

ORDERS ON I.A No.20

The counsel for L.Rs of plaintiff has filed the present application under Order XXVI Rule 9 r/w Section 151 of CPC to appoint a surveyor as court commissioner for local inspection of the suit schedule property for proper adjudication of the same for the reasons assigned in the accompanying affidavit stating that, father of plaintiff No.1(b) has purchased the suit schedule properties under a registered sale deed dated 29/07/2004 and 29/07/2004 respectively. Further it is averred that originally the entire land bearing Sy.No. 48 measuring 2 acre 17 guntas was granted to one Mallige Papaiah during his life time and he had formed layout and also sold the same in favour of prospective purchasers. The father of plaintiff No.1(b) purchased site No.1 and 1A under registered sale deed from Mallige Papaiah, but the 1st defendant claims to have purchased the written statement schedule property from one Smt. Sunandamma D/o Mallige Papaiah. Further in order to substantiate their contention the

plaintiffs have produced Ex.P.19 to 31 apart from the sale deeds, but during the cross-examination of D.W. 1 denied that Mallige Papaiah had formed a layout and has no right to sell the property contending that the said Sy.No. 48 remained as agricultural land and vendor had inherited the said property accordingly the 1st defendant claims to have purchased land measuring 6 ½ guntas which was subsequently converted and also claims to have possession of the land to that extent.

Further in view of the fact that Mallige Papaiah during his life time had formed a layout and sold to various persons but defendants claim it as an agricultural land and both the parties are claiming title under Mallige Papaiah in different forms, as such in view of divergent contentions of the parties it is just and necessary to appoint a commissioner for local inspection of the property in dispute. On these grounds prayed for allowing the application.

2. Per contra it is contended in the objections that, the deceased plaintiff had approached the court by filing frivolous and vexatious suit in respect of unidentifiable and non existing property on the strength of the alleged sale deeds dated 29/07/2004 to make wrongful gain, as such the suit itself is not maintainable and consequently the application is also not maintainable and liable to be dismissed with exemplary costs. Further contend that, the deceased plaintiff having dragged the matter on one pretext or the other at the stage of evidence and when the case was posted for final arguments during the life time of deceased plaintiff and subsequent dates again the L.Rs of

plaintiff have come up with present application. Further contend that application filed by the deceased plaintiff to implead one Sunandamma came to be dismissed and D.W. 1 has been fully cross-examined.

Further contend that when the matter was posted for arguments the L.Rs of plaintiff got filed several applications and thereafter P.W. 2 was also being fully cross-examined and case was posted for arguments on merits by dismissing I.A. No.16 to 19 in the year 2019 itself, but again the L.Rs of plaintiffs knowing fully well that they have no case on merits have come up with present frivolous and vexatious application at belated stage seeking appointment of commissioner for the purpose of local inspection of the property though there is existence of site No.1 or 1A in the said Sy.No. 48 referred supra. Further contend that the said Mallige Papaiah acquired the land under Land Reforms Act by the land tribunal with a condition as not to alienate for 15 years and died on 22/02/1996 without obtaining conversion order pertains to property, but the theory of selling the property by forming sites in favour of various persons including deceased plaintiff are all created and concocted story to make wrongful gain. On the contrary defendant No.2 being purchaser of 6.5 guntas with specific boundaries from the daughter of Mallige Papaiah after expire of non alienation period with conversion order got the corporation katha/Phodi and spot inspection, as such the documentary evidence placed on record is sufficient to prove and establish the said fact. On these grounds prayed for dismissal of the application with exemplary cost.

3. Heard and perused written arguments along with the material on record.

The learned counsel for plaintiffs relied on the following decisions:-

1. 2000(7) JT 379, 2. 1999(3) Kar.L.J. 359, 2010(2) 3. Kar.L.J. 228 and 4. 2016(3) Kar.L.J. 714.

The learned counsel for defendants relied on following decisions:-

1.2004(2) KLR 191 (B.S. Nazir Hassan Khan Vs. Ashwath Naryan Rao and others), 2. 2014(2) KCCR 1564 (K.M. Chikkabadappa Vs. C. Krishnappa and another), 3. 2002(3) CTC 748 (Devadoss Vs. A. Duraisingh), 4. 2008(3) CTC 597 (KMA Wahab and others Vs. Eswaran and another) and 5. W.P. No.2098/2017 (Anitha Dev Vs. Susheela Bai and another)

4. The point that arises for my consideration is:-

“Whether I.A. No.20 filed under Order XXVI Rule 9 r/w Section 151 of CPC by the L.Rs of plaintiff is fit to be allowed?”

