

01/07/2026

Plaintiff by: Shri.BKS Adv.

Defendant by: Shri.AN Adv.

**ORDERS ON IA.NO.3 FILED BY THE DEFENDANT UNDER
ORDER 26 RULE 9 R/W SEC.151 OF CPC.**

1. Plaintiff has filed the present suit for the relief of declaration of his title and for perpetual injunction as against the defendant.
2. When the case was at the stage of defendant side evidence, the defendant has filed the instant application praying to appoint the court commissioner.
3. In the affidavit accompanying the application it is averred that the plaintiff has filed the present suit for the relief of declaration of his title and for perpetual injunction as against the defendant. It is averred that in order to ascertain whether the suit property is a Government or private property, in order to ascertain the possession of the defendant over the suit property and to fix the boundary stone to the suit property, it is necessary to appoint the

Taluka Surveyor as a court commissioner. It is averred that if the court commissioner is not appointed as sought for in the instant application, then the rights of the defendant over the suit property will be adversely effected, in which even the defendant will be put to untold hardship which cannot be compensated in terms of money. It is further averred that if the court commissioner is not appointed then it will also lead to multiplicity of litigation. It is averred that if the application is allowed and thereby if the court commissioner is appointed, no harm and no loss will be caused to the plaintiff. Therefore, for fare and effective adjudication of the above case, it is necessary to appoint the court commissioner so as to note and report about the points referred in the application. Hence, on the above grounds, the defendant has prayed to allow the application and to appoint the court commissioner.

4. The application was resisted by the plaintiff by filing his objection. The plaintiff has contended that the present application filed by the defendant is not maintainable under the law. The reasons assigned in the accompanying affidavit are vague and baseless. No valid reasons are forthcoming from the defendant to allow the application. The defendant has sought for appointment of court commissioner. But the trial in this case is not yet concluded. By appointing court commissioner the defendant is intending to gather the evidence and the same is not permissible under the law. The present application being filed before the completion of trial, the same is premature. It is contended that appointing the court commissioner and calling for his report on the points referred in the instant application is not called for, for

the purpose of fair and effective adjudication of the above case. Hence, with the above contentions, the plaintiff has sought for dismissal of the application by imposing costs.

5. Heard arguments from both the side. Perused the records. After going through the application along with affidavit, objection statement and the relevant document placed on record, the following points arises for my consideration:

Point No.1: Whether the defendant has made out valid grounds to allow the application?

Point No.2: What order?

6. My answers to the above points are as hereunder:

Point No.1 : In the Negative.

Point No.2 : As per the final orders
for the following:

REASONS

7. POINT NO.1: Plaintiff has filed the present suit for the relief of declaration of his title and for perpetual injunction as against the defendant. By filing the instant application, the defendant has prayed to appoint the court commissioner for three purposes. Firstly, to visit and to inspect the suit property so as to ascertain whether the suit property is a Government or private property. It is significant to note here that, in his written statement it is the defendant who had taken up the contention that the suit property was a Government land. Therefore, the burden is on the defendant to prove the same by leading his evidence and by producing the

documentary evidence. But, without leading his evidence, the defendant has filed this application to gather the evidence through the court commissioner to prove his said contention. It is a settled law that the court commissioner cannot be appointed to gather the evidence. Moreover, in order to ascertain whether the suit property is a Government or private property, there is no necessity for spot inspection and the same can be proved by producing documentary evidence. Hence, the court commissioner cannot be appointed so as to ascertain whether the suit property is a Government or private property.

8. Secondly, the defendant has sought for appointment of court commissioner to ascertain the possession of the defendant to an extent of 1 acre 6 guntas of land in the suit property. At this juncture I would like to rely on decision of the **Hon'ble High Court of Karnataka reported in ILR 1996 KAR 1443 in the case of Puttappa Vs. Ramappa** wherein at para No.3 and 4 it is held as under:

3. I think, the lower Court is right and that a Commissioner cannot be appointed to find out as to who is in possession of the property. Under Order 26 CPC, a Commissioner can be appointed to make local investigation to investigate the facts or other materials which are found in the property and to make a report in regard to that matter to the Court. In a suit for injunction the question as to who is in possession of the property, is a matter to be decided by the Court on the basis of the evidence, either oral or documentary, to be adduced by the parties. That

function cannot be delegated to a Commissioner who cannot find out as to who is in possession of the property. Accordingly, the lower Court was right in rejecting the application.

4. *The Counsel for the Revision-petitioner relied on a Decision of the Delhi High Court reported in Manmohan Service Station v. Mohd. Haroon Japanwala, wherein the Court has relied on a Commissioner's report in regard to the possession of the plaintiff at the interlocutory stage by considering the question as to whether temporary injunction should be granted or not. The Court in that case has relied on an exparte report of a Commissioner who stated in his report that the plaintiff is in possession of the portion of the suit schedule property. The Commissioner had also produced a photograph which also the Court took into account for coming to the conclusion that prima facie the plaintiff is in possession of a portion of the property. With great respect, I am unable to agree with the view taken by the learned Single Judge of the Delhi High Court that Commissioner's report can form the basis for coming to the conclusion that a party is in possession of the property or not. A Commissioner will not be in a position to determine the question as to who is in possession of the property when there is dispute between the parties regarding the same. The Court will have to decide the matter on the basis of the evidence to be adduced by the parties. It is not the function of the Commissioner to determine or to report to the Court as to who is in possession of the same.*

9. Further, in another decision of the **Hon'ble High Court of Karnataka reported in 2023 SCC OnLine Kar 53 in the case of Shadaksharappa Vs. Kumari Vijayalaxmi and Others** wherein at para No.14 it is held as under:

14. 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.

10. Hence, in the above cited dictums it is clearly held that the question as to who is in possession of the suit property has to be decided by the court on the basis of evidence adduced by the parties and the said function cannot be delegated to a commissioner who cannot find out as to who is in possession of the property. So also it is held that it is not the function of the commissioner to determine as to who is in possession of the disputed property. Hence, the above being the law, this court cannot consider the prayer made by the defendant in the instant application. By filing the present application, the defendant is intending to prove his possession over the suit property by calling for the report of the court commissioner. But it is not the function of the court commissioner to determine the possession and title of the parties. Accordingly in view of the law laid down by the Hon'ble High Court in the aforcited dictums, I conclude that the court commissioner cannot be appointed so as to find out the possession of the defendant over the suit property.

11. Thirdly, the defendant has sought for appointment of court commissioner to fix the boundary stone to the suit property. But, fixing of boundary stones is not the function of the civil courts. The records reveals that the trial of this case is not yet concluded. It is only after the conclusion of the evidence, the court can decide whether the evidence placed before it are sufficient or not to decide the matter in dispute and whether there is a need for appointment of court commissioner. Hence, in view of the foregoing discussions, this court is not inclined allow the application. I do not find any merits in the application. The present application being devoid of merits, the same deserves to be dismissed. **Accordingly, point No.1 is answered in the Negative.**

12. POINT NO.2: In view of my foregoing findings and discussions on Point No.1, I proceed to pass the following:

ORDER

IA No.3 filed by the defendant U/o 26 rule 9 R/w Sec.151 of CPC is hereby dismissed with cost of Rs.300/-.

Case is restored to its original stage.

For defendant side evidence finally as last chance.

Call on: 02/07/2026.

I ACJ & JMFC, K.R.Nagar.

