged access roads are in serious dispute and at this stage the court commissioner cannot be appointed which would amounts of delegation the judicial function of the court to commissioner which is impermissible in law.

6. The plaintiff has placed the reliance upon the alleged memorandum of understanding dated 03.07.2020, which is denied by defendant as same was fabricated one. When the foundation of the document on which plaintiff bases is a serious dispute, as such no useful purpose would be served by appointing the Court Commissioner. The plaintiff was not owner of his property on the date of memorandum of understanding and the defendant was the absolute owner of his property. Hence, any memorandum of understanding by Mr. Steve Abraham with respect to property of defendant does not arise. The said Memorandum of Understanding itself reveals serious discrepancies and same is altered, erased, manipulated, fabricated. Thus, the plaintiff is attempting to establish non-existent right over the defendant's property on the said document. The plaintiff has suppressed the material facts and has obtained the ex-parte temporary injunction and now attempting to prolong the proceedings by filing the present application. The present application is an abuse of the process of court.

7. Further, it is contended that the Court Commissioner cannot be appointed to decide possession or to demarcate disputed boundaries when title and

rights themselves are in dispute. The plaintiff must establish his legal entitlement before seeking the assistance. The application is premature. Issues are yet to be framed and evidence is yet to be commenced. The application is filed to create evidence and to strengthen the weak case.

8. Further, it is contended that the defendant, by taking the undue advantage of the *ex parte* temporary injunction, interfering with and threatening the defendant and have caused damage to the property of the defendant. The plaintiff is misusing the interim order as tool of harassment rather than for protection of any lawful right. The court can take judicial notice of repeated adjournments sought by the plaintiff for canvassing arguments on IA No.I. The conduct of the plaintiff would clearly demonstrate that the present application has been filed only with intention to prolong the proceedings and to continue enjoying the benefit of interim order. Hence, the present application is abusive of process of court and liable to be dismissed. Hence, it is prayed to reject the present application with a compensatory cost in the interest of justice.

9. Heard the learned counsel for plaintiff and also learned counsel for defendant. Perused the material and sound record.

10. Learned counsel for plaintiff has relied on the following judgment.

1	<i>Hon'ble High Court of Karnataka Kalaburagi Bench in the case of Sri. Shadaksharappa S/o. Veranna and Kumari Vijayalaxmi D/o Pampanna and others bearing WP No.201274/2022 (GM/CPC)</i>
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11. Learned counsel for defendant has relied on the following judgment.

1	<i>Hon'ble Bombay High Court, Bench at Aurangabad bearing W.P no.6700/2011 judgment dated 12.06.2013 in the case of Gangaram Baban Tagad and others vs. Sarubai Yashwant Tagad and others</i>
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12. On going through contention of both parties, the following points arises for consideration by this Court.

1. Whether the plaintiff has made out a grounds to appoint the Court Commissioner as contended in the present application?

2. What order?

13. The answer to the above points are as below:

Point No.1 : In the Affirmative.

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

REASONS

14. Point No.1 : It is relevant to note that the plaintiff has come up with a present suit for relief of permanent injunction for restraining the defendants, his servants, his agents in interfering into the peaceful possession and enjoyment of Suit Road.

15. The plaintiff has filed the present application to appoint the Court Commissioner for ascertaining as to the existence of 60 feet road Layout/CDP road is to be formed and situated in Survey No.20/2015 by noting the physical features, measurement.

16. It is also pertinent to note that it is contention and it is claimed by plaintiff that there is a existence of 60 feet road in Layout and CDP road in Survey No.20/2015. Further, the defendant has denied the said

existence of road. As such, it is claimed by plaintiff that it is necessary to appoint the Court Commissioner for local inspection about existence of such road.

17. The defendant has strongly objected the present application on the ground that the application is not maintainable being at a premature stage, and plaintiff is claiming right of way on the basis of concocted memorandum of understanding alleged to be executed by the one Mr. Steve Abraham. Even it is contention of defendant that the court commissioner cannot be appointed for collection of evidence with related to possession and also plaintiff cannot be permitted to fill up the lacuna.

18. It is to be noted that the defendant has though disputed the memorandum of understanding alleged to be executed by Mr. Steve Abraham in favour of plaintiff. But the present application is filed for appointment of Court Commissioner for ascertaining the existence of road, as claimed by plaintiff, this the validity of the memorandum of understanding cannot be taken into consideration while adjudicating the application for appointment of court commissioner.

