

KABG040012332009



24.11.2022

O.S.No.451/2009

**ORDER ON COMMISSIONER REPORT
DATED 09.12.2021**

Heard both sides on the commissioner report.

2. In this suit, the Surveyor, A.D.L.R. Land Records, Belagavi was initially appointed as Court commissioner

on 16.07.2014. Finally, the commissioner was re-appointed on 30.09.2021 and the commissioner was directed to carry out the work as per order dated 16.07.2014. The commission warrant was issued and the Court commissioner has submitted the commission report along with the map. The plaintiffs and the defendants No.1 and No.2 have filed objections to the commissioner's report.

3. The objections of the plaintiffs to the commissioner's report are as follows :

They have stated that the commissioner's report is partly correct and partly wrong. They have further stated that the commissioner has not followed the

memo of instructions submitted by the plaintiffs and the defendants and not carried out the work as per the memo of instructions. They have further stated that the Court commissioner has not measured the property fallen to the shares of Shri. Vilas Jivaji Kulkarni and Ashok Jivaji Kulkarni and also the property fallen to the share of Shri. Shankar Rao Kulkarni. The Court commissioner has not measured the set-back areas left by the defendants and other encroachers with attached portion of the properties belonging to the defendants. The Court commissioner has not properly mentioned the deviation of the boundaries of the plaintiffs' property due to encroachment with measurements of set-back area. They have further stated that the Court commissioner has not submitted the exact location of the property of the plaintiffs measuring 05 Guntas 09 Annas out of total area.

4. The objections of the defendants No.1 and No.2 to the commissioner's report are as follows :

They have stated that the Court commissioner has not carried out the commission work as per the memo of instructions and without collecting the documents from the respective offices such as A.D.L.R., D.D.L.R., Gram Panchayat, Hindalaga. He has not followed the correct procedure in preparing the report. The Court commissioner has not answered the queries

sought by the parties. Hence, they prayed to reject the commissioner's report.

5. The learned counsel for the defendants No.1 and No.2 has argued that the Court commissioner report is correct and it can be relied. He has further argued that the plaintiffs have not mentioned which part of the commissioner report is correct and which part of the commissioner report is incorrect. He has further argued that the measurement of the adjoining property is not a ground for setting aside the commissioner report. He has further argued that the objections pointed out by the plaintiffs cannot be the ground for setting aside the commissioner report. He has relied upon the rulings reported in 1) **AIR 1995 Madras 274**, 2) **2000(1) KCCR 210** and 3) **CRP No.897/2015, Madras High Court, Madurai Bench, dated 16.04.2019.**

6. The learned counsel for the plaintiffs has argued that the Court commissioner has not answered the questions in the memo of instructions. He has not carried out the commission work as per the memo of instructions. Hence, he prayed to reject the commission report.

7. In this case, the Court commissioner is examined as C.W.1 and the commission reports and other documents are marked as Ex. C.1 to Ex. C.21. Ex. C.1

is the commissioner report. C.W.1 is cross-examined by the learned advocate for plaintiffs and the learned advocate for the defendants. In this case, both the advocates for the plaintiffs and the defendants have filed the objections to the commission report and they have cross-examined the C.W.1. It is relevant to refer the cross-examination of the C.W.1 by the advocate for plaintiffs.

He has stated as follows :

"ನಾನು ಮುಂದುವರೆದು ಹೇಳುತ್ತೇನೆ ಖರೀದಿ ಪತ್ರದ ಕ್ಷೇತ್ರ ಹಾಗೂ ವಹಿವಾಟಿನ ಕ್ಷೇತ್ರದಲ್ಲಿ ವ್ಯತ್ಯಾಸ ಇದ್ದುದರಿಂದ ನನಗೆ ಕೆಲವು ಪ್ರಶ್ನೆಗಳಿಗೆ ಉತ್ತರಿಸಲು ಆಗಿಲ್ಲ. ಈ ರೀತಿ ಪ್ರಶ್ನೆಗಳನ್ನು ಉತ್ತರಿಸಲು ಸಾಧ್ಯವಿಲ್ಲ ಎಂಬ ಕುರಿತಾಗಿ ನ್ಯಾಯಾಲಯಕ್ಕೆ ಮನವಿ ಸಲ್ಲಿಸಲು ಯಾವುದೇ ತೊಂದರೆ ಇರಲಿಲ್ಲ ಎಂದರೆ ಸ್ಥಳದಲ್ಲಿ ಪರಿಶೀಲಿಸಿದ ನಂತರ ಈ ರೀತಿ ಸ್ಥಳದ ವ್ಯತ್ಯಾಸ ಕಂಡುಬಂದಿರುತ್ತದೆ. ನನ್ನ ವರದಿಯಲ್ಲಿ ಕ್ಷೇತ್ರದ ವ್ಯತ್ಯಾಸ ಇರುವುದರಿಂದ memo of instruction ನಲ್ಲಿ ಕೇಳಿರುವ ಕೆಲವು ಪ್ರಶ್ನೆಗಳಿಗೆ ಉತ್ತರಿಸಿಲ್ಲ ಎಂದು ಬರೆದಿಲ್ಲ ಎಂದರೆ ಸರಿ."

