

ORDER ON I.A. NO. III

The learned counsel for the applicant/plaintiff has filed IA No. III under Order XXVI Rule 9 and Sec. 151 of C.P.C. along with affidavit of plaintiff praying to appoint an advocate as a

commissioner along with survey assistance to note and report the points as mentioned in the application.

2. The plaintiff in his affidavit stated that an application for survey measurement to plot the plaint 'A' schedule property on 04-07-2024. However the defendants do not allow the surveyor to measure the property. Hence measurement may be done only through process of court. To note and report the encroachment made by the defendant it is very much necessary to appoint an advocate commissioner along with survey assistance, so that the plaint 'A' schedule property may be measured with reference to the title deeds and encroached portion of the plaint 'A' schedule property may be demarcated. Hence, prayed to allow the application.

3. Per contra, the counsel for the defendants have filed the objection to the IA No.III stating that the defendants are in actual possession and enjoyment of the land in Survey No.574/2P17 exclusively belong to them and they have never obstructed or encroached the plaint 'A' schedule property in any manner. The boundary lines of the Survey No.574B/1 is clear and the northern side of the compound wall was built by the 1st defendant during the allotment of the property by the government. Hence prayed to dismiss the application.

4. Heard arguments. On perusal of the application and objections and materials placed on record following points arise for this court consideration:

1. Whether the plaintiff has made out grounds for appointing court commissioner to elucidate matter in dispute?

2. What order?

5. This court answers the above points as under:

Point No.1: In the Affirmative.

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

REASONS

6. **Point No.1:** The suit is one for Mandatory injunction directing the defendants to remove the unauthorized construction such as laterite stone compound wall put up by defendants on northern side by encroaching 0.02 acres of land specified in the plaint 'A' schedule property and to surrender vacant possession of the encroached portion of the suit property and put plaintiff in to actual possession of the same.

7. At this juncture it is necessary to interpret order XXVI RULE 9 OF C.P.C., where it clearly indicates that, whenever the court deems a local investigation to be proper for the purpose of elucidating any matter in dispute then it may issue a commission to

such person as it thinks fit directing him to make such investigation and to report thereon to the court.

8. The counsel for plaintiff in his favour has relied on decision of the Hon'ble High Court of Karnataka in the case of Sri. Shadaksharappa Vs/- Kumari Vijayalaxmi and others, reported in W.P. No. 201274/2022(GM-CPC), honorable court has held that: "The expression '*Court deems a local investigation to be requisite*' appearing in the provision makes it apparent that the discretion lies with the court whether to appoint a court commissioner or not".

" 12.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 situation the commissioner is appointed to find out the nature of possession ". " In the case on hand, the petitioner to prove his assertion of encroachment, instead of leading oral evidence of witnesses has applied for local inspection, and the same is not only permissible but also desirable".

" 18. The burden of proving the alleged encroachment is on the plaintiff. Instead of voluminous oral evidence, if the petitioner seeks to prove his contention relating to encroachment through the report of the commissioner, the prayer for local inspection should be willingly granted unless there are justifiable reasons for the court to take a view that the local inspection is a futile exercise".

9. In the instant case the matter in dispute is to elucidate whether the defendant has illegally constructed laterite stone compound wall encroaching of 0.02 acres of land in the northern side of plaint 'A' schedule property. Therefore, this court considers it is necessary to appoint court commissioner along with the surveyor of Tahsildar Karkala in order to ascertain the matter in dispute. If the present application is allowed then the defendant will not face any hardship. By commission report it will ascertain whether there is existence of alleged encroachment or not in order to meet the ends of justice. Therefore, for the aforesaid reason, this court answer Point No.1 in the '**Affirmative**'.

10. **Point No.2:** In view of discussion and the findings arrived at Point No.1, this court proceed to pass the following:

:: O R D E R ::

IA. No.III filed by the plaintiff under order XXVI Rule 9 and Section 151 of C.P.C. is allowed.

The court commissioner is appointed to note and report the points as sought in the application.

Issue intimation to the ADLR, Karkala to depute any one of the surveyor to assist the advocate commissioner. Office is

hereby directed to intimate to ADLR with regard to this order.

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

Both the parties are at liberty to file the memo of instruction at the time of spot inspection.

The parties are hereby directed to suggest the name of the court commissioner.

Call on: 30.07.2025.

Addl. Civil Judge & J.M.F.C.,
Karkala.