

**IN THE COURT OF CIVIL JUDGE AND
J.M.F.C., AT ARAKALAGUD**

PRESENT : SMT. PREETI . L.MALAVALLI, B.B.A., L.L.B.,
Civil Judge & JMFC,
Arkalagud.

O.S. No.408/2022

Dated this the 03rd day of April, 2024

Plaintiffs : Suvarna and others

Vs

Defendant : K. chandrashekara

Parties to IA No. I

Applicant: Suresha

S/o Late K. K. Basavashetty
Aged about 50 years,
Kotavalu village,
Ramanathapur Hobli,
Arakalagud Taluk,
Hassan District.

-V/s-

Opponent : K. Chandrashekara and others

ORDERS ON I.A.NO. I

The plaintiffs have filed I.A.No.I under Order 26 rule 9 of C.P.C., to appoint Court commissioner to measure the property of the plaintiffs and defendant and to submit report regarding the extent of encroachment made by defendant in the plaintiffs' property along with sketch, as prayed for in the application.

2. Per contra, the counsel for defendant has filed detailed objection to the said application on the ground that there are two items in the schedule to the plaint and the plaintiffs have not specified which of the two items have to be measured, and further that the plaintiffs have got measured their property already and filed the suit based on the said sketch and as such the present application is not necessary. The defendant has further stated that he has also filed a suit against plaintiffs in O.S.No.04/2023 and that this application is not necessary at this stage and on these grounds the defendant has prayed to reject the present application with costs.

3. Perused the application, objection.

4. Heard arguments of both sides.

5. The following point arises for my consideration.

1. Whether the plaintiffs / applicants have made out sufficient grounds to allow I.A.No.I filed under Order 26 rule 9 of C.P.C. ?

2. What order ?

6. My findings to the above points are as follows;

Point No.1 : In the Affirmative.

Point No.2 : As per final order

for the following;

REASONS

7. **Point No.1:** The present suit has been filed by the plaintiffs for the relief of declaration and possession against the defendant in respect of schedule property .

8. In the present case, the counsel for the plaintiffs argued that, the father of plaintiffs purchased suit A schedule property which is to the extent of 1-30 guntas of land in Sy.No.1/2 in Kotavalu village and the defendant herein is the adjacent owner towards the west and northern side of suit schedule property, and that the defendant has encroached 0-05 guntas of land belonging to plaintiffs, and has been interfering with the plaintiffs' peaceful possession and enjoyment over suit schedule property towards its western side. That due to the said reason, the appointment of taluk surveyor as court commissioner is very much necessary in order to ascertain true facts in the case. The plaintiffs are said to be in possession of suit A schedule property after death of their father Basavashetty.

9. The counsel for defendant has objected the said application on the ground that the plaintiff has not mentioned which of the two items mentioned in

the schedule is to be measured and further that the plaintiffs have already got measured his property before filing suit and as such appointment of Court commissioner for the same purpose is not necessary. It is also contended by defendant that there is already another suit filed by defendant against the plaintiffs in O.S.No.04/2023 and as such the present application deserves to be dismissed.

10. Before going to discussion it is necessary to peruse order 26 rule 9 of C.P.C. The provisions of Order XXVI Rule 9 of the CPC are very clear and for the ready reference the same is reproduced below :-

“9. Commissions to make local investigations.--

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be

bound by such rules.”

11. It is clear from the above that during pendency of the trial and before the judgment if the Trial Court finds that any issue requires clarification or elucidation, the Court may suomoto appoint Commissioner to submit the report for which no application is required.

12. The scope of Order 26 Rule 9 of the CPC is very limited. The Trial Court in any suit in which a local investigation is required or proper for purpose of elucidating any matter of dispute may appoint a Commissioner. It is settled law that the parties are required to prove their own case by way of evidence, therefore, it is the duty of plaintiff/defendant to first give evidence in support of their case and after the evidence of parties, if Court deems it proper that any issue requires clarification then the Court may appoint a Commissioner. The report of Commissioner is merely a piece of evidence and not binding on the Trial Court. It can be used for the purpose of appreciating the evidence that has come on record. The Hon'ble Supreme Court has also considered the scope of Order XXVI Rule 9 and held that the provision of Order XXVI Rule 9 is to be invoked if the controversy is regarding demarcation of the land between the parties. The Hon'ble

Supreme Court in the matter of **Haryana WAQF Board v/s Shanti Sarup and Ors.**, reported in **(2008) 8 SCC 671**, has held that if the controversy is regarding demarcation of the land between the parties, the Court should direct the investigation by appointing a legal Commission.

