

**ORDER ON I.A.NO.IV FILED U/ORDER XXVI RULE
9 OF THE C.P.C. FILED BY THE DEFENDANT**

The Plaintiff filed the suit for relief of injunction against the Defendant.

2. The nutshell of the Plaintiff's suit are that:

The Plaintiff and Defendant are brothers. On 12/07/2000 there was registered partition in their family and the suit 'A' scheduled property was allotted to the share of the Plaintiff along with the buildings etc. The 'B' schedule property is the part of 'A' schedule property. The Plaintiff has been in peaceful possession and enjoyment of the same. The Defendant has no right over the same. On 30.01.2021, the Defendant without the knowledge of the Plaintiff, he started to demolish the buildings touching 'B' Schedule property. The Plaintiff resisted the illegal act of the Defendant. The Defendant has not obtained any permission from the Municipality to demolish the same. In spite of valid objections the Defendant went ahead and demolished the buildings on 30th January and 31st January. On 1st February the Defendant did not continue to demolish. On 02/02/2021 the Plaintiff informed Bhatkal Police with regard to the illegal movements and attempts of the Defendant. Hence Plaintiff filed this suit praying before this Court to

restrain the Defendant from entering upon the suit 'A' schedule property and interfering with the Plaintiff's lawful possession and enjoyment and from causing damages, loss to the 'B' schedule property and premises situated in suit 'A' schedule property . The act of the Defendant is illegal. Hence he filed this suit.

3. The Defendant appeared before this Court and filed his written statement. The Defendant admitted the relationship and also the ownership of suit 'A' schedule property. The Defendant submitted that he is the owner of 2 guntas of land in Sy.No.623 Hissa 3 of Sosagadi village of Bhatkal Taluka i.e., adjacent to the land bearing Sy.No.623 Hissa 5 measuring 2 guntas of land in Sosagadi village of Bhatkal Taluka. He further submitted that there exist buildings in both the survey numbers. He denied that demolishing a building in the Defendant's property would endanger the Plaintiff's suit 'B' schedule property. He further submitted that the Defendant is in possession of the portion of the land allotted to his share. Said building is not fit for residence or running shops. Hence, the Defendant has obtained permission from TMC Bhatkal. But the TMC Bhatkal has not granted permission to demolish the same till January 2021. As on 29.01.2021, the statutory period for granting or

refusing the permission was lapsed the Defendant demolished some portion of the said building without damaging Plaintiff's building. After demolishing a major portion of the Defendant's property the Plaintiff started to disturb. The Defendant has worked only upon his 2 Guntas of land without damaging the Plaintiff's building. He has not encroached any portion of the Plaintiff's building nor caused any damage to the Plaintiff's building. Thereby he prayed to dismiss the suit.

4. The Defendant filed this application praying before this Court that to appoint a Taluka Surveyor, Bhatkal as a Court Commissioner to visit the suit land and the land of the Defendant and remaining Hissa 1, 2 and 4 of the suit survey number, in order to ascertain the actual boundary between the Plaintiff's and Defendant's property.

5. He submits that the Plaintiff has started to disturb the Defendant after a major portion of the Defendant's building was demolished. The Defendant had not encroached any portion of the Plaintiff's building nor caused any damage to his building. The Plaintiff filed an application seeking Advocate

Commissioner and the Advocate Commissioner can not assist the Court nor the parties to solve the dispute. If the Plaintiff have any doubt about encroachment, this application would suffice the circumstances. In case if all the hissa of Sy.No.623 is measured, this Court can decide the dispute. Hence he prayed to allow the application.

6. The Plaintiff filed objections to the application of the Defendant. The Plaintiff objected that the application is prematured and the stage is premature stage. The purpose for which the prayer sought is for collection of evidence. There would be no purpose served. There is no ground made out in the application. The alleged grounds are all false and are not sufficient to appoint the Court Commissioner. The facts is issue does not warrant for appointment of the Court Commissioner. The suit is for bare injunction. Hence he prayed to dismiss the application with cost.

The Counsel for Defendant relied on following citations.

1. ILR 2001 KAR 5013
2. 2015(5)KCCR 1575
3. 2021(2) KCCR 1741
4. KCCR 2015(5) PAGE 1477

5. 2023(1) KCCR 637

7. The Counsel for Plaintiff relied on following citations.

1. ILR 2022 KAR 35999

2. 1996(5) KARLJ583

8. On perusal of the materials placed on record, following points arise for my consideration;

Point No.1 : Whether the Defendant has made out grounds to appoint a Court Commissioner to survey the suit survey number, Defendant's land and remaining Hissa No.1, 2 and 4 of suit survey number by appointing a Taluka Surveyor ?

Point No.2 : What Order ?

9. My findings on the above points are as follows;

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

Point No.2 : **As per final Order,
for the following:-**

REASONS

10. **Point No.1** : The Plaintiff's filed the suit for the relief of injunction against the Defendant. The Plaintiff submits that, the Plaintiff and Defendant are brothers. The Plaintiff is the owner of the suit schedule properties. The Defendant is illegally and highhandedly

demolished his buildings which are touching suit 'B' schedule buildings, which would cause loss and damaged to the Plaintiff's property. Thereby, the Plaintiff filed this suit.

