

IN THE COURT OF THE ADDL.CIVIL JUDGE AND**JMFC., Sira****KUM. SHARMILA E.J., B.A LL.B., LL.M.,****Addl. Civil Judge & JMFC., Sira.****Dated this the 1st day of April 2026****F.D.P.No.8/2022**

Petitioner : Smt.Rathnamma
(By Sri.P.B.S.B., Advocate)

-V/S-

Respondents : Sri.Raghavendra and another
(R.1 by Sri.R.B.R., Advocate)
(R.2 by Sri.H.B.V., Advocate)

PARTIES TO THE I.A. NO.1**Applicant/s:** Smt.Rathnamma (Petitioner)**-V/S-****Opponent/s:** Sri.Raghavendra and another (Respondents)

i	<i>Provision under which the application is filed</i>	<i>Order XXVI Rule 10 R/w Sec.151 of CPC.</i>
ii	<i>Relief sought for</i>	<i>To appoint commissioner.</i>
iii	<i>The date on which the application is filed</i>	<i>31.07.2023</i>
iv	<i>Number of the application</i>	<i>IA.No.1</i>
v	<i>The date on which the objections are filed by different opponents</i>	<i>22.08.2023</i>
vi	<i>The date on which the orders were passed on the said application</i>	<i>01.04.2026</i>

**ORDER ON I.A. No.1 UNDER ORDER XXVI RULE 10 R/w SEC.151
OF CODE OF CIVIL PROCEDURE, 1908.**

The petitioner has filed the present application under Order XXVI Rule 10 read with Section 151 of the Code of Civil Procedure, seeking appointment of the Tahasildar, Sira Taluk, as Court Commissioner to effect partition of the petition schedule properties in terms of the Preliminary Decree passed in O.S.No.244/2017.

2. It is averred in the affidavit annexed to this application and in the petition that the petitioner had filed a suit for partition in O.S.No.244/2017, which came to be decreed, and a preliminary decree was drawn on 20.12.2021. It is further submitted that no stay order has been granted by the appellate court in the regular appeal filed by the respondent against the said judgment and decree of this Court. It is also stated that if the application is not allowed, the petitioner would be put to hardship and deprived of enjoying the fruits of the decree, whereas no prejudice would be caused to the respondent if the application is allowed. Hence, the petitioner has prayed for allowing the application.

3. Per contra, the respondent No.1 has filed objections to the said application contending that the application is not maintainable either in law or on facts and is liable to be dismissed in limine. It is contended that the respondent No.1 has already challenged the judgment and preliminary decree passed in O.S.No.244/2017 by filing R.A.No.05/2022 before the appellate court, which is still pending consideration. Hence, until the said appeal is disposed of,

the present application is premature and liable to be kept in abeyance. It is further contended that the appeal is a continuation of the original proceedings and the shares determined under the preliminary decree are under challenge. Therefore, no steps towards final decree proceedings can be taken at this stage, and the petitioner is not entitled to the relief sought and has prayed for dismissing the application.

4. Heard both the sides and perused the materials available on record.

5. Ongoing through the averments stated in the application accompanying the affidavit, the following points arise for the consideration of this Court:

POINTS

1. Whether the petitioner has made out sufficient and reasonable grounds to appoint the commissioner for effecting the partition?
2. What order?

6. The findings 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: On perusal of the records, it is not in dispute that the suit in O.S.No.244/2017 filed by the petitioner for partition came to be decreed and a preliminary decree was drawn on

20.12.2021 determining the shares of the parties. It is also not in dispute that the respondent No.1 has preferred an appeal in R.A.No.05/2022 against the said judgment and decree, which is pending before the appellate court. However, the material on record clearly discloses that no stay order has been granted by the appellate court against the operation of the judgment and preliminary decree passed by this Court. It is a well-settled principle of law that mere filing of an appeal does not operate as a stay of the decree unless specifically ordered by the appellate court. In the absence of any stay, the decree holder is entitled to seek enforcement and work out the decree in accordance with law. Further, the final decree proceedings are only a continuation of the original suit and are intended to give effect to the preliminary decree already passed. Therefore, initiation of steps for effecting partition by appointment of a Court Commissioner cannot be said to be either illegal or premature in the absence of any stay order. The contention of the respondent No.1 that the shares are under challenge in appeal and hence the present application is not maintainable cannot be accepted at this stage, as the preliminary decree continues to be valid and enforceable unless it is set aside or stayed by a competent court. On the other hand, if the application is not allowed, the petitioner would be deprived of enjoying the fruits of the decree. No prejudice would be caused to the respondent, as the proceedings would always be subject to the outcome of the pending appeal. Hence, this Court is of the considered opinion that the petitioner has made out sufficient and

reasonable grounds for appointment of a Court Commissioner for effecting partition of the suit schedule properties. Accordingly, this Court answers **Point No.1 in the Affirmative.**

8. Point No.2: For the reasons stated in the Point No.1 this Court proceeds to pass following:-

O R D E R

The I.A.No.1 filed by the petitioner under Order XXVI Rule 10 read with Section 151 of CPC is hereby allowed.

Accordingly, the Tahasildar, Sira Taluk, is appointed as Court Commissioner to effect partition of the suit schedule properties in terms of the preliminary decree dated 20.12.2021 passed in O.S. No. 244/2017, with the assistance of the jurisdictional Taluk Surveyor.

The commissioner fee is tentatively fixed for Rs.1,500/-.

For filing memo of instructions.

(Dictated to the Stenographer, directly computerized by him, then corrected, printout taken, signed by me and pronounced in the open court on this the **1st day of April 2026**).

Sd/-

(Sharmila E.J.)

Addl. Civil Judge & JMFC.,
Sira.