

KAUK210016322017



**IN THE COURT OF THE ADDL. CIVIL JUDGE, ANKOLA**

**PRESENT**

**Smt. Arpitha B Bellad.**

B.Com., LL.B.,

Addl., Civil Judge and J.M.F.C.,  
Ankola.

**ORIGINAL SUIT NO. 77/2017**

Dated this the 22nd day of June, 2024

**Plaintiffs:-**

1. Smt. Vathsalabai Rama Pavaskar,  
Aged about 86 years,  
O/c: Retired Teacher,

2. Smt. Radhabai Kom Shripada  
Pavuskar,  
Aged about 80 years,  
O/c: Agriculturist & Household,  
LRs: Chandrahasa S/o. Shripaada  
Pavuskar,  
Aged about 53 years,  
O/c: Agriculturist & Goldsmith,

3. Sri. Ramakrishna Vishwambara  
Pavaskar,  
Aged about 65 years,  
O/c: Agriculturist & ,

4. Sri. Panduranga Vishwambara  
Pavaskar,  
Aged about 62 years,

O/c: Agriculturist & Goldsmith ,

5. Sri. Divakara Vishwambara  
Pavaskar,  
Aged about 60 years,  
O/c: Agriculturist & Goldsmith ,  
R/o. Avarsa, Tq. Ankola.  
[By Sri. M.A.R., Advocate]

V/s

**Defendant:-**

1.Smt. Sudha Rohidas Bamavalikar,  
Legal heirs,  
1(a) Kishor Rohidas Banalikar,  
Aged about 28 years,  
O/c: Job,

1(b) Vinayak Rohidas Banalikar,  
Aged about 24 years,  
O/c: Household,  
All are Kavalgadde, Avarsa,  
Ankola Tq, U.K.

2. Smt. Seeta @ Geetha Kom  
Nagesh Naik. U.F.M.  
Aged about 60 years,  
O/c: Household,

3. Smt. Indira Kom Umesh Naik.  
Aged about 54 years,  
O/c: Agriculturist,

4. Sri. Anandu Umesh Naik.  
Aged about 30 years,  
O/c: Agriculturist,

5. Sri. Shivanand Umesh Naik.  
Aged about 26 years,

O/c: Agriculturist,

6. Sri. Seetaram Ananth Naik.

Aged about 56 years,

O/c: Agriculturist,

7. Sri. Maruti Ananth Naik.

Aged about 54 years,

O/c: Agriculturist,

8. Smt. Anitha Manjunath Naik.

Aged about 32 years,

O/c: Agriculturist,

9. Smt. Akkamma Been Ananth Naik.

Aged about 52 years,

O/c: Agriculturist,

10. Smt. Vasanthi Been Ananth Naik.

Aged about 42 years,

O/c: Agriculturist,

11. Smt. Rathnavati Been Ananth Naik.

Aged about 39 years,

O/c: Agriculturist,

[D-1,3 to 6, 8 to 10-Exparte]

[D-7 by M.P.B.]

[D-1(a) (b) (c)- absent]

i.	Provision under which the application is filed	O.XXVI. Rule 9 &
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		Section 151 of CPC
ii.	Relief sought for	Appointment of commissioner
iii.	The date on which the application is filed	13-03-2024
iv.	Number of the application	IA No.XV
v.	The date on which the objections are filed by Defendants	19-04-2024
vi.	The date on which the orders were passed on the said application	22-06-2024

**ORDERS ON IA NO. X**

This order arises out of an application filed on behalf of plaintiffs under Order XXVI Rule 9 R/w section 151 of CPC seeking to appoint survey commissioner for local inspection of suit schedule properties.

**2.** An affidavit sworn in by the plaintiff No.1 is accompanied with the said application wherein she stated that she has instituted a case seeking the relief of permanent injunction against defendants in respect of the house constructed by encroaching the item No.1 of the suit schedule property. Further stated that though the item No.2 of the suit property is also in the possession of plaintiffs but the defendants have trespassed into the said property. It is necessary to inspect the suit properties

and to identify the boundaries for effective adjudication of the case. Hence, prays to appoint the survey commissioner.

