

KAKB210003382018



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

:PRESENT:

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

R.A. No.44/2018

DATED THIS THE 2ND DAY OF MAY - 2025

**Appellant/
Plaintiff:**

Chandrakanth S/o. Shankreppa Ganure.

V/s

**Respondents/
Defendants:**

Maheboob S/o. Mohd. Khan Pathan
and Others.

**PARTIES TO I.A.NO.I****Applicant/
Plaintiff:**

Chandrakanth S/o. Shankreppa Ganure,
Aged: 65 years, Occ: Agriculture,
R/o. village Matki, Taluka Aland,
District Kalaburagi.

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

Vs.

**Opponents/
Defendants:**

1. Maheboob S/o. Mohd. Khan Pathan,
Aged: 45 years, Occ: Driver,
R/o. village Matki, Taluka Aland,
District Kalabuagi.
2. Ayub S/o. Mohd. Khan Pathan,
Aged: 48 years, Occ: Agriculture,
R/o. village Matki, Taluka Aland,
District Kalabuagi.
3. The Gram Panchayat of village Matki
but affiliated to Gram Panchayat of
village Nirgudi, through its
Secretary, R/o. village Nirgudi,
Taluka Aland, District Kalaburagi.

(R.1 &2 By Sri S.S. Chinchue, Advocate)



(R.3 placed ex-parte)

**ORDER ON IA NO.I FILED UNDER ORDER XXVI
RULE 9 of CPC, BY THE APPELLANT/PLAINTIFF.**

This is an application filed by the appellant/plaintiff under order XXVI Rule 9 of CPC, to appoint the Court Commissioner for spot inspection and to submit his report on the points for reference made by the both parties 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 the property of himself and property of defendants are the plots granted by the panchayat authority under the Hakku patra and definite measurement are their in Hakku patra. It is also specific case of the plaintiff that the defendants have constructed



their house and while constructing the houses 5' feet lane is left and in his wall and wall of the defendants there are windows which open in the common lane of 5' feet and the photographs produced by him clearly depicts that there are windows and lane as claimed by him. Even the existence of lane and windows are totally denied by the defendants and therefore, in view of technical controversy, IA-4 filed by him before the trial court in O.S.No.63/2008 for appointment of commissioner to observe and measure the existence of lane and windows etc., but wrongly without appreciating the facts involved, the trial court had rejected the IA-4 under order dated 08.11.2017. Hence, it is necessary to decide the matter ones for all to inspect the spot and to get a report as whether there is lane of 5' feet or not and



whether windows of both plaintiff and defendants opened in the lane or not. Because, rival claims are made by the plaintiff and defendants and unless the spot is inspected and report is got, the court cannot come to decide the matter in issue. Moreover, in the cross-examination of DW,-1 categorically admitted about there is only one lane of one feet in between house of plaintiff and the defendant left as common lane while putting up construction. Admittedly, the appeal is continuation of suit and this court has vide power to appoint the commissioner in such matter and it will expedite to appoint the any Senior Advocate of Aland Bar association as commissioner and get report from him as per point for reference made by the plaintiff and defendants, otherwise he



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

3. On the other hand, the counsel for the respondents/defendants files detail objections to the application stating that the application is not maintainable in the eye of law. It is further contended that the appellant has pleaded that house of himself and defendants plots were granted to him, but he has not produced any document of title and unless the plaintiff prove his title, he cannot seek any relief through this court and even if the plaintiff shown that the suit property is panchayat property i.e. 'A-B' road, firstly, he has to prove the existence of 'A-B' road as mentioned in the plaint sketch and he wants to create evidence in respect of suit property by appointing court commissioner and same is not



maintainable under law. It is further contended that the plaintiff has to prove the alleged panchayat road as mentioned in the plaint sketch by leading evidence and producing cogent documents before this court. But, it is also to get the help of the commissioner to prove his case and it means that the appellant is creating the evidence which is not as per provision of law and even the appellant in all has filed three applications in the trial court for appointment of commissioner and those applications were dismissed and no appeal has been filed nor it was challenged in any higher court still that order of IAs in force. Despite of that, the appellant knowing filing of the same application prayed the relief of appointment of commissioner which is not nothing but abuse of the process of law.