19. Learned counsel for defendant has relied on the judgment of **Hon'ble Bombay High Court, Bench at Aurangabad bearing W.P no.6700 of 2011 judgment dated 12.06.2013 in the case of Gangaram Baban Tagad and others vs. Sarubai Yashwant Tagad and others** and has referred the following findings:

Exh.5 i.e Temporary injunction application is not yet decided and said application has to be decided on the basis of prima facie case. Whereas the defendant has moved the application for appointment of court commissioner, it is for the plaintiff to prove his own case. If after the evidence is recorded, the court finds it is necessary to appoint commissioner for proper disposal of the case, the court at the stage can consider the application for appointment of court commissioner. It would be premature to consider the application under Order XXVI Rule 9 of CPC. At this stage i.e. prior to decision on Exh.5, it is for the plaintiff to prove prima facie case, balance of convenience, and irreparable loss.

20. Whereas learned counsel for plaintiff has also relied a judgment of **Hon'ble High Court of Karnataka Kalaburagi Bench in the case of Shadaksharappa S/o Veranna and Kumari Vijayalaxmi D/o Pampanna and others Bearing WP No.201274/2022 (GM/CPC)** vide judgment dated 24.01.2023, and submitted that the stage is immaterial for consideration of appointment of court commissioner and appointment of Court Commissioner is necessary.

21. It is relevant to note that the Hon'ble Bombay High Court has held in the aforesaid Judgement that the plaintiff has to prove his own case and it is premature to consider the application filed under Order XXVI of CPC prior to decision on Exh.5 and it is plaintiff to prove prima facie case, balance of convenience and irreparable loss. Whereas as per the judgment of Hon'ble our own High Court referred above it has held that the stage of the suit is immaterial for consideration of application for appointment of Court Commissioner. The judgment of Hon'ble Bombay High Court has been delivered in the year 2013 whereas The judgment of Hon'ble High Court of Karnataka has been delivered in the year 2023. Whereas the Hon'ble High Court of Karnataka has extensively dealt with the appointing of court commissioner and has issued the guidelines for appointment of court commissioner. Therefore, it is no doubt that it is burden on the plaintiff to has establish

prima facie case, balance of convenience and irreparable loss for granting the temporary injunction.

22. It is significant to note that the submission of learned counsel for defendant is well settled principle of law that the court commissioner cannot be appointed to collect the evidence and also to decide the possession of the disputed property. However the Hon'ble High Court of Karnataka in the judgment referred above, in the case of **Sri Shadaksharappa S/o Veranna, (Supra)**, has specifically held Appointment of Court Commissioner is not stage-centric. Even the provision for appointment of Court Commissioner can be invoked either before the commencement of the trial or after. Whereas it is also observed by Hon'ble High Court of Karnataka that the court has to consider the pleadings and records of parties and allow the application for appointment of commissioner before the commencement of the trial. Even it has specifically observed at Para No.14 that the disputes relating to the existence of pathway, stream, pond, well, or disputes relating to the boundary between the adjoining holders, encroachment, easement of air, light, construction of building in violation of setback rules, or relating to the authenticity of the of a document, signature/thumb impression to name 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.

23. Even Hon'ble High Court of Karnataka has held in the aforesaid judgment that the appointment of court commissioner cannot be controlled by the form and nature of the suit. Therefore, having regard to the ratio held by the Hon'ble High Court of Karnadaka, it is evident that though the present suit is for relief of injunction and it is also significant to note that the defendant has denied the existence of a road in his property bearing Survey No.20/15 whereas it is contention of the plaintiff that there is a road existed measuring 60 feet. Therefore when defendant has flatly denied the existence of road therefore it is necessary to appoint the court commissioner to ascertain as to whether there is a existence of such road or not. It is also relevant to note that learned counsel for defendant has fairly submitted that if court considers IA No. 5, then the time bound has to be fixed for conducting the survey.

24. It is relevant to note that mere appointing the Court Commissioner for ascertaining the existence of road, does not itself amounts to collection of evidence. But the appointment of Court Commissioner is necessary to find out as to whether the alleged road has existed in Sy.20/15 or not. In light of aforesaid discussion, this Court is of the opinion that plaintiff has made out grounds to appoint the Court Commissioner for

ascertaining the existence of 60 feet road in Sy.20/15.
Hence, the **Point No.1 is answered in the Affirmative.**

25. Point no.2:- For the forgoing reasons and findings on point No.1, this Court proceeds to pass following

ORDER

The IA No.5 filed by plaintiff under order XXVI Rule 9 of CPC is hereby allowed.

The Taluka surveyor is hereby appointed as Court Commissioner for ascertaining the existence of 60 feet layout/ CDP road in Survey No.20/15.

The court commissioner fee is fixed of Rs.4,000/-.

For filing the memo of instructions by the both parties by 18.03.2026.

Call on 18.03.2026.

(Dictated to the Adalat AI and same is transcribed by Stenographer, then corrected, signed by me and pronounced in the open Court dated this **16th Day of March 2026**)

(Avinash M. Ghali)
Prl., Civil Judge & JMFC.,
Dharwad.