

KAUK620010162020



**IN THE COURT OF PRINCIPAL C.J & J.M.F.C  
AT: HONNAVAR**

**Present: Sri. Chandrashekhar Banakar.,  
B.A., LL.B., LL.M.,  
Pri. Civil Judge & JMFC Honnavar  
Dated this the 18<sup>th</sup> day of December, 2023  
O.S. No.47/2020**

**Plaintiff: Sri. Mahesh Shivaram Shet,**  
Age: 40 years, Occ: Agriculture,  
R/o. Gersoppa Pete, Honnavar,  
Tq: Honnavar, U.K.,

**//Vs//**

**Defendants:**

- 01. Sri. Nagappa Manjunath Raikar**  
Age: 33 years, Occ:Agriculture,  
R/o. Gersoppa Pete, Tq: Honnavar,  
U.K.,
- 02. Sri. Ganapa Manjunath Raikar,**  
Age: 28 years, Occ:Agriculture,  
R/o.Gersoppa pete, Tq: Honnavar,  
U.K.,
- 03. Smt. Rajeshwari W/o Manjunath  
Raykar,**  
Age: 65 years, Occ:Household,  
R/o.Gersoppa pete, Tq: Honnavar,  
U.K.,
- 04. Panchayat Development Officer,**  
Nagarabastikeri, Village Panchayat,  
R/o.Gersoppa pete, Tq: Honnavar,  
U.K.,

**Parties to I.A. No. V:**

**Applicant/plaintiff:**

**Sri. Mahesh Shivaram Shet,**  
Age: 40 years, Occ: Agriculture,  
R/o. Gersoppa Pete, Honnavar,

Tq: Honnavar, U.K.,

**(By Advocate Sri. M.L.N).**

**//Vs//**

**Opponents/defendants:**

**01. Sri. Nagappa Manjunath Raykar**

Age: 33 years, Occ:Agriculture,  
R/o. Gersoppa Pete, Tq: Honnavar,  
U.K.,

**02. Sri. Ganapa Manjunath Raykar,**

Age: 28 years, Occ:Agriculture,  
R/o.Gersoppa pete, Tq: Honnavar,  
U.K.,

**03. Smt. Rajeswari W/o Manjunath  
Raykar,**

Age: 65 years, Occ:Household,  
R/o.Gersoppa pete, Tq: Honnavar,  
U.K.,

**04. Panchayat Development Officer,**

Nagarabastikeri, Village Panchayat,  
R/o.Gersoppa pete, Tq: Honnavar,  
U.K.,

**(By D-1 to 3 VRN & D-4 KRN  
Advocates)**

**ORDERS ON I.A. NO. V**

The applicant/plaintiff has filed an application under Order XXVI Rule 9 of CPC seeking for the appointment the ADLR as Court Commissioner to visit the schedule property to perform works mentioned in the application. The present application is filed when the case is posted for hearing on I.A.No.4.

2. The plaintiff has sworn to an affidavit annexed to the application and contended that he has filed this suit seeking for the relief of permanent injunction and mandatory injunction against the defendants. The defendant Nos. 1 to 3 have filed the caveat and started to

construct building without leaving set back. Even they have not obtaining any license from the Grama Panchayat. The defendant No.1 had taken several contentions in I.A.No. III. This suit is filed based on the contention that the defendant Nos. 1 to 3 have constructed building illegally without leaving set back. It is not possible to the plaintiff to prove these aspects by way of evidence. In order to know the exact picture and nature of the suit schedule property, appointment of Court commissioner is very much necessary. Hence, he filed this application.

3. The defendant Nos. 1 to 3 have filed their objections and contended that this application is not maintainable. Further they have contended that these defendants have constructed the building as per the terms stated by the Nyaya Samithi, Grama Panchayat, Nagarabasti village. Hence, the application is not maintainable. Hence, they prayed to dismiss the application.

4. I have heard the learned advocate for the plaintiff and the learned advocate for the defendant Nos. 1 to 3 and I have perused the records.

5. The point that arises for my consideration:

1. Whether the applicant made out sufficient grounds for appointment of Commissioner to visit the suit schedule property as sought for?

2. What order?

6. My answer 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:-** The plaintiff has instituted the suit against the defendants for the relief of permanent injunction and mandatory injunction.