8. The C.W.1 has clearly admitted that he has not answered all the questioned asked in the memo of instructions. He has further stated that since there is difference in the area shown in the sale-deed and area in the possession of plaintiffs, it is not possible for him to answer the quarries in the memo of instructions. He has further stated that the difference in the area shown in the sale-deed and the difference in the actual enjoyment

came to his knowledge after surveying the suit property. It is further relevant to refer the further cross-examination of C.W.1.

He has stated as follows :

"ಖರೀದಿ ಪತ್ರದಂತೆ ವಾದಿಯ ಜಾಗ 67 ಗುಂಟೆ 12 ಆಣೆ ಇರುತ್ತದೆ ಎಂದರೆ ಸರಿ. ನನ್ನ ಕಮಿಷನ ವರದಿಯಲ್ಲಿ ವಾದಿ ಕಬ್ಬಾಡ್ಡಲ್ಲಿ ಇರುವ ಜಾಗ 61 ಗುಂಟೆ 3 ಆಣೆ ಎಂದು ತೋರಿಸಿರುತ್ತಾನೆ ಎಂದರೆ ಸರಿ. 6 ಗುಂಟೆ 9 ಆಣೆ ಯಾವ ಭಾಗದ ಕ್ಷೇತ್ರದ ಕಡಿಮೆಯಾಗಿದೆ ಎಂದು ನನ್ನ ವರದಿಯಲ್ಲಿ ಉಲ್ಲೇಖಿಸಿಲ್ಲ ಎಂದರೆ ಸರಿ. ಯಾವ ಕಾರಣದಿಂದ ಈ ಕ್ಷೇತ್ರದಲ್ಲಿ ವ್ಯತ್ಯಾಸವಾಗಿದೆ ಎಂದು ನನ್ನ ವರದಿಯಲ್ಲಿ ಬರೆದಿಲ್ಲ ಎಂದರೆ ಸರಿ. ದಾವಾ ಆಸ್ತಿಗಳ ಕೆ ಜೆ ಪಿ ಆಗಿಲ್ಲ ಎಂದು ನನ್ನ ವರದಿಯಲ್ಲಿ ಉಲ್ಲೇಖಿಸಿರುತ್ತಾನೆ ಎಂದರೆ ಸರಿ. ದಾವಾ ಆಸ್ತಿಯಲ್ಲಿ ಒಂದು ಪೈಪಲೈನ ರಸ್ತೆ ಇದೆ ಎಂದು ಉಲ್ಲೇಖಿಸಿದ್ದು, ಸದರಿ ರಸ್ತೆ ಯಾವುದಾದರೂ ಸರ್ಕಾರಿ ಆದೇಶದ ಪ್ರಕಾರ ಆಗಿದೆಯೋ ಇಲ್ಲವೋ ಎಂದು ನಾನು ಪರಿಶೀಲಿಸಿರುವುದಿಲ್ಲ. ಸದರಿ ಪೈಪಲೈನ ರಸ್ತೆಯ ಕ್ಷೇತ್ರಕ್ಕೆ ಪ್ರತ್ಯೇಕವಾದ ಕೆ ಜೆ ಪಿ ಇರುತ್ತದೆ. ಸದರಿ ಪೈಪಲೈನ ರಸ್ತೆ ಸರ್ವೇ ನಕಾಶೆಯಂತೆ 9 ಮೀಟರ ಅಗಲವಿತ್ತು. ಸರ್ವೇ ನಂಬರ 98/3 ರಲ್ಲಿ 82 ಮೀಟರ ಉದ್ದ ಇರುತ್ತದೆ. ಸರ್ವೇ ನಂಬರ 99/1 ರಲ್ಲಿ 95 ಮೀಟರ ಉದ್ದ ಇರುತ್ತದೆ. ಸದರಿ ರಸ್ತೆ ಸರ್ವೇ ದಾಖಲೆಯಲ್ಲಿರುತ್ತದೆ. ಸದರಿ ರಸ್ತೆ ವಾಸ್ತವಿಕವಾಗಿ ಎಷ್ಟು ಉದ್ದ ಹಾಗೂ ಅಗಲ ಇದೆ ಎಂದು ನನ್ನ ವರದಿಯಲ್ಲಿ ಬರೆದಿಲ್ಲ ಎಂದರೆ ಸರಿ. ಪೈಪಲೈನ ರಸ್ತೆ ಕುರಿತಾಗಿ ನನ್ನ ವರದಿಯಲ್ಲಿ ನಿಖರವಾದ ಉದ್ದ ಅಳತೆಯ ಮಾಹಿತಿ ಇಲ್ಲ ಎಂದರೆ ಸರಿ. ದಾವಾ ಆಸ್ತಿಗಳ ಪಶ್ಚಿಮ ಭಾಗದಲ್ಲಿ ಅತಿಕ್ರಮಣ ಇದೆಯೋ ಇಲ್ಲವೋ ಹಾಗೂ ಪ್ರಸ್ತುತ ಇರುವ ಬಿಲ್ಡಿಂಗ್‌ಗಳ ಕುರಿತಾಗಿ ನನ್ನ ವರದಿಯಲ್ಲಿ ಉಲ್ಲೇಖ ಇಲ್ಲ. ನಾನು ಮುಂದುವರೆದು ಹೇಳುತ್ತೇನೆ ಖರೀದಿ ಪತ್ರದಲ್ಲಿರುವ ಆಸ್ತಿಯ ವಿಸ್ತೀರ್ಣ ಹಾಗೂ ಸ್ಥಳದಲ್ಲಿ ಇರುವ ವಹಿವಾಟಿನ ಕ್ಷೇತ್ರದಲ್ಲಿಯ ವಿಸ್ತೀರ್ಣ