4. It is further contended that in para No.3 of the application it is stated that he has constructed his house and respondent has constructed their house and both of them have left open space for lane and in the plaint, the plaintiff has pleaded that the suit property is panchayat road and existing in between two houses and the appellant is still not able to decide the suit property in appellant stage, which clearly goes to shows that the plaintiff still desire to get ascertain of suit property through the court commissioner and the commissioner cannot be appointed to ascertain the possession on the spot or for observation and ascertain the title of the parties and even the suit property is alleged as 'A-B' panchayat way as mentioned in the plaint sketch windows and pernalas and denied all existence of



windows by the respondents is not legal or proper grounds to appoint the court commissioner. There is no technical controversy to explain by appointing the commissioner and the trial court has rightly rejected the three applications filed by the plaintiff for appointment of court commissioner and the order of the trial court was still in force and without challenging the order of the trial court, the present application is not maintainable and it is also hit by principles of res-judicata.

5. Moreover, the appellant has produced the photographs, oral evidence in support of his case, but he has not proved the existence of suit way i.e. road and the appellant/plaintiff has stated that the defendant in his cross-examination admitted about there is 1' feet open space in between two houses of



parties. Now the burden is completely on the appellant to prove the panchayat road in between two houses and plaintiff cannot take advantage of statement of the defendants and also cannot take any weakness of the defendants case. So, the plaintiff is not entitled to fill up this locuna by appointing commissioner. Moreover, the appellant has already submitted the documents and adduced oral evidence in the trial court for proving the identity and existence of alleged panchayat road. So, at this stage there is no necessity to appoint the court commissioner and the appointment of court commissioner is nothing but to produce the additional evidence as if this court has not empower to decide this appointment of commissioner at this stage. Moreover, it is not the case of the appellant



that without report of the court commissioner, court cannot come to real conclusion and the plaintiff has produced sufficient documents and led oral evidence and he has also taken the help of defendant No.3. But, he could not prove the case and now he wants to desire to appoint the commissioner and to create the evidence in his favour and the appellant wants to exercise the judicial power through the commissioner and no one can delegate the judicial power to commissioner and it is nothing but to misguide to the court and waste and spoil the precious time of this court. Moreover, the present application is not maintainable without filing the application as per the provision under Order 41 Rule 27 of CPC. The appellant by taking disadvantage of statement desire to appoint the commissioner for



observing the distance in between two houses and this is no ground for appointment of commissioner and case of the plaintiff is that there is 5' feet panchayat road or lane in between two houses it means that the appellant wants to get report as to who is in possession, at what extent and the possession cannot be ascertain through the court commissioner and the application is not maintainable. On these grounds prayed for dismissal of application with costs.

6. Heard arguments on both side.

7. During the course of hearing on applications, the learned counsel for the appellant/plaintiff relied upon decisions as follows;

1. KCCR 2023 (1) 637.



2. AIR 1795 Allahabad.
3. Judgment in W.P.No.7278/2022
Bombay High Court.
4. Commentaries

8. On the other hand, the learned counsel for the respondents relied upon following decisions.

1. 2014(2) KCCR 1564.
2. 2020(3) KCCR 2380.
3. AIR 1977 SC 392.
4. Manu/KA/2099/2012.

9. I have gone through the above cited decisions.

10. On the above pleadings, the following points that arise for my consideration

- 1) Whether the appellant/plaintiff has made out sufficient grounds to allow his application?*



2)) What order?

11. 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

12. **Point No.1:** It is pertinent to note that the appellant/plaintiff being aggrieved by the judgment and decree passed by the Trial Court in O.S. No.63/2008 dated 19.09.2018, preferred this appeal, wherein the suit of the plaintiff before the Trial Court was dismissed with costs.

13. When the matter was posted for arguments on merits, the appellant/plaintiff come up with the



present application to appoint the court commissioner for spot inspection and to submit his report on the points for reference made by the parties to the suit.

14. It is specific case of the appellant that the property of the plaintiff and property of the defendants are the plots granted by the panchayat authority under the Hakku patra and definite measurement are their in the Hakku patra and in this regard the appellant has not produced any Hakku patra either before this court or before the trial court. With regard to property granted by the panchayat to the defendants, the plaintiff himself produced the certified copy of Hakku patra marked at Ex.P4, but with regard the property given by the panchayat authority to him, the plaintiff has not



produced any documents before this court. Further it is specific case of the plaintiff that himself and defendants have constructed the house and while constructing the houses a 5' lane is left and in his wall and wall of the defendants, there are windows and which open in the common lane on 5' feet and in order to shows the said windows and common lane, he has produced the documents. Admittedly, the photographs are not title documents and the plaintiff has to establish his title and existence of 'A-B' road as mentioned in the plaint sketch by producing cogent and relevant documents before this court. Furthermore, the plaintiff before the trial court has filed IA-4 U/o.26 Rule 9 R/w.151 of CPC and the trial court after considering the entire records and documents produced by the both parties dismissed



the application on 08.11.2017. Later on, the plaintiff without challenging the order of the trial court dated 08.11.2017, once-again, he moved an application for appointment of court commissioner on 20.01.2018 and the said application was also dismissed by the trial court on 31.01.2018 and the plaintiff has filed similar application before this court without challenging the order passed by the trial court.