8. Under this application, the plaintiff is seeking for the appointment of ADLR as Court commissioner to visit the suit schedule property and to record the circumstance existing over the suit schedule property.

9. In Anil Kamalakar Shirodkar vs Dudhappa Santu Patil, reported in ILR 2001 Kar 5013, the Hon'ble High Court of Karnataka has held as follows,

**"2. After hearing the Counsel for the petitioner, I find no merit in the revision to interfere with the order in question which is a discretionary order passed by on the basis of material available before the Trial Court. In a suit for injunction, when there is contest between the parties regarding the encroachment of the property or otherwise and when the correct extent and boundaries of the property are in dispute, it is just and necessary that a survey has to be conducted and the boundaries of the properties have to be identified. In such a situation, the appointment of a Commissioner should not be mistaken as appointment of Commission for collecting evidence for a party to the suit. In the present suit, the parties are neighbours and attempts of trespass and encroachments is being alleged, in that context the appointment of Commission does not appear to be illegal.**

**3. The Counsel for petitioner brought to my notice the rulling of this Court in *Puttappa v. Ramappa* [ ILR 1996 1443.] . After carefully going through the facts and ratio**

**laid down, I am of the view that the ratio has no application to the facts of the case. Unlike in the cited case the appointment of Commissioner is not sought to enquire into the question of possession. On the other hand, the Commission is appointed to demarcate the boundaries and to demarcate the actual extent of the properties in question. In that view of the matter, the appointment of the Commission for measurement of the property and to demarcate the boundaries and correct extent of the properties as per the claims made by the parties would be fully justified. However, the Commissioner cannot go into the question as to who is in possession of the property. Accordingly, the Revision is dismissed."**

10. In Annappa Mestha Vs Mutayya Achari reported in ILR 2002 Kar 3599, wherein the Hon'ble High Court of Karnataka has held that,

**"8. The need to have resort to Order 26, Rule 9 ought to be felt by the Court for purpose of elucidating certain details which, in its opinion, can neither be had from the records and nor can be produced by the parties by way of oral and documentary evidence. The details so required by the Court ought to be such that in their absence determination of issues in dispute cannot be effectively adjudicated upon necessitating the appointment of Commissioner on its own or at the instance of either of the parties. Where the Court is of the opinion that the matters in dispute could be effectively adjudicated upon by having resort to the evidence available on record, the Court at its discretion can refuse to direct appointment of Commissioner. In the case on hand the Court-below on more than one occasion referred to the sufficiency of evidence on record for**

**deciding the rival claims of the parties. When the Court itself is of the view that elucidation of any matter is not required for purpose of deciding the case, the order passed by it rejecting the I.A. XI filed for appointment of Commissioner cannot be found fault with. In the view that I have taken, I find that the Court below has not exercised its jurisdiction illegally or with material irregularity calling for interference at the hands of this Court.”**

11. I have perused the above decisions. As held by the Hon'ble High Court of Karnataka, where the dispute is with regard to the boundaries, appointment of Court commissioner is necessary and the appointment of a Commissioner should not be mistaken as appointment of Commission for collecting evidence for a party to the suit. Further it is clear that when there are pleadings and documents in the suit, there is absolutely no scope for the Court to allow the commission application. In this case, to check whether the set back is left or not and to know the exact situation exists over the suit schedule property, the appointment of Court commissioner is very much necessary. Without the assistance of the report of the Court commissioner, this Court cannot presume about the existence of the situation as alleged and contended by the plaintiff. Therefore, for the above said reasons the plaintiff has made out grounds to allow the application. Hence, I answered point No. 1 in the **affirmative**.

12. **Point No.2:-** In view of findings on point No. 1, I proceed to pass the following:

**ORDER**

I.A. No. VI filed by the applicant/plaintiff under Order XXVI Rule 9 of CPC is hereby allowed.

ADLR, Honnavar is hereby appointed as Court commissioner.

Rs.2,000/- is hereby fixed as Commissioner fee.

Plaintiff is hereby directed to deposit the commissioner fee and the plaintiff and defendants are directed to file memo of instructions.

Office is hereby directed to issue commissioner warrant after fixed fee deposited by the plaintiff.

Await Commissioner report

Call on 15/02/2024.

(Typed by me in my laptop, corrected and signed by me and then pronounced in the open Court on this 18<sup>th</sup> day of December, 2023).

**Principal Civil Judge & J.M.F.C.  
Honnavar.**