5. My answer to the above point is in the affirmative for the following:-

REASONS

6. It is worth to note that initially the suit was being filed by one Sri. Sampath Raj s/o Ganesh Mal against the defendants Govinda Reddy and another for the relief of permanent injunction based on the sale deeds dated 29/07/2004 executed by Smt. Pushpa in favour of plaintiff and to declare that the alleged sale deed dated 10/09/2003 alleged to be executed by

Smt. Sunandamma in favour of 2nd defendant is null and void and not binding.

7. Records reveal that the defendants appeared through their counsel and filed written statement by denying the claim of the plaintiff contending that plaintiff has approached the court with unclean hands with malafide intention based on fabricated documents to make wrongful gain in respect of the alleged property though defendant No.2 is in lawful possession and enjoyment as a rightful owner over the written statement schedule property, accordingly based on pleading predecessor in office framed issues in the month of August 2010. Further during pendency of the suit the plaintiffs got amended the plaint by adding the relief of declaration, possession along with the relief of permanent injunction in main suit.

8. Similarly the said Samapth Raj also filed another suit in O.S. No.3505/2007 for the relief of declaration and permanent injunction in respect of the property in dispute, wherein also the defendants appeared and filed written statement by taking similar contention as referred supra.

9. As could be seen from the record that, plaintiff Sampath Raj fully examined himself as P.W. 1 and got marked documents at Ex.P.1 to 18.

10. Further it is evident that, during the pendency of the suit original plaintiff Sampath Raj reported to be dead by leaving behind the plaintiff No.1(a) to (d) as L.Rs. During the pendency of the suit several interim

applications were being filed by the plaintiff/L.Rs and in the meanwhile O.S. No.3505/2007 came to be clubbed with main suit in O.S. No.3504/2007.

11. Further, the plaintiff No.1(b) examined himself as P.W. 2 and got marked the documents at Ex.P.19 to 31 in addition to the sale deeds of the year 2004 and also fully cross-examined by the other side. Similarly the defendant No.1 fully examined himself as D.W. 1 and got marked documents at Ex.D.1 to D.67. So when the case was posted for final arguments on merits in the year 2019 several interim applications filed by the parties came to be disposed off along with I.A. No.11, 12 and 14, aggrieved by the same the L.Rs of plaintiff filed writ petition No.11435/2019 and series and later on said writ petitions came to be disposed of by modifying the aforesaid orders passed by the predecessor in office. Further aggrieved by the common orders passed by this court on I.A. No.16 to 19 dated 17/09/2019 the L.Rs of plaintiff filed W.P. No.50165/2019, which came to be partly allowed subject to payment of cost and conditions.

12. Thereafter when the case was posted for further examination-in-chief of P.W. 2 as per the observations made by the Hon'ble High Court in the writ petition referred supra, again this court heard regarding admissibility of GPA dated 18/05/1992 along with affidavit and agreement of sale with possession, then passed considered order with a direction to pay deficit duty and penalty of Rs.65,890/- and after complying the same, again this court heard the arguments on merits in part, but considering the nature of reliefs claimed by later on amending the plaint and in

the light of the decisions referred supra this court observed that it is just and proper to hear on I.A. No.20 first and then to hear arguments on merits, accordingly after having heard above numbered case is posted for orders on I.A. No.20.

13. The learned counsel for plaintiffs relying on the decisions argued that since parties in both the suits are common and L.Rs of plaintiff claimed the relief of declaration and possession and identification of property is in dispute, as such appointment of commissioner at this stage is necessary.

14. It has been held by the Hon'ble Apex Court in the decisions referred supra by the counsel for plaintiffs that, if there is serious dispute with regard to the identity and boundaries of land in dispute and oral evidence is not sufficient for the purpose of establishing the identity of land in dispute at the spot, then issuing a survey commission to find out the same is necessary.

15. Per contra the learned counsel for defendants would contend that though the defendants dispute existence as well as identification of the plaint schedule property contending that defendant No.2 is the owner in lawful possession of the written statement schedule property, but parties have already adduced oral and documentary evidence and the same is sufficient to proceed with the case on merits instead of appointing the commissioner.

16. It has been held in the decisions referred supra by the learned counsel for defendants that when the evidence is completed and case is fixed for arguments then entertaining of such

ill timed application would disrupt trial and dilate proceedings. Further observed that the advocate commissioner cannot be appointed under Order 26 Rule 9 CPC to find out physical possession of the parties. But in W.P. No.2098/2017 dated 06/08/2018 our Hon'ble High Court again observed that if court finds that there is no sufficient material then trial court can appoint such commissioner for the purpose of physical inspection of the property in dispute.