13. Further, in the case of **Durga Prasad v/s Parveen Foujdar**, reported in **(1975) MPLJ 810** has also considered the scope of Order XXVI Rule 9 and held that the Court should order the appointment of Commission when there is a dispute of encroachment. Para 25 of the said judgment is reproduced as under :

“25. Point No.2: In cases where there is a dispute as to encroachment, the fact whether there is such an encroachment or not cannot be determined in the absence of an agreed map, except by the appointment of a Commissioner under Order 26, Rule 9 of the Code of Civil Procedure.”

14. In view of the law laid down in the above judgments, the commission can be appointed only in case of demarcation and encroachment. The issue of possession is to be decided only on the basis of evidence. In the present case, the defendant is adjacent owner towards the west and

northern side of suit schedule property and according to plaintiffs, the defendant has encroached 0-05 guntas of land in the suit 'A' schedule property towards western side. It is pertinent to note that the plaintiffs have mentioned 1-30 guntas of land as suit 'A' schedule property in respect of which they have sought relief of declaration and possession, and they have mentioned the encroached area of 0-05 guntas of land has suit 'B' schedule property, hence it can be inferred that the plaintiffs have sought for appointment of Court Commissioner to measure property belonging to them i.e., suit 'A' schedule property and there is no ambiguity on this aspect as contended by defendant. Further though the plaintiffs have got measured their property already as contended by defendant, it is pertinent to note that the averments of plaint reveal that defendant was not present at the time of said measurement and as such it is very much necessary to direct the said work to be carried out in the presence of both parties and further the properties belonging to plaintiffs as well as defendant has to be measured in order to come to a proper conclusion. It is pertinent to note here that the main dispute between the parties in the present suit is regarding the encroachment said to have been made by defendant in the suit schedule property and as

such if Court commissioner is appointed and report is obtained regarding encroachment if any in the suit schedule property, then it would put an end to litigation between plaintiffs and defendant, since the plaintiffs as well as defendant have filed different suits against each other in respect of same dispute. As such it is very much necessary to get the properties belonging to plaintiffs and defendant measured through court commissioner. Hence, on considering the facts and circumstance of the case this Court comes to the conclusion that, the applicant has made out sufficient grounds to appoint Court commissioner in order to find out the exact state of affairs in the suit 'A' schedule property. Hence, this Court answers point No.1 in the **affirmative**.

15. **Point No.2**: For the foregoing reasons, this Court proceeds to pass the following:

ORDER

I.A.No. I filed by the plaintiffs/ applicants order XXVI Rule 9 of C.P.C. is hereby **allowed**.

The Taluk Surveyor attached to Tahasildar, Arakalgud is hereby appointed as Court Commissioner for the purpose mentioned below:

The Court Commissioner shall measure suit 'A' schedule property of the present suit and also the property belonging to defendant and shall file report along with sketch showing any encroachment made in suit 'A' schedule property with details thereof, after considering the memo of instructions if any filed by both parties and on obtaining documents pertaining to their respective properties from the parties.

The commissioner fee is fixed at Rs.2000/- to Taluk Surveyor, to be deposited by the plaintiffs. Further, the applicant shall bear all expenses including the legal fee for preparing sketch.

The Court commissioner fees is to be deposited in C.C.D. within a week from the date of this order.

For memo of instructions if any by the parties to be given to Court Commissioner at the time of carrying out the work.

The Court Commissioner shall give prior notice to both parties before carrying out the work.

Issue Commissioner warrant accordingly.

Call on 30/05/2024.

**Civil Judge & J.M.F.C
Arakalagudu.**