**3.** Per contra, objections came to be filed on behalf of the defendants refuting the said application. It is contended that both the parties have adduced evidence, the stage of evidence is closed and the case is posted for arguments, as such it is not necessary to inspect the properties. If the said application is allowed, then it amounts to collection of evidence. It is further stated that the work of fixing the boundaries by identifying it comes within the ambit of Karnataka Land Revenue Act and a separate department is there for the said purpose to take appropriate action, hence the question of identifying the boundaries at this stage does not arise. The burden is on the plaintiffs to prove their case and the court has no authority to appoint the commissioner for fixing the boundaries. The said application is filed only to prolong the proceedings and to harass the defendants. On all these grounds, prays to dismiss the said application.

**4.** Heard both the sides in detail.

**5.** Perused the materials on record. The points which arises for my consideration are -

**1. Whether the application for appointment of the commissioner deserves to be allowed ?**

## **2. What Order?**

**6.** My findings to the above points are as follows -

**Point No.1: In the Affirmative**

**Point No.2 : As per the following order**

### **REASONS**

**7. Point No.1** : The present suit is filed by the plaintiffs against the defendants seeking the relief of the Permanent Injunction restraining defendant No.1 and other defendants from encroaching the suit lands by illegally trespassing into the suit lands. After framing of issues, both the parties have adduced evidence and the case is posted for arguments. At this stage, plaintiffs have sought for appointment of survey commissioner for local inspection to identify and to fix the survey boundaries of the suit properties. Plaintiffs have filed the instant application mainly on the ground of encroachment committed by the defendant in item No.1 of the suit property.

**8.** The plaintiffs have filed a suit in respect of two properties bearing Sy.No.310/2 measuring 0-23-08 and Sy.No. 316/2 measuring 0-2-8. The averments of the pleadings reveal that item No.1 of the suit land is belonging to the ownership of the plaintiffs and they are also in long, continuous and peaceful possession of item No.2 of the suit property belonging to to the ownership of defendants which is situated adjoining the boundary of the plaintiffs property towards southern side and plaintiffs are in possession of the same from prior to 1965 but it came to their

knowledge that defendants No.6 to 7 have sold out the item No.2 and item No.1 measuring to an extent of 0-01-00 belonging to the ownership of the plaintiffs to defendant No.1 and further alleged that defendant No.1 has encroached an area to an extent of 0-01-08 in Sy.No.310/2 which is belonging to the plaintiffs by claiming to construct the house in a purchased area of 0-03-08. Hence, through the instant application, he has sought for identification of boundaries.

9. Before going further, it is necessary to throw a light on the relevant provision in respect of appoint of commissioner which is extracted hereunder -

**Order XXVI Rule 9 provides for Commissions to make local investigations:** In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court:

Provided that, where the state Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. Under the said provision, the Court has the discretion to order local investigation and the object of the local investigation is not so much to collect evidence which can be taken in Court but

to obtain evidence which from its peculiar nature can only be had on the spot. The cases of the boundary dispute and disputes about the identity of lands are instances, when a court should order a local investigation under Order 26 Rule 9 of the CPC. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the area encroached upon.

**11.** Reverting back to the present case on hand, there is absolutely no dispute so far as Sy.No.310/2 is concerned. It is an undisputed fact that the said property is belonging to the ownership of the plaintiffs. But so far as item No.2 property bearing Sy.No.316/2 is concerned, both the plaintiff and defendant claims to be in possession of the same. The issue of possession has to be proved independently by the party who asserts his lawful possession by adducing oral and documentary evidence and it is well settled law that commissioner cannot be appointed to ascertain as to who is in possession which amounts to collection of evidence. But as already stated above, if there is a dispute regarding boundaries and encroachment, it is better to get the lands surveyed by the experts in order to ascertain an encroachment.