17. It is pertinent to note here that on careful perusal of the pleadings and oral evidence of P.W. 1 and 2 and D.W. 1 in its entirety we can find that plaintiffs claiming to be the owners of the plaint schedule property bearing site No.1 and 1A carved out in Sy.No. 48 situated at Singasandra village, Begur Hobli, Bengaluru South Taluk within the limits of Ward No7, City Municipal Council, Bommanahalli,

18. Similarly, the defendants are also claiming to be the owners in possession of the non agricultural converted property measuring 6 ½ guntas situated in Sy.No. 48/2 situated at Singasandra village, Begur Hobli, Bengaluru South Taluk.

19. In this connection if we go through the pleadings of the parties it is evident that the defendants have seriously disputed the existence as well as identification of the plaint schedule property relied by the plaintiffs in both the suits stating that no such layout has been formed by Mallige Papaiah. Further the boundaries relied by the parties as plaint schedule and written statement schedule properties reflects different boundaries to the extent of right over the property claimed by the

parties respectively. During the course of cross-examination of P.W. 1 and 2 though it has been elicited that plaint schedule property was being allotted by the government in favour of Mallige Pappanna/Papaiah but they failed to identify the properties in dispute as reflected in Ex.D.1 and 3 photographs and also denied the suggestion that they have created the documents pertains to the plaint schedule properties in both the suits as site No.1 and 1A though no such properties are in existence.

20. Similarly, during the course of cross-examination of D.W. 1 when a suggestion was put to the witness that the property shown in Ex.D.1 photographs is the plaint schedule property, he denied as false and states that measurement shown in Ex.D.3 sketch is correct, but denied the suggestion that plaintiffs have purchased the plaint schedule properties in both the suits from one Venkatesh, again D.W. 1 volunteers that one Sunandamma gave instructions to write Ex.D.4 sale deed pertains to written statement schedule property measuring 6 ½ guntas out of 2 acres 17 guntas in Sy.No. 48 referred supra and in order to knock off the written statement schedule property plaintiffs have created sale deeds. Further he has denied the suggestion that in order to grab the plaint schedule properties defendants have created the documents.

21. The plaintiffs claiming to be the owners of the property bearing site No.1 and 1A in the same Sy.No. 48 situated at Singsandra based on Ex.P.1 registered sale deeds dated 29/07/2004 in both the suits. As could be seen

from perusal of Ex.D.25 to 27 that as per the application filed by Smt. Manjulamma defendant No.2 in main suit the deputy commissioner, Bengaluru Urban has issued conversion order dated 21/12/2004 pertains to the written statement schedule property measuring 6 ½ guntas in Sy.No. 48 of Singsandra village. But Ex.P.34 sketch prepared by consulting civil engineer and relied by the plaintiffs does not tally with the sketch and particulars mentioned in Ex.D.22 and 24 Aakarbandh followed by hissa tippani pertains to Sy.No. 48 of Singsandra village.

22. Therefore having regard to the facts and circumstances of the case, I am of the opinion that, the material on record is not sufficient for identification of the plaint as well as written statement schedule properties in question and there is ambiguity in oral and documentary evidence relied by the parties, as such in order to find out exact position of the suit properties appointment of court commissioner is proper and essential. Both the suits are of the year 2007 which comes under the category of more than 10 year old cases and there is direction of the Hon'ble High Court for speedy disposal of oldest matters. For these reasons, the arguments/written arguments submitted by the learned counsel for plaintiffs holds good. On the other hand arguments/written submissions made by learned counsel for defendants cannot be accepted at this stage. Consequently, I.A. No.20 deserves to be allowed subject to condition that plaintiffs in both the suits should bear expenses arising out of appointment of commissioner and to get the report

within the stipulated period. Hence, I answer the point raised for consideration in the affirmative and proceed to pass the following:-

ORDER

I.A. No.20 filed under Order XXVI Rule 9 r/w 151 of CPC by the counsel for the L.Rs of plaintiff is hereby allowed.

The City Surveyor concerned, City Survey office, Bengaluru Urban is hereby appointed as Court Commissioner.

His fees fixed at Rs.10,000/- to be paid by the L.Rs of plaintiff.

The L.Rs of plaintiff are hereby directed to deposit the fees within seven days from the date of this order.

The parties/counsels are directed to file memo of instructions in the office within fifteen days, failing which for addressing arguments on merits case will be called on 29/09/2021.

Issue commission warrant along with copy of I.A, necessary documents and memo of instructions, if complied the same with a direction to do the commission work and to submit his report on or before **29/10/2021** without fail.

Await commission report call on 29/10/2021.

(C.D. Karoshi)
V ACC &SJ, Bengaluru.