11. The Defendant appeared before this court and denied the Plaintiff's averments and submitted that, this Defendant is in possession of those buildings which were allotted to his share. The Plaintiff without any base has filed this suit, to encroach the portion of the Defendant's land. There is no any scope of encroachment or damage to the suit 'B' schedule property. The Defendant has demolished some portion of his old building without causing damage to the Plaintiff's property. This Defendant has filed complaint before the police. This Defendant has done his work only within his 2 guntas of land without causing any damage or loss to the Plaintiff's building. The Plaintiff has filed this suit in order to claim right over the Defendant's land. Hence, the Defendant prayed to dismiss the suit.

12. Heard both the sides. The learned counsel for the Defendant relied upon following judgments.

1) ILR 2001 Kar 5013: The Hon'ble High Court of Karnataka has held that, in a suit for injunction when parties alleges encroachment of property and correct extent and boundaries of

the property are in dispute then, it is just and necessary to conduct a Survey to identify the boundaries of the properties. In such circumstances, appointment of commissioner would suffice the circumstances of the suit.

2) 2015(5) KCCR 1575: Application seeking appointment of local inspection to find out encroachment can be allowed to reach a correct conclusion.

3) 2021(2) KCCR 1741: In a suit for injunction there exist a dispute with regard to location, identification and measurement of the property and such dispute is raised in the written statement, then the Defendant can assile commissioner's report to solve the issue.

4) 2015(5) KCCR 1477: In a suit for declaration, dispute with regard to the boundaries and if the situation is that , evidence can only be secured through the court commissioner, there will be no prejudice in appointing commission.

5) 2023(1) KCCR 637: The Hon'ble High Court has discussed the general principles for appointment of the Court commissioner , and when and at what stage not appointment of the court commissioner can be done. When the appointment of the commissioner in a suit for injunction would lead to collection of evidence and also certain guidelines with regard to appointment of the commissioner.

13. The learned counsel for the Plaintiff relied upon a following judgments:

1) ILR 2002 Kar 3599 : The purpose of elucidating certain details which in its opinion can neither be had from the records nor can be produced by the parties by way of oral and documentary evidence and such evidence can be collected only by appointing a court commissioner to resolve the dispute effectively shall be the point to allow the application.

2) 1996(5) kar.LJ 583: Where the possession and the measurement of the property is admitted then the appointment of the court commissioners is not necessary.

14. On perusal of the entire materials, the Plaintiff's suit is not with respect to encroachment of his suit schedule property. There is an admission by either party with regard to their possession and ownership. The prayer sought by the Defendant in the application is with respect to identity of such encroachment and boundaries. However, it is the burden of the Plaintiff to show that, the boundaries shown in the suit does not create any dispute. However the Defendant has not denied or stated anything contrary to the boundaries shown in the plaint, and in such circumstances, the prayer of the Defendant to Survey the entire survey number including other Hissas would cause raise to multiplicity of proceedings.

15. The learned counsel for the Plaintiff submitted that, the Defendant had approached the Survey department of Bhatkal Taluk and filed an application seeking for an Haddu-bastu Survey and when this Plaintiff informed with regard to the temporary injunction order of this suit , the Defendant has come up with this application. Both the parties admitted that, the entire Survey number was of 00-10-00

guntas and it has been bifurcated into 5 Hissa's equally. Further, they admitted that, the Plaintiff has filed an application U/O 26 Rule 9 of the C.P.C., at the time of filling of the suit and the same is still pending. Thereby, the learned counsel for the Defendant argued that, the Plaintiff has consent to appoint a court commissioner for local investigation. Whereas, the counsel for the Plaintiff submitted that, said application was filed praying before this court to appoint an advocate commissioner and there is no nexus between that application and this application. The citation relied by the counsel for the Defendant is applicable when the parties have dispute with regard to boundaries and encroachment. The stage of the suit is irrelevant. Thereby, it is understandable that there is no such issue which cannot be effectively adjudicated without such evidence at this movement.

16. On perusal of the entire materials available on record, the prayer made by the Defendant in this application may not lead in collection of evidence. But, such prayer would lead to multiplicity of proceedings. It is further noticed that the Defendants have an opportunity of approaching concerned authority to suffice the prayer in the application. Thereby, **I answer above Point No.1 Negatively.**

17. Point No.2 : In view of answering above point, I proceed to pass following;

ORDER

The application filed by the Defendant U/Order XXVI Rule 9 of CPC is dismissed.

No order as to cost.

(Dictated to the Stenographer, transcribed by her, corrected and then pronounced by me in the open Court on this **17th day of November 2023.**)

Sd/-

Addl. Civil Judge and
J.M.F.C. Bhatkal.

Call on for Issues by 27/11/2023.

Sd/-

Addl. Civil Judge and
J.M.F.C. Bhatkal.

