

KAKB410002202022



**IN THE COURT OF THE SENIOR CIVIL JUDGE
& J.M.F.C., AT : CHINCHOLI**

**Present : Smt.Jyoti.Shantappa.Kale
L.L.M.,
Senior Civil Judge & JMFC, Chincholi.**

DATED : THIS THE 19th DAY OF MARCH 2025

ORIGINAL SUIT No.72/2022

i.	Provision under which the application is filed	U/o 26 Rule 9 CPC
ii.	Relief sought for	Appointment of court commissioner.
iii.	The date on which the application is filed	06-03-2025
iv.	Number of the application	I.A No.VI
v.	The date on which the objections are filed by defendant/opponents	06/03/2025
vi.	The date on which the orders were passed on the said application	21/03/2025

Plaintiff/s

Ramchandra S/o Bheemu and others.

V/s

Defendant/s:

Siddappa S/o Hashappa and others.

-: I.A.No.VI :-

Applicant/s:

Siddappa S/o Hashappa and others.

V/s.

Opponent/s:

Ramchandra S/o Bheemu and others.

**ORDER ON INTERIM APPLICATION No.VI FILED BY
THE DEFENDANT UNDER ORDER 26 RULE 9 CIVIL
PROCEDURE CODE, 1908**

1. The defendants filed I.A.No.VI U/o 26 Rule 9 of Civil Procedure Code, 1908, praying to appoint the ADLR Kalagi as court commissioner for visiting the Land bearing Sy.No.44 and 45 of Mogha village and measure both lands and demarcate, to furnish the location of both the lands with their extent and correct boundaries by way of preparing map of lands with the help of village map and furnish the detail particulars of extent and boundaries of land in whose possession with extent and boundaries by way of Survey for fair adjudication of dispute in the interest of justice.

2. The application is accompanied with an affidavit sworn in by the defendant wherein he has stated that plaintiff has filed this

suit for the relief of Declaration of ownership and for Perpetual Injunction. It is stated that the defendant No.1 has sold the suit land measuring 7 acres 18 guntas in Sy.No.44 of village Mogha considering the long standing possession of the defendant and thereafter defendant through valid sale deed vide Doc.No. 1891/2019-20 dated 05-11-2019 and since the date of purchase defendant is in actual and physical possession over the suit land as lawful purchasers and prior to it he was in possession of suit land but the Defendant No.1 in executing the said sale deed has legalized the lawful long-standing possession of the defendant over the said suit land. At no point of time neither the deceased Shivappa Haibathi, Siddappa Haibathi nor the deceased Bheemu and present plaintiffs were and /or are in alleged possession over the said suit land but they were and are out of possession of entire land in Sy.No.44 including the suit land.

3. It is further stated that the boundaries of suit land shown in the Subject matter of suit is quite contrary to the boundaries given in the cross Examination of PW1-1 and hence it is just and proper to ascertain the correct boundaries through commissioner. In fact, the boundaries given by PW1 in his cross examination are boundaries of

Sy.No.45. In fact, the defendant No.2 defendant is in possession of land Sy.No.44 measuring 07 acres 18 guntas. During the course of cross examination the PW1 has stated and admitted as. Towards eastern side of Sy.No.44 there is land of Roopla Naik. Towards Western side there is a Bill portion and then land of plaintiffs. Towards Northern side there is a Hill portion. Towards Southern side there is land of Shamrao Bhimrao.

4. It is further stated that the defendant is in possession of land Sy.No.44 measuring 07 acres 18 guntas of village Mogha. As per such admission made by PW-1 in his cross examination on Page No.6 of his deposition and boundaries given, the plaintiff is in possession of land Sy.No.45 and not in Sy.No.44. The plaintiffs have contended that they purchased land Sy.No.44 measuring 03 acres 29 guntas from its previous owner but no authentic or genuine document is filed to prove these facts. Now the plaintiff is trying to dispossess the defendant from the land Sy.No.44 measuring to the extent of 03 acres 29 guntas out of 07 acres 18 guntas contending the said 03 acres 29 guntas is part of Sy.No.44 which is quite incorrect. Infact the plaintiff is in possession of 03 acres 29 guntas of Sy.No.45 as per own admission made by him in his cross

examination of PW1. Now the defendant is trying to dispossess the defendant from 03 acres 29 guntas of Sy.No.44 out of 7 acres 18 guntas contending that it is his purchased land though he is in possession of Sy.No.45 measuring 03 acres 29 guntas, whereas the defendant is in possession of 07 acres 18 guntas in Sy.No.44. When such disputes between the parties then it is just and proper to appoint the ADLR Chincholi as Court commissioner to ascertain the truth, location of both the lands with their extent and correct and boundaries for proper adjudication of the matter in disputes. Thus defendant prayed to allow the application.

