

IN THE COURT OF ADDL. CIVIL JUDGE AND JMFC.,**KUNIGAL****Present:****Sri.Manjunath Shivapooji**, B.A., L.L.B.,

Addl. Civil Judge & JMFC., Kunigal.

Dated: 14th Day of August, 2025**O.S.NO. 716/2023****Plaintiff** : Nagamma

V/s

Defendant : Manchegowda**ORDERS ON APPLICATION FILED BY THE DEFENDANT**
UNDER ORDER XXVI RULE 9 OF CPC

The defendant has filed application under order XXVI Rule 9 of CPC, for appoint any competent persons or surveyors attached to Taluk office as a court commissioner to visit the spot in old Sy.No.23/2, new Sy.No.23/2B11 and also Sy.No.23/3 and find out whether any road is existed towards Northern edge of the suit schedule property.

2. On the other hand, the plaintiff has filed objections to the application by denying the contention of defendant. The plaintiff in her objections has stated that, the defendant has filed this application when the matter posted for hearing on IA No.1 at belated stage. Hence, the application is not maintainable. The plaintiff is able to establish her title and her contention with respect to suit property as such the question of appointing commissioner as to find out, whether any road is existed at the Northern side of suit property does not arise. The scope of suit is only to see and to adjudicate by appreciating the pleadings, evidence placed on record in the case. What is not pleaded before the court or what is not urged before this court cannot be permissible to be urged by way of appointing commissioner. As such, the application filed by the defendant is unsustainable in law and liable to be dismissed.

3. Heard arguments.

4. In light of the above contentions, the infra points that would arise for my consideration.

1. Whether the defendant has made out a case to appoint a court commissioner as prayed in the application?

2. What order?

5. My findings on the above points are as under:

Point No.1: In the *Affirmative*

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

REASONS

6. **Point No.1** : This is a suit for the relief of permanent injunction against the defendant. In this case, the defendant has filed U/o 26 rule 9 of CPC to appoint any person as a court commissioner to visit the spot and find out whether a road is existed at the Northern side of two property or not.

7. The defendant argued that now it is just and necessary to appoint court commissioner to elucidating the subject matter in dispute as to determined whether he has encroached any portion of plaintiff property and whether there is a road is existed at the Northern side of suit property. The defendant has vehemently relied on decision of our Hon'ble High Court of Karnataka in 2021(5 KCCR SN 146).

8. Now the question arised before this court is “ Whether court commissioner can be appointed in a suit for relief of encroachment, mandatory injunction and permanent injunction”. The plaintiffs have filed several documents as to support of their contention.

9. It is pertaining to note that, our Hon'ble High Court of Karnataka in 2023 ICC 57(Kar). In the said decision Hon'ble High Court, it clarified as to in what cases court commissioner can be appointed and in which stage court commissioner can be appointed and for what purpose court commissioner can be

appointed.

10. The Hon'ble High Court has held that, the appointment of a commissioner for local inspection, or scientific /forensic investigation/expert's opinion is indeed to secure the evidence and the same is not only permissible but also desirable in certain cases. The report, given the intrinsic complexities of matter in a case, may go a long way in arriving at a just decision or assisting the court to appreciate the other evidence on record or fact situation in a proper perspective. If the report of the Commissioner is nothing to do with the subject matter in dispute, then there cannot be an order appointing the commissioner. Order appointing a commissioner can be made only if the commissioner's report become a relevant piece of evidence. That being the position, the contention that the appointment of court commissioner amounts to collection of evidence has no merit.

11. Further, the Hon'ble High Court has clarified that, at what stage of the proceedings in a suit, the application can lie? As could be easily noticed from the provision, the provision is not 'stage' centric. Thus, the provision can be invoked either before the commencement of the trial or after. If the application is filed before the commencement of the trial, the court having regard to the pleadings and records may allow such application before the commencement of the trial.

12. The discretion, though lies with the court, as to appoint the commissioner before the trial or after the trial, the decision must be taken with due regard to the possibility of reducing or eliminating the need to record the oral evidence of witnesses to prove an issue which could be effectively decided with the aid of the report. More often than not, in disputes relating to the existence of pathway, stream, pond, well or disputes relating to the boundary between adjoining holders, encroachment, easement of air and light, construction of

building in violation of setback rules, or relating to the authenticity of a document, signature/thumb impression to name a few by way of illustration, a report secured before the trial may cut short the trial in as much as the party relying upon the report may not examine multiple witnesses to prove the matters covered by the report. The party may simply rest his case based on his evidence and the report.

13. The next question is whether the court commissioner for local inspection can be appointed in a suit for an injunction. The answer to the question referred to above, lies in the reframing question and the question would be whether the power of the court to appoint the commissioner is controlled by the form of the suit. The answer is a big no. The language of the provision is clear. It does not impose any such restrictions based on the form of the suit. The guiding factor is 'whether the report is necessary for elucidating matters in dispute. It can be any kind of suit. Be it suit for injunction,

mandatory injunction, declaration and injunction, possession, partition, specific performance, or any suit for that matter.

14. On the basis of direction given by Hon'ble High Court and on careful perusal of provision Order 26 Rule 9 of CPC, this court comes to the conclusion that, considering the controversy involved in this case, this court is inclined to appoint court commissioner as to visit the spot and to determine whether any portion of suit property is encroached or not?. If the court commissioner is appointed no harm would be cause to defendant. Moreover, in this case the evidence of plaintiffs and defendant already completed. The plaintiff has filed this application, when the matter is posted for arguments on merits. If the court is appointed court commissioner and if commissioner submit his report then it may cut shot the elucidated the dispute.

15. In view of the above decisions, if present case is discussed, it is clear that the crux of issue is with respect to

alleged encroachment of suit schedule property. On perusal of the application, it is clear that the proposed appointment of the Court Commissioner is not for the purpose of collection of evidence as to the possession, but with determine encroachment of suit schedule property. In view of the above, in order to curtail the duration of litigation, this court of the opinion that the application deserves to be allowed. Hence, point No.1 in ***Affirmative.***

16. Point No.2: For the above discussed reasons, this court proceeds to pass the following:

ORDER

The application filed by the defendant under Order XXVI rule 9 of CPC is hereby allowed.

The PWD Engineer is hereby appointed as Court Commissioner to visit the spot and find out whether road

is existed at the Northern side of suit
property.

The Commissioner fee is fixed at
3,000/-.

Await commissioner report by
23.10.2025.

[Dictated to the stenographer directly on computer and then corrected by me and
thereafter pronounced in the open court on this the *14th day of August, 2025*]

Sd/-

[Manjunath Shivapooji]
Addl. Civil Judge and JMFC.,
Kunigal.