**12.** Whenever there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by another party, the facts have to be physically verified, because, the

recitals of the documents may not reveal the true facts and measuring of land on the spot by a commissioner may become necessary. There is no absolute bar on appointment of commissioner in a suit for injunction as per the law laid down nor the provisions of section 75 and Order XXVI Rule 9 do impose such a prohibition. Thereby the statute permits in that context collection of required evidence in that behalf by way of visiting the property demarcating it and localizing it and also just noting the physical feature there on subject to the limitations enumerated in the order. So the court shall fully utilize this provision when the implementation of it is needed for proper disposal of the proceedings before it. Prevention of collection of such evidence is definitely against the purport of this statutory provision which thereby cannot be permitted. When a person got a right to make use of certain provision of law for proper adjudication of a matter in controversy, accordingly he is to be permitted to avail that provision otherwise that becomes redundant.

**13.** The Hon'ble High Court of Karnataka in its decision passed in W.P.No. 201274/2022 reported in 2023 Live Law (Kar) 57, has observed clearly as to in which cases it is desirable to make an order for appointment of commissioner and also framed guidelines to be followed in this regard. It is held in the said judgment that if one party alleges encroachment by another and another party denies such allegation, the Commissioner can be appointed to ascertain whether there is encroachment or not. In such a situation, the Commissioner is appointed to findout the

nature of possession. The report based on local inspection will be a handy tool to decide the case relating to encroachment.

**14.** In the present case also, on going through the plaint contents, it reveals that plaintiffs have alleged that defendant No.1 has encroached an area to an extent of 0-01-08 which is belonging to the plaintiffs by claiming to construct his house which has been denied by the defendant, as such in order to determine whether there is any encroachment by the defendant No.1 in item No.1 of the suit property of plaintiffs, it is just and proper to appoint a commissioner and also both the parties have already led their evidence and the case is posted for arguments. It is also no more res integra that commissioner can be appointed at any stage of the suit even before the commencement of the trial or after the conclusion of the trial.

**15.** During the arguments, the Counsel for the defendants argued that the suit is filed only for bare injunction and the plaintiffs have not sought for mandatory injunction to recover an encroached portion, as such the said application is not maintainable. It is no doubt true that the plaintiffs have not sought for the relief of recovery of encroached area but the same is the matter of main arguments and the same will be considered while determining the case but the merits of the case cannot be looked into while deciding the said application when there is an allegation of encroachment in the pleadings. Also the

commissioner report assists the Court in determining the case effectively.

**16.** Therefore, in the present case on hand, after going through the pleadings, documents placed on record and after hearing the submissions made by the respective counsels for the plaintiffs and defendants, an order for appointing a commissioner is necessary to measure the suit properties and to identify the boundaries only in order to ascertain any encroachment on the part of the defendant in item No.1 of the suit property.

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

**ORDER**

**The IA No.XV filed by the Plaintiffs under Order XXVI Rule 9 R/w section 151 of CPC is hereby allowed.**

**Taluka surveyor is hereby appointed as Court Commissioner for local investigation of the suit properties, to measure the suit land and to identify and fix the boundaries and also to note down whether there is any encroachment on the part of the**

**defendants in Sy. No.310/2 measuring  
0-23-08 of Avarsa village of Ankola  
Taluk and to submit the report in this  
regard.**

(Prepared and typed by myself, then corrected by me and printed through stenographer, then pronounced in the open court on this the 22nd day of June- 2024)

**(Arpitha B Bellad)  
Addl. Civil Judge, Ankola.**

**(Order Pronounced by in the open court  
vide separate order)**

**ORDER**

**The IA No.XV filed by the  
Plaintiffs under Order XXVI Rule 9  
R/w section 151 of CPC is hereby  
allowed.**

**Taluka surveyor is hereby  
appointed as Court Commissioner  
for local investigation of the suit  
properties, to measure the suit  
land and to identify and fix the  
boundaries and also to note down  
whether there is any encroachment  
on the part of the defendants in  
Sy. No.310/2 measuring 0-23-08 of  
Avarsa village of Ankola Taluk and  
to submit the report in this regard.**

**Addl. Civil Judge, Ankola.**

