



**IN THE COURT OF THE CIVIL JUDGE AND JUDICIAL  
MAGISTRATE FIRST CLASS, SAVANUR.**

PRESENT : **Sri. Srinivasa. S. N,**  
*B.A., LL.M.,*  
Civil Judge and JMFC.,  
Savanur.

**O.S.No.334/2012**

**Dated this 5<sup>th</sup> day of July, 2025**

**PLAINTIFFS:** Baseerahmmad.M.Annigeri and others

***Vs***

**DEFENDANTS:** Smt. Yallamma W/o Kedarappa Babani  
[since dead by LRs]

**IA No.XVIII**

**Applicants:** Baseerahmmad.M.Annigeri and others  
(Plaintiffs)

***Vs***

**Opponents:** Smt. Yallamma W/o Kedarappa Babani  
(Defendant ) [since dead by LRs]

i	Provision under which the application is filed	U/O XXVI Rule 9 read with Section 151 of the CPC,
ii	Relief sought for	For appointment of a Court Commissioner
iii	The date on which the application is filed	28-03-2025
iv	The date on which the objections are filed by different opponents	05-04-2025
v	The date on which the orders were passed on the said application	05-07-2025



**ORDER ON IA NO.XVIII**

This application I.A.No.XVIII is filed by the plaintiffs U/O XXVI Rule 9 read with Section 151 of the CPC, seeking for appointment of a Court Commissioner to inspect the building alleged to have been constructed by the defendants encroaching upon the suit schedule public road, in the interest of justice.

**2.** In the accompanying affidavit, the plaintiff No.2 has stated that the defendant has illegally constructed building over a portion of the public road, despite requests from the plaintiffs and other members of the locality. Hence they approached the TMC authorities and Tahsildhar Savanur, but they did not take any action. Hence they have filed this suit. Hence they have filed this suit. Earlier the plaintiffs sought for Temporary Injunction and this court has granted the same in their favour. Later the said order was challenged by the defendant, and it came to be dismissed. The plaintiffs contend that the appointment of a Court Commissioner is necessary to ascertain encroachment upon the public road by the defendant. The plaintiff stated that appointment of a Court Commissioner would facilitate proper adjudication of the real controversy without causing any harm or prejudice to the defendant. Therefore they pray to appoint



Advocate / Junior Engineer, TMC, Savanur, as court commissioner to inspect the suit property and submit their report.

**3.** Per contra, the defendants filed his objection opposing the application. It is contended that the application is not maintainable. The plaintiffs have filed suit for permanent injunction against the defendants. In a suit for permanent injunction the factum of possession is to be proved by the parties on the basis of their oral and documentary evidence. At this stage if court commissioner is appointed, it amounts to collection of evidences. Now the case is for arguments, and in this stage, this application cannot be considered. Hence, on the above said grounds, the defendants prays to reject the application with costs.

**4.** Heard both the sides and perused materials on record.

**5.** The following points arise for my consideration:

**POINTS**

- 1) Whether the application filed by the plaintiff has made out sufficient grounds to allow?
- 2) What order ?

**6.** My answers 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 plaintiffs have filed this suit seeking the relief of mandatory injunction for demolition of the illegal plinth allegedly put up on a public road and permanent injunction to restrain the defendant from encroaching property No.338 and from raising any construction over the suit public road and for such other reliefs. The plaintiffs have filed this application, seeking for appointment of a Court Commissioner to inspect the building alleged to have been constructed by the defendants encroaching upon the suit public road, in the interest of justice.

**8.** It is the case of the plaintiffs is that the defendant has constructed building by encroaching into the public road. It is also on record that this Court had granted temporary injunction in favour of the plaintiffs and the said order was upheld upon challenge by the defendant. The very nature of the dispute involves an allegation of illegal encroachment over a public pathway, which requires physical verification of the spot for proper adjudication of the controversy.

**9.** Though the defendant contends that the matter is now at the stage of arguments and the appointment of a Commissioner at



this juncture would amount to collection of evidence, such objection cannot be sustained in the facts and circumstances of this case. It is well settled that the purpose of appointing a Commissioner under Order XXVI Rule 9 CPC is not to gather evidence but to enable the Court to appreciate the factual aspects more clearly, particularly where the dispute pertains to identification, location, and physical features of immovable property.

**10.** This court has relied on the decision of Hon'ble High Court of Karnataka, Kalaburgi Bench, in W.P.No.201274/2022, reported in 2023 LiveLaw (Kar) 57, in the case of Shadaksharappa V/s Vijayalaxmi and others, wherein the Hon'ble Court has held that;

“13. The next question is, at what stage of the proceeding in a suit, the application can lie? As could be easily noticed from the provision, the provision is not 'stage' centric. Thus the provision can be invoked either before the commencement of the trial or after. If the application is filed before the commencement of the trial, the court having regard to the pleadings and records may allow such application before the commencement of the trial. For example, in a given case, if the report is necessary for consideration of an application seeking some interim measure, before the commencement of the trial, the Commissioner can be appointed, if the case is made 13 out for a such appointment. On the other hand, again, having due regard to the pleadings and records, if the court finds that there is every likelihood that after recording the



evidence of the parties, the need to appoint the court Commissioner may not arise or that the court is of the view that it can take a call on the application, only after recording the evidence, then it may defer the order on the application till such time. Thus the decision as to when the report of the Commissioner is to be secured must be taken having due regard to the facts and circumstances.”

