



**IN THE COURT OF SENIOR CIVIL JUDGE AT ALAND,
KALABURAGI DISTRICT.**

:PRESENT:

SRI. S.M. ARUTAGI
B.com. LLB., (Spl)
SENIOR CIVIL JUDGE, ALAND.

O.S. No.19/2019

DATED THIS THE 22nd DAY OF APRIL 2025

Plaintiff: Mahebood Sab S/o Abdul Ali @
Bashasab Ambalagi.

V/s

Defendants: Doulat bee W/o Lal Ahamad
Mullanwale & Others,

PARTIES TO I.A.NO.13

Applicant Maheboob Sab S/o Abdul Ali
Plaintiff: @ Ambalagi, Age: 65 Years,
Occ: Agriculture, R/o Aland,
Tq: Aland, Dist. Kalaburagi.



(By Sri. P.N.Shah, Advocate)

Vs.

**Opponents/
Defendants**

1. Doulat bee W/o Lal Ahamad
Mullanwale, Age: 60 Years,

Since deceased through LRs

- a. Sheikh Babu S/o Lal
Ahamad Mullan, Age: 49
Years, Occ: Agriculture, R/o
Village, Nellur, Tq:Aland.
- b. Imamsab s/o Lal Ahmad
Mullan, Age: 36 Years, Occ:
Agriculture, R/o Village
Nellur, Tq: Aland.
- c. Layakali S/o Lal Ahamed
Mullan, Age: 34 Years, Occ:
Agriculture, R/o Village
Nellur, Tq: Aland



(D1 (a to c) & by Sri S.S.
Chinchure, Advocate).

**ORDER ON INTERIM APPLICATION NO. 13 FILED UNDER
ORDER XXVI RULE 9 OF CPC, BY THE PLAINTIFF.**

This is an application filed by the plaintiff under order XXVI Rule 9 of CPC., to appoint the ADLR as court commissioner to survey the land of the parties to the suit and to answer the points for reference made by them by allowing the application in the interest of justice and equity.

2. In the affidavit annexed to the application, it is stated that, it is specific case of the plaintiff that he was owner in possession of land bearing Sy.No.27/3 measuring 4 acres 18 guntas and same has been purchased under registered sale deed dated : 08-06-1970. Since the date of purchase, he was in possession enjoyment of his land till



the date. It is the specific case of the defendant that the plaintiff is not owner of 4 acres 18 guntas, but he is only to an extent of 2 acres 18 guntas and extent in his possession is disputed. Infact, in his sale deed to an extent of 4 acres 18 guntas was mentioned and ROR entries are also mentioned to an extent of 4 acres 18 guntas in his name. Moreover, the defendants have raised boundary dispute and rival contentions are made by the parties and in such situation only oral evidence made by the parties cannot be decided the matter in the dispute. So, in order to prove his possession and enjoyment of 4 acres 18 guntas, it is necessary to appoint the court commissioner and to survey his land as per his sale deed and unless the court commissioner is appointed, the matter in issue cannot be decided. Therefore, it will be expiated in the interest of justice to allow the application and to appoint ADLR.



Otherwise, he will be put to great and irreparable loss. Hence, sought for allow the application.

3. On the other hand, the counsel for the defendants files detailed objection to the application stating that the application is not maintainable in the eye of law. It is further contended that the plaintiff has filed this application in order to fill-up the lacuna and he has to prove his case by producing documentary evidence and leading oral evidence. Moreover, the contention of the defendants that the plaintiff is not the owner of the suit property as he claims and as per the plaintiff case is that he purchased the suit property from his vendor and the vendor of the plaintiff had no title to sell the land of 4 acres 18 guntas as she was owner of only 2 acres 18 guntas of land in Sy.No.27/3 of Mamdapur village. In spite of giving the said fact, the plaintiff has filed this application in order to harass the innocent defendant and just to get measure



the land through the commissioner and to fill-up lacuna filed this false application. It is further contended that claim of the plaintiff is declaration and permanent injunction and he has prove his case by leading oral and by producing documentary evidence and he has already produced documents and adduced in his oral evidence. When there is a sufficient materials on record, there is no necessity to appoint the court commissioner. The plaintiff by appointing the court commissioner tried to collect the evidence which is not permissible under law.