5. The defendant filed objections to the present application. It is contended that the suit is for declaration and injunction and both parties must prove their case as per the pleadings before the Hon'ble Court by oral and documentary evidences. To that extent already documentary and oral evidence are completed by both the parties, and also part of the plaintiff/s side argument is over and it is posted for defendant's side arguments. Hence under these circumstances there is only way to the defendant to argue the case by the defendant. It is contended that previously Siddappa S/o Hashappa Chintal is the owner of the property and later on he is

having a rights to sale that land to the Ramanna S/o Nagappa, the plaintiffs to have challenged that, the said land Sy.No.44 of Mogha village were noway concerned to the Siddappa S/o Hasappa Chintal and Ramanna S/o Nagappa Iragampalli. It is furhter contended that in this case appointment of the Court commissioner for survey of the suit land Sy.No.44 and non suited land Sy.No.45 does not arise at all as it is not a boundaries disputes and not a case of the encroachment, it is purely case of declaration of ownership. The law is not permitting in any person to prove the possession of the parties by collecting the evidence by appointment of the Court commissioner. Hence it is not necessary and is not proper case to appoint the Court commissioner for visiting the land Sy.No.44 and 45 and observing the possession of the parties in those lands. On the other hand the land Sy.No.45 is noway concerned to either the plaintiff or the defendants. Hence the Hon'ble court may kindly be reject the application filed by the defendant No.2 U/o 26 Rule 9 R/w Sec.151 of C.P.C.

6. Heard arguments of learned counsel for the plaintiff and learned counsel for the defendants on I.A.No.VI and perused the entire materials on record.

7. On the basis of materials on record the points arises of my consideration are as under,

- 1) *Whether the defendant has made out reasonable grounds to allow the application and appoint court commissioner as sought in application?*
- 2) *What Order?*

8. On perusal of the materials on record and the application and its contents, My findings on aforesaid points are as under

- Point No.1** : In the Negative.
- Point No.2** : As per final orders
for the following,

: R E A S O N S :

9. Reasoning on Point No.1 :

i) The suit is for the relief of Declaration and perpetual injunction in respect of the suit schedule properties. The defendant has filed I.A.No.6 under the provisions of Order 26 Rule 9 of Civil Procedure Code, 1908 praying to appoint the ADLR Kalagi as court commissioner for visiting the Land bearing Sy.No.44 and 45 of Mogha village and measure both lands and demarcate, to furnish the location of both the lands with their extent and correct boundaries by way of preparing map of lands with the help of

village map and furnish the detail particulars of extent and boundaries of land in whose possession with extent and boundaries by way of Survey for fair adjudication of dispute in the interest of justice. In this case the plaintiffs claim that they are absolute owners and in possession of suit land bearing Sy.No.44 measuring 03 acres 29 guntas. On the contra the defendants have denied all the plaint averments. In the entire written statement the defendant have nowhere contended that the plaintiff are in possession Land bearing No.45 but not Sy.No.44. Land bearing Sy.No.45 is not the subject matter of the suit. The learned Counsel for the defendant has drawn the attention of this court towards the cross examination of PW1. In the cross examination the PW1 has stated about the boundaries of land. In the entire written statement the defendant have not denied the boundaries and description of the suit properties. But infact they have denied the ownership and possession of Shivappa Haibati and Siddappa Haibathi over the suit property and claimed that the defendant No.2 is the owner in possession of suit property. There is no denial of the boundaries and description of the suit property by the defendant No.2.

(ii) On perusal of pleadings of both parties, it shows that plaintiffs are claiming their absolute ownership in the suit property whereas defendant claims that he is the owner of suit property. In this application the defendant has stated that plaintiffs are in possession of Sy.No.45 has Perusal of the written statement filed by the defendant shows that the defendant has not pleaded that plaintiffs are in possession of Sy.No.45. The plea of possession is to be proved by the defendant and also by the plaintiff on the basis of cogent oral and documentary evidence. Looking to the nature of suit and the absence of pleadings about plaintiffs are in possession of Sy.No.45 there are no grounds to appoint the ADLR Kalagi as court commissioner for commission work as sought in the application. There is no ambiguity in the identification of the property or there is no any plea of encroachment over the suit land by either parties. The plea of possession is to be proved by the defendant. Moreover there is no ambiguity in evidence of both the parties. There are no grounds or the reasons shown in the affidavit annexed with the application to appoint the ADLR Kalagi as court commissioner. In this case there is no dispute regarding boundaries or physical features of the property or any allegation of

encroachment. Possession is a matter of proof of necessary oral and documentary evidence. The Court has to investigate and record finding as to who is in physical possession of the dispute property. In this regard, the investigation by a local Commissioner for ascertaining the possession of Sy.No.45 which is not the subject matter of the suit is not permissible. Thus no reasonable grounds are made out by the defendant to appoint the ADLR Kalagi as court commissioner . Hence, I answer point No.1 in Negative.

10. Point No.2: In view of my findings on point No.1, I proceed to pass the following:

:- O R D E R :-

IA.No.VI filed by the defendant No.2 U/o 26

Rule 9 of CPC seeking is hereby rejected.

For defendant arguments.

(Dictated to Typist typed by her corrected by me, signed and pronounced by me in the open court on 21th day of March 2025)

**(Jyoti Shantappa Kale)
Senior Civil Judge & JMFC.,
Chincholi.**