

ORDER ON IA-5

The defendants have filed an application under order XXVI rule 9 read with section 151 of CPC to appoint a court commissioner preferably the ADLR or any other survey authorities in order to measure and demarcate ABC schedule properties and note down the existing affairs of the suit property and submit a report.

2. The plaintiffs have filed objections.

3. Heard both.

4. Now the point that arises for the consideration of this court is “

1. “Whether the plaintiffs have made out grounds to allow the application for appointment of court commissioner as sought in the suit?”

5. On hearing both and perusal of the necessary materials on records, this court answers the above point in the **Affirmative** for the following:

REASONS

6. **Point No.1:-** Along with the application, the defendant no. No.1 has filed an affidavit sworn to by him. The sum and substance of the said affidavit filed by the defendant is that the plaintiff has filed the suit for declaration, mandatory injunction and permanent injunction. According to the plaintiff plaint A schedule property is the Santhe Maidana and the defendants have encroached the said property and made construction. But, in the cross examination the plaintiff has admitted that there are many other persons who have encroached the A schedule property. But they are not made as parties to the suit. The defendants, in the written statement, apart from denial of the encroachment have also given details of the persons who have encroached the suit A property. Therefore, in order to ascertain who are all have encroached the suit property and give correct findings, the appointment of court commissioner is necessary to measure the suit property. Hence the present application.

7. On the other hand, the plaintiffs apart from denying the averments of the affidavit have contended the defendants have not yet lead evidence. The appointment of the court commissioner cannot be done without completion of trial.

Therefore, the application is premature one and liable to be dismissed. The appointment of commissioner can be made only when the court opines that the suit cannot be decided effectively without the commissioner report and therefore it is purely discretion of the court. Therefore, the defendants have not made out grounds to allow the application and hence it is liable to be dismissed.

8. But these objections of the plaintiffs is not acceptable. Because, very suit of the plaintiff is for declaration that the suit property being Santhe Maidana is a public property. But the present proceedings are not the suit proceedings and mandatory injunction to remove the encroachment. The best way of ascertainment of the encroachment is to measure the property through a competent person. In this case, from the written statement and objections, it is very clear that the defendants have not disputed the encroachment. But according to them, it is done by them, but done by others. As rightly contended by the defendants, if the commissioner has visits the spot and makes the measurement truth will come out. Therefore, it is very clear that the appointment of commissioner is most necessary in this case.

9. There is two fold objections submitted by the plaintiffs. First one is that the application is premature one as it is filed before completion of evidence of defense evidence and second one is that appointment of commissioner is pure discretion of the court and hence the application needs to be dismissed. In so far as first objection is concerned, it is pertinent to note that there is no hard and fast rule that the commissioner is to be appointed only after completion of trial or evidence. It depends upon the facts and circumstances of the case. The commissioner can be appointed before or after the commencement of the trial. In this regard the decision relied upon by the counsel for the defendants reported in **2023(3) ICC 57** rendered in case of **Shadaksharappa Vs Kumari Vijalakshmi and others** is aptly applicable to the case on hand. In this case Hon'ble High court has given guidelines to the court to follow while deciding the application filed for appointment of commissioner. In head note No. C (e) of the said judgment, it is clearly observed that commissioner can be appointed either before or after commencement of trial. Therefore, the contention of the plaintiffs that the application is premature is not acceptable.

10. In so far as second fold of the argument is concerned, there is absolutely no doubt that the order of appointment of court commissioner is purely discretion of the court. But, the said discretion needs to be exercised very judiciously. But the contention that only after the court forming opinion that without report the issue cannot be decided, then only commissioner is to be appointed is not acceptable. In the present case, as mentioned above, the best way of ascertainment of encroachment is making measurement of the entire suit property. Just because, such commissioner is appointed before the completion of the defendants evidence, it would no way changes the position of requirement of appointment and sanctity of the report to be submitted. On the other hand, as rightly contended by the defendants, it would help this court to record a correct findings on the encroachment. It also minimize the evidence also. Because, as rightly contended by the defendants if report has come showing that it is not the defendants who have made the encroachment, but it some other persons, the evidence of the defendant may not be required. In fact it would help the plaintiffs to add necessary parties to the suit. Though the plaintiffs opposed the application, they never stated any thing specifically

about the hard ship which may be caused to them if the application is allowed. Therefore, viewed from any angle there are no reasons to discard or reject the application filed by the petitioner. Hence, the application filed by the plaintiffs need to be allowed. **Accordingly**, above point is answered in **Affirmative** and proceed to pass the following.

ORDER

Application filed by the defendants under order XXVI rule 9 read with section 151 of CPC to appoint a court commissioner is hereby allowed.

ADLR, Maddur taluk, is appointed as court commissioner to measure the suit property and submit report.

**Call for memo of instructions by
3/11/23**

**Additional SENIOR CIVIL JUDGE & JMFC
MADDUR.**