15. On perusal of the entire records, there is no dispute as to location of houses of the plaintiff and defendants and it is also admitted fact that the house of the plaintiff is located on the southern side and house of the defendants located on the northern side and the real dispute is with regard to existence of panchayat lane in between those houses which can be establish by the plaintiff without appointment of



court commissioner. Moreover, the trial court while deciding the application filed by the plaintiff dated 08.11.2017 and 31.01.2018 rightly come to conclusion that the admission on existence of 1' feet space by the defendant does not prove that there is a panchayat lane of 5' feet lane and no way the defendants have admitted that there is a 5' feet panchayat lane as alleged by the plaintiff and therefore, it is for the plaintiff to prove the same on his own strength. The trial court while deciding the applications filed by the plaintiff u/o. 26 Rule 9 of CPC it is held that two applications filed by the plaintiff is hit by the principles of res-judicata and therefore, the applications are not maintainable. Admittedly, the plaintiff has already filed two applications before the trial court and both have been



dismissed by the trial court on 08.11.2017 and 31.01.2018 on merits. The plaintiff has not preferred any appeal, being aggrieved by the orders passed by the trial court.

16. It is specific contention of the respondent that the present application has been filed at fag end that to when the case is posted for arguments on merits and even filing of the same applications before this court is amounts to res-judicata. At this juncture, I would like to rely upon a decision reported in ***AIR 1977 Supreme Court 392 in a case of Y.B. Patil and Others V/s. Y.L. Patil*** wherein his lordship has held that,

**(A) Civil P. C. (1908), S. 11 -
Principle of res judicata Applicability in
subsequent stage of proceeding.**



Principles of res judicata can be invoked not only in separate subsequent proceedings; they also get attracted in subsequent stage of the same proceedings. Once an order made in the course of a proceeding becomes final, it would be binding all the subsequent stage of that proceeding.

The High Court at the time of the decision of the earlier writ petition on December 18, 1964 recorded a finding and gave directions to the Revenue Appellate Tribunal not to reopen the questions of fact in revision. The Tribunal while passing the order dated September 12, 1967 complied with those directions of the High Court:

Held that the Appellants were bound by the judgment of the High Court and it was not open to them to go behind that judgment in the appeal to the Supreme Court against the decision of the High Court in the



subsequent writ petition. No appeal was filed against that judgment and it became final.

17. Another decision reported in **ILR 2002 KAR 2675 in a case of Abdul Sattar and Others V/s. Gurulingayya and Another** wherein his lordship has held that,

PROCEDURE CODE, 1908 (CENTRAL ACT NO. V OF 1908) - ORDER XI RULES 97, 98, 100, 101 AND SECTIONS 11 AND 151 - Obstracter's application in the year 1992 for the execution of a decree on the ground that they are in Lawful possession of the suit property as tenants was dismissed on 11.11.1992 and also the Revision filed before the High Court challenging the same. Again on the same grounds, they filed yet another Application after lapse of ten years under Section 47 read with Section 151 of



the Code of Civil Procedure and this Application was dismissed on 13.2.2002. In Revision filed against this order on the question of Res Judicata it was contended that order passed in the earlier proceedings does not operate as Res-judicata because that was passed on an Interlocutory Application and not in a suit.

HELD:

Orders passed on Interlocutory Applications and also the orders passed in the same proceedings at earlier stages, operate as Res-judicata in subsequent stage of the same proceedings.

18. On perusal of the above cited decisions their lordships have clearly held that principles of res judicata can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings. Once an



order made in the course of a proceedings becomes final, it would be binding all the subsequent of that proceeding. It is further held that order passed in interlocutory applications and also order passed in the earlier stage operates as res-judicata in subsequent stage of the same proceedings. In the instant case also admittedly, the appellant/plaintiff had filed the similar applications before the trial court on twice and the those applications were dismissed by the trial court on merits on 08.01.2017 and 31.01.2018. However, the plaintiff/appellant has not challenged the order of the trial court and again he come with same application before this court which operates res-judicata in view of ratio laid down in the above decisions, because this appeal is continuation of suit. Hence, the principles laid down



in the above decisions squarely applicable to the present case in hand.