“16. The next question is whether the court Commissioner for local inspection can be appointed in a suit for an injunction.

17. The answer to the question referred to above, lies in the reframing question and the question would be whether the power of the court to appoint the 16 Commissioner is controlled by the form of the suit. The answer is a big no. The language of the provision is clear. It does not impose any such restrictions based on the form of the suit. The guiding factor is ‘whether the report is necessary for elucidating matters in dispute’. It can be any kind of suit. Be it suit for injunction, mandatory injunction, declaration and injunction, possession, partition, specific performance, or any suit for that matter. The form of a suit is never the guiding or deciding factor while considering the application for the appointment of a Commissioner. In the judgment of M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit v. Modi Transport Service referred supra, the Apex court has held that the court has wide discretion under Order XXVI Rule 9 of the Code to appoint the Commissioner. The relevant portion of paragraph 35 of the said judgment is extracted here.

*“35. xxx Order XXVI Rule 9 of the Code gives wide powers to the court to appoint a Commissioner to make local investigations which may be requisite or proper for elucidating any matter in dispute, ascertaining the market value of any property, an account of mesne profit or*



*damages or annual net profits. xxx" (emphasis supplied)*

This being the position, the application for appointment of Commissioner cannot be rejected on the premise it amounts to collection of evidence or on the premise that it is not permissible looking into the form of the suit. If the Court deems it fit that the report is necessary to elucidate the matter in dispute then the application for local inspection has to be allowed.”

“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 19 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 22 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."

**11.** In view of the above decision, the appointment of a Court Commissioner under Order 26 Rule 9 of CPC is a discretionary power to be exercised judiciously. A Commissioner cannot be appointed for mere collection of evidence. However, where the local inspection would assist the Court to understand the nature of the property, alleged encroachment, and boundaries in dispute, a Court Commissioner may be appointed.

**12.** In the present case, both parties have completed their evidence. The main controversy is regarding the alleged



encroachment and construction by the defendant over the plaintiff's suit public road. Having regard to the dispute and the pleadings and in order to enable the Court to have a clear understanding of the factual situation at the spot, it is just and proper to appoint a Court Commissioner. The Court Commissioner shall conduct a local inspection of the suit property and submit a report.

**13.** This court has relied on the decision of Hon'ble High Court of Karnataka in reported in (2001) 2 KCCR 1283 in the case of Anil Kamalakar Shirodkar Vs. Dudhappa Santu Patil and another, wherein the Hon'ble court has held that.-

*"In a suit for injunction, when there is contest between the parties regarding the encroachment of the property or otherwise and when the correct extent and boundaries of the property are in dispute, it is just and necessary that a survey has to be conducted and the boundaries of the properties have to be identified. In such a situation, the appointment of a Commissioner should not be mistaken as appointment of Commissioner for collecting evidence for a party to the suit. In the present suit, the parties are neighbours and attempt of trespass and encroachments is being alleged, in that context the appointment of Commission does not appear to be illegal-Commission is appointed to demarcate the boundaries and to demarcate the actual extent of the properties in question. In that view of the matter, the appointment of the Commission for measurement of the property and to demarcate the*



*boundaries and correct extent of the properties as per the claims made by the parties would be fully justified. However, the Commissioner cannot go into the question as to who is in possession of the property. Accordingly, the Revision is dismissed.”*

**14.** However, considering the nature of the dispute involving, this court is of the opinion that appointment of a Engineer, TMC, Savanur, would serve the purpose. Therefore it is necessary to appoint a Engineer, TMC, Savanur, as Court Commissioner. No prejudice will be caused to the defendants by such appointment, as both parties will have the opportunity to raise objections, if any, to the report submitted. In view of the aforesaid reasoning and discussions, it is clear that the application filed by the plaintiff deserves to be allowed. Accordingly, I answered ***point No.1 in the Affirmative.***

**15. POINT No.2 :-** In view of the above discussion, this Court proceed to pass the following;

### **ORDER**

The I.A.No.XVIII is filed by the plaintiffs U/O XXVI Rule 9 read with Section 151 of the CPC, by the plaintiffs is allowed.

An Engineer from the TMC, Savanur is appointed as Court Commissioner to inspect the suit schedule property.



The Court Commissioner is directed to:

- Conduct an inspection of the suit property in the presence of both parties,
- After issuing at least 7 days prior notice to both the plaintiffs and the defendants,
- Consider the memos of instructions filed by both parties, and
- submit a detailed report on or before 16-08-2025.

The plaintiffs and defendants are directed to file their memo of instructions before the Court office within 7 days from the date of this order.

Rs.3,000/- is fixed for Court Commissioner fees.

*(Dictated to the stenographer on computer, corrected by me and then pronounced in the open court this the 5<sup>th</sup> day of July 2025.)*

(SRINIVASA.S.N)  
Civil Judge & JMFC.,  
Savanur.