4. Moreover, the possession of the parties to the suit cannot be ascertained by appointing court commissioner and even the defendant has not raised any dispute with regard to boundaries and it is only the case of the defendant that the vendor of the plaintiff has no salable right of title to an extent of 4 acres 18 guntas and same was not boundary dispute and no rival contention and the



plaintiff repeatedly mentioned that he is possession of 4 acres 18 guntas if it so, what is the necessity to measure the land and neither the plaintiff nor the defendant have pleaded the boundary dispute and encroachment. So, the appointment of court commissioner is nothing but collection of evidence in support of the case of the plaintiff. Moreover, the evidence of the both parties already over and case is set-down for final argument, at this stage the plaintiff filed this application which is not maintainable in the eye of law. The court commissioner report is not only the solution to decide the matter in law and there are other legal source to plaintiff to prove his case and matter in issue cannot be decide and appointment of commissioner is nothing but to delay the matter in hand. On these grounds prayed for dismissal of the application with costs.



5. Heard arguments on both side. During the course of hearing, the learned counsel for plaintiff relied upon a following decision.

1] *The Hon'ble High Court of Karnataka (Kalaburagi Bench) reported in 2023(1) KCCR 637 in a case of **Sri. Shadaksharappa Vs. Kumari Vijaylaxmi & Others.***

2] *The Hon'ble High Court of Andhrapradesh reported in a case of **Ramakka VS. Muniraju & Others**, decided on 19-07-2024.*

6. On the other hand, the counsel for defendant relied upon a decision, the Hon'ble High Court of Karnataka reported in AIR 2007 KANT 133 in a case of **Renuka Vs. Tammanna & Others** and another decision reported in AIR 1996 Karnataka 257 in a case of **Puttappa Vs. Ramappa.**

7. I have gone through the above cited decisions.



8. On the above pleadings, the following point that arise for my consideration

- 1) *Whether the plaintiff has made out sufficient grounds to appoint the court commissioner and to allow his application ?*
- 2) *What order ?*

9. My answer to the above points are as follows:

Point No.1 : In the Negative.

Point No.2 : As per order below for the following :

REASONS

10. **Point No.1:** It is pertinent to note that the plaintiff has filed this suit for declaration and injunction against the defendants with respect to the suit schedule property bearing Sy.No.27 measuring 4 acres 18 guntas situated at Mamadapur Village of Aland Taluka and other reliefs.



11. On meticulously perusal of pleadings, application and objection filed by the both parties in this case, the plaintiff has asserted his right, title over the suit property on the basis of registered sale deed executed by his vendor by name Gudumabee dated: 08-06-1970 to an extent of 4 acres 18 guntas of land in the above said survey number. On the other hand, it is specific case of the defendant that the plaintiff father vendor i.e., Gudumabee was not in possession of land to an extent of 4 acres 18 guntas and she was only in possession of to an extent of 2 acres 18 guntas on the date of alleged sale deed and even she has no salable right to execute the sale deed to an extent of 4 acres 18 guntas in favour of father of the plaintiff.

12. Admittedly, the plaintiff has filed the suit for declaration of title and consequential relief of permanent injunction against the defendants. The defendant has totally denied the title and possession of plaintiff over the



suit property to an extent of 4 acres 18 guntas. But, the defendant has admitted that the vendor of the plaintiff father was owner of only to an extent of 2 acres 18 guntas as on the date of sale deed. When the defendants have denied the title and possession over the suit property by the plaintiff, then the burden is on the plaintiff to establish the same by producing cogent and relevant document and oral evidence before this court and said possession cannot be find out by appointing to commissioner for collection of evidence by filing this application, because when the plaintiff has filed the suit for relief of declaration, he has to prove his case by producing cogent and relevant document before this court, which cannot delegate to the commissioner. At this juncture, I would like to rely upon a decision passed **by Honorable Karnataka High Court in WP No.4646/2018 in a case of Smt. Laxamma V/s Siddaramu**, wherein his lordship has held that,



The application is filed for appointment for court commissioner to demarcate the suit property in a suit filed for permanent injunction contending that they are the owners in possession of the suit properties. The defendant filed written statement denying the affidavit averments. In a suit for permanent injunction, it is on the plaintiff to prove that they are in lawful possession as on the date of suit by producing oral and documentary evidence. The plaintiff has produced gift deed, sale deed and sketch to prove the alleged interference by the defendant in a suit for injunction is filed after measurement made by concerned authority, question of appointment one more surveyor would not arise.

