

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

-: PRESENT :-

Sri. Mohanagowda M.E., B.A., LL.B.,
Civil Judge & J.M.F.C.,
Ponnampet.

O.S.No.44/2015

Dated, the 7th day of July 2018.

Plaintiffs:

Sri.D.T.Govinda,
S/o: late Thammaiah Shetty,
Age: 75 years,
R/o: Mathur Village,
Ponnampet Post,
Virajpet Taluk,
Kodagu District.

Represented by GPA Holder
D.G.Venkatesh,
S/o: D.T.Govinda,
Age: 48 years,
Mathur Village, Ponnampet Post,
Virajpet Taluk, Kodagu District.

(By **Sri.C.H.Eshwar.**, Advocate)

-Vs-

Defendants:

1. D.K.Ponnappa,
S/o: late Karumbaiah,
Age: 70 years,
 2. D.P.Rathan Bopanna,
S/o: D.K.Ponnappa,
Age: 35 years,
- Both are residing at
Ballyamundoor Village & Post,
Virajpet Taluk, Kodagu District.

(By **Sri.N.P.Madaiah.**, Advocate)

ORDER ON I.A XIII

**Applicant/
Defendant:** Sri. D.K.Bopanna,

**Opponent/
Plaintiff:** Sri D.T.Govinda,

ORDERS ON I.A.No.XIII FILED BY THE DEFENDANT
UNDER ORDER XXVI RULE 9 OF CPC

This I.A. No.13 is filed by the defendant U/O XXVI Rule 9 of the CPC with a prayer to appoint a the ADLR, Kodagu and an advocate as Court Commissioners to inspect and survey Suit schedule A and B properties and counter claim properties.

2. In the affidavit annexed to the I.A., it is stated that a survey is to be conducted to find out the encroachment if any as alleged in plaint. The plaintiff also filed similar application for the same relief but later prayed to dismiss it as not pressed to protract the proceedings. No prejudice would be caused to the plaintiff if this I.A is allowed. Hence it is prayed to allow the IA.

3. Objection to the I.A. has been filed by plaintiff but later the learned counsel for the plaintiff filed memo and submitted that he has no objections to allow I.A no.13.

4. Heard and perused the materials on record.

5. The following point arise for my consideration :

- i) Whether the I.A. filed by the defendant deserves to be allowed?
- ii) What order?

6. My answer 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 :-** It is an established principle of law that a court commissioner can be appointed to find out alleged encroachment. Admittedly the plaintiff filed I.A No.9 and sought for appointment of court commissioner to find out the encroachment. For the present IA the plaintiff has no objections.

1. In Bhimappa Rayappa Chougala v. Shrikant, 2014 SCC OnLine Kar 12277 Hon'ble High court held as under:

“4. The suit is one for possession and injunction. The plaintiffs claim, the defendants have encroached upon their property. Only if the plaintiffs are able to show that the defendants have encroached upon their property, they would be entitled to the relief. Any amount of oral evidence is not a substitute or sufficient to prove the encroachment. To cut short the litigation to reduce recording evidence, the trial Court in its wisdom, thought it fit to appoint a commissioner even before the commencement of the trial. That is how the duration of the litigation could be curtailed and speedy disposal of the civil matter could be achieved.”

8. Admittedly any amount of oral evidence is not sufficient to prove the encroachment, hence it is proper to take assistance of court commissioner in this regard. In the present case the plaintiff has not yet started his evidence. In view of the above judgment there is no impediment to appoint court commissioner at this stage. Hence, for all these reasons, I am of the considered opinion that the application filed by the defendant deserves to be allowed. Accordingly, I answer Point No.1 in the Affirmative.

9. **POINT NO.2:-** In view of my findings on Point No.1, proceed to pass the following :

ORDER

The I.A. XIII filed by the defendant U/O.XXVI Rule 9 of CPC is hereby allowed.

(Typed by me on my laptop, after clerical additions by the stenographer, corrected and pronounced by me in the Open Court on this the 7th July 2018)

(Mohanagowda M.E.,)
Civil Judge and J.M.F.C.
Ponnampet.