19. Further it is relevant to note that the counsel for the respondents during the course of arguments vehemently argued that the present application is not maintainable without filing the application u/o.41 Rule 27 of CPC and in support of his arguments relied upon a decision reported in **2020 (3) KCCR 2380 in the case of M/s. Cantreads (P) Ltd. Mangaluru and Another Versus Smt. Annie Augustine Kunnapillil and Others**, wherein his lordship held that;

*“CIVIL PROCEDURE CODE, 1908 –
Order 26, Rule 9 and Order 41, Rule 27 –
Appeal against order of dismissal of suit –
In appeal, the Lower Appellate Court on
an application under Order 26, Rule 9*



appointed a commissioner for local inspection without there being an application under Order 41, Rule 27 for additional evidence – Held, it is not permissible – The party has to make an application under Order 41, Rule 17 and the same has to be considered along with the appeal – Impugned order was set aside.”

20. On perusal of the above cited decision his lordship clearly held that in appeal the trial court of on an application u/o. 26 Rule 9 of CPC appointed a court commissioner for local inspection without their being an application u/o.41 Rule 27 for additional evidence held it is not permissible the party has to make out an application u/o. 41 Rule 17 of CPC and same has been consider along with appeal and therefore, impugned order for set aside. In this case



also the plaintiff/appellant while filing the application u/o. 26 Rule 9 of CPC he has not filed any application u/o. 41 Rule 27 of CPC and therefore, in view of the ratio laid down in the above decision, the present application filed by the plaintiff/appellant is not maintainable. Hence, I inclined to accept the contention taken by the counsel for respondents.

21. Furthermore, it is relevant to note that it is specific case of the defendants is that the present application has been filed at fag-end, when the case is posted for arguments on merits and therefore, the application is not maintainable. At this juncture, I would like to rely upon a decision reported in ***AIR 2004 Karanataka 92*** in case of ***B.S.Nazir Hassan Khan, V/s Aswathnarayana Rao and other*** wherein his lordship has held that,



Civil P.C.(5 of 1908), Order 26, Rule 9-Appointment of Commissioner - Application filed at a belated stage-When evidence is complete and case is fixed for arguments-Rejection of application held to be proper as application even if bonafides have to be filed at a proper time that is before closing of plaintiffs evidence.

22. On perusal of the above cited decision, his lordship has clearly held that the application filed at a belated stage when evidence is completed and case is posted for arguments and rejection of application held to be proper and application even bonafide have to be filed at a proper time is before closing of plaintiff evidence. In the instant case also, as I have already held that the similar applications filed by the plaintiff before the trial court were already rejected on 08.11.2017 and 31.01.2018 and without challenging



the order of the trial court, the appellant/plaintiff again come up with the same application before this court, which is not maintainable and even the present case is posted for arguments on merits and same is filed at fag end and therefore, the present application is not maintainable under law. Hence, the ratio of the above decision is squarely applicable to the present case in hand.

23. As I have already held that the trial court while deciding the applications filed by the plaintiff before it it is held that merely because there are windows and pernalas on the Northern side of house of plaintiff, it cannot be said that there is a panchayat lane of his house and there is a possibility that there is open space on the Northern side of the plaintiff might have open windows and fixed pernalas



on the Northern wall of his house and the controversy as to whether there is a panchayat lane or not cannot be resolved by the appointment of commissioner in this case and even the plaintiff can very well to prove the same about existence of panchayat lane on the Northern side by leading cogent and convincing evidence and also he can very much produce the panchayat records to show the existence of such lane. The plaintiff himself has contended that the existence of lane on the Northern side of his house is admitted by the defendant No.3 in the written statement and he can take very well advantage of the same and he can produce more evidence to show the existence of lane. However, no commissioner can be appointed to find out whether there is a panchayat lane or not. So, in view of the



findings given by the trial court while passing the order u/o. 26 Rule 9 of CPC, the present application is not maintainable and the plaintiff/appellant has not shown any sufficient grounds or new grounds to appoint the court commissioner and even I have already held that the present application filed by the plaintiff/appellant is hit by principles of res-judicata and also without filing the supplementary applications u/o. 41 Rule 27 of CPC, the present application is not maintainable. Hence, the appellant/plaintiff has not made out any reasonable or sufficient grounds to allow the application. Accordingly, I answered **point No.1 in the Negative.**

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



ORDER

Interim Application No.I filed by
the appellant/plaintiff U/O., XXVI
Rule 9 of CPC, is hereby rejected
with costs.

(Dictated to the Stenographer,
transcribed by him, then corrected by me
and pronounced in open court on this the 2nd
day of May, 2025)

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

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