That the Trial Court considering the application and objection, rightly rejected and recorded findings of the plaintiff and defendant for producing number of documents in support of their case. Hence, it is clear that the land



was already measured and the plaintiffs have not made out any grounds to appointment of court commissioner to measure the property once again. The order passed by the Trial Court is in accordance with law. Hence, the petitioner has not made out any grounds to interfere the order passed by the Trial Court in so far as jurisdiction of court is concerned. Accordingly, WP dismissed.

637 13. Another decision reported in **2023 (1) KCCR 637, Karnataka High Court, Kalaburagi Bench, in a case of Sri. Shadaksharappa V/s Kumari Vijayalaxmi & others**, wherein his lordship has held that,

**B. CIVIL PROCEDURE CODE, 1908 –
Order 26, Rule 10 – Appointment of
Commission – When impermissible?**



The court stated that “Under the provisions applicable for local inspection, what is impermissible is the delegation of adjudicating power. To cite an example, if both parties claim to be in possession of the disputed property, the local inspection by the Commissioner cannot be ordered to ascertain the possession. The question of possession is to be decided by the Court. However, if one party alleges encroachment by another and another party denies such allegation, the Commissioner can be appointed to ascertain whether there is encroachment or not. IN such a situation the Commissioner is appointed to find out the nature of possession. The report based on local inspection will be a handy tool to decide the case relating to encroachment. In the case in hand, the petitioner to prove his assertion of encroachment instead of leading oral evidence of witnesses has applied for local inspection, and the same is not only permissible but also desirable.



E. INJUNCTION SUIT – Appointment of Commissioner – *Plea that the appointment of Commissioner would be to facilitate to collect evidence and hence cannot be made – See Civil Procedure Code.*

F. CIVIL PROCEDURE CODE, 1908 – Appointment of Commissioner – Broad guidelines – Discussed.

For this reason, this Court deems it desirable to summaries 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 XXV, Rules 9 band 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 of scientific investigation/expert's opinion can be invoked even sue motu by the



Court, without there being an applicant 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.

14. On perusal of the above cited decisions, his lordship has clearly held that, if both parties claim to be in possession of the disputed property, the local inspection by the Commissioner cannot be ordered to ascertain the possession. The question of possession is to be decided by the Court. In this case also, the plaintiff asserts that he was in possession and enjoyment of the suit schedule property bearing Sy.No.27 measuring 4 acres 18 guntas, based on the Regd. sale deed dated:08-06-1970 and same was denied by the defendant that the



plaintiff's father vendor was only owner and in possession of to an extent of 2 acres 18 guntas as on date of sale deed. So, the possession of the parties should be decided by the court and commissioner can not be appointed to ascertain the possession of the parties to to the suit. However, if one party alleges encroachment by another and another party denies such allegation, the Commissioner can be appointed to ascertain whether there is encroachment or not. In such a circumstances, the Commissioner is appointed to find out the nature of possession. The report based on local inspection will be a handy tool to decide the case relating to encroachment. In the case in hand, the petitioner to prove his assertion of encroachment instead of leading oral evidence of witnesses has applied for local inspection, and the same is not only permissible but also desirable.



15. In the present case also, on perusal of the entire plaint, the plaintiff has not made any allegation against the defendant that he is tried to encroaching his property, but it is stated that during the first week of March 2019, the defendant has tried to interfere in his possession and also tried to dis-mental the alleged A-B bund which is situated as demarcating bund in between the land of the plaintiff and defendants. So, interference is different from encroachment. The plaintiff never alleged in the plaint about encroachment by the defendants to his land and even the defendant has not at all raised boundary dispute and he has taken only contention that the vendor of the plaintiff has no saleable right to execute total 4 acres 18 guntas of suit land and same is not boundary dispute. So, when the parties to the suit have not pleaded about the boundary dispute and encroachment, then the appointment of commissioner



nothing but collection of evidence. Hence, the commissioner cannot be appointed for finding out the possession of the suit property by the parties to the suit.

16. Another decision passed by the Honorable **Madras High Court in a case of Selvamariammal V/s Kanagavel, in CRP (MD) (PD) No.1701/2017 dated 13.11.2018** wherein his lordship has held that,

In a suit for declaration and injunction, the defendants need not seek for the appointment of commissioner to disprove the case of the plaintiff. The Trial Court has considered all the facts and circumstances and also found that the plaintiffs are bound to prove their case based on pleadings, for which the defendants are not entitled to make out any application for appointment of commissioner. Hence, the Civil Revision Petition is dismissed.



17. In the instant case also, as I have already held that the defendants have denied the title and possession of the suit schedule property by the plaintiff and he has taken plea that the plaintiff is not owner of the suit property to an extent of 4 acres 18 guntas and vendor of the plaintiff's father has no salable interest to that extent. When the defendant has denied the title and possession over the suit property, then the plaintiff has to establish his case by producing relevant documents and also by examining the independent witnesses about his title and possession over the suit property.

18. In this case, the plaintiff has already got examined two independent witnesses as PW-2 & PW-3. Even, I have already held that the plaintiff either in the plaint or in his examination in chief, did not whisper anything about the alleged encroachment made by the



defendants to his land. But, when the matter was posted arguments on main suit, he come up with present application in order to measure the suit property, as well as the property of the defendants which cannot be accepted, because the report of commissioner can not decide the title of the parties to the suit and filing of this application, which clearly goes to show that the plaintiff desires to get the information as to how much extent he in possession of the suit property from the court commissioner. The local inspection by the commissioner cannot ordered to ascertain the possession and the question of possession to be decided by the court. . As, I have already held that the plaintiff has to establish his title and possession over the suit property by producing cogent and relevant documents and oral evidence. Hence, the plaintiff has not made out sufficient grounds to allow his application.



19. Moreover, the plaintiff has filed the present application at fag end when the matter was posted for final arguments on the plaintiff side. At this juncture, I would like to rely upon a decision reported **in AIR 2004 Kant 92, in a case of B.S. Nazir Hassan Khan V/s Aswathanarayana Rao & others**, wherein his lordship has held that,

CODE OF CIVIL PROCEDURE, 1908 –
Order 26, Rule 9 – Application for Appointment of Commissioner – Belated – If could be granted.

The petitioner challenged the order of the trial court in dismissing his I.A. seeking appointment of a Commissioner for local investigation as being highly belated.

Held : *The application for appointment of a Commissioner was filed long after the trial had reached the stage of finality and case was fixed for arguments. Even, if the application*



was bonafide and genuine it has to be filed at a proper point of time in the proceedings. The Law does not permit such ill-timed applications which could only have the effect of disrupting and dilating the proceedings.

Not only the trial Court fully justified but, the challenge presented through the C.R.P. to that order is totally misconceived.

20. On perusal of the above cited decision, his lordship has clearly held that the Law does not permit such ill-timed applications which could only have the effect of disrupting and dilating the proceedings. The courts have been virtually struggling to ensure that civil proceedings are heard and disposed of within a reasonable time and applications of this type only disrupt the proceedings and dilate them. In the instant case also, the plaintiff has filed the present application when the matter



was posted for argument on main suit and without showing any sufficient reasons for appointment of court commissioner. Even, the plaintiff without making any efforts by production of cogent and relevant documents, he wants to shift his burden on the commissioner without proving his case. Therefore, the appointment of the commissioner amounts to collection of evidence and in view of the ratio laid down in the above said decision, the application filed by the plaintiff itself is not maintainable. Hence, the plaintiff has not made out any sufficient grounds to appoint the court commissioner and therefore, the ratio laid down in the above decision squarely applicable to the present case in hand. Accordingly, I answer **point No.1 in negative.**

21. **Point No.2:-** For the above said reasons, I proceed to pass the following;



ORDER

Interim Application No.13 filed
by the plaintiff under order U/O.,
XXVI Rule 9 of CPC., dated:15-02-
2024 is hereby rejected with costs.

For arguments on plaintiff side
finally,

(Dictated to the Stenographer, transcribed by
her, then corrected by me and pronounced in
open court on this the **22nd** day of April 2025)

(S.M. ARUTAGI)
Senior Civil Judge,
Aland.

Visit ecourts.gov.in for updates or download mobile app “**eCourts Services**” from
Android or iOS