ಬದಲಾವಣೆ ಇರುವುದರಿಂದ ಈ ರೀತಿ ಅತಿಕ್ರಮಣ ತೋರಿಸಲು ಆಗುವುದಿಲ್ಲ. ಪ್ರತಿವಾದಿಗಳು ಯಾವುದೇ ಕ್ರಯ ಪತ್ರಗಳನ್ನು ಕೊಟ್ಟಿಲ್ಲ ಎಂದರೆ ಸರಿ. ಪ್ರತಿವಾದಿಗಳಿಗೆ ಕಾಗದ ಪತ್ರಗಳನ್ನು ಕೊಡಲು ಕೋರಿರುತ್ತೇನೆ, ಆದರೆ ಅವರು ಯಾವುದೇ ಕಾಗದ ಪತ್ರಗಳನ್ನು ನೀಡಿರುವುದಿಲ್ಲ. ದಾವಾ ಆಸ್ತಿಗಳ ಪಶ್ಚಿಮದ ಗಡಿಯಲ್ಲಿರುವ ಮನೆಗಳ ಸೆಟ್ ಬ್ಯಾಕ್ ಕುರಿತಾಗಿ ಪ್ರತ್ಯೇಕ ಅಳತೆ ಮಾಡಿ ನಮೂದಿಸಲು ಯಾವುದೇ ತೊಂದರೆ ಇರಲಿಲ್ಲ ಎಂದರೆ ಸರಿ."

9. It is admitted by the commissioner that the area shown in the possession of the plaintiffs is 61 Gunthas 03 Annas and the plaintiffs are in possession of 61 Gunthas 03 Annas. He has further admitted that he has not mentioned the difference area of 06 Gunthas 09 Annas comes in which portion of suit survey number. He has further admitted that he has not stated the reason for the difference in the area shown in the sale-deeds and the actual possession. He has further admitted that he has not mentioned the measurement of the pipeline road. He has further admitted that he has not mentioned the encroachment in the western side of the suit property in his report. He has stated that there is difference in the area in the possession of the plaintiffs and the area of the property shown in the sale-deed. He has further admitted that he has not shown the set-back area of the houses situated in the western side of the suit property. From his evidence, it is clear that the Court commissioner has not stated the set-back area in his report. It is further clear from the admission of the C.W.1

that he has not mentioned as to whether there is encroachment in the western side of the suit property or not. Further, it is clear that the length and width of the pipeline road is not mentioned in the said report.

10. The learned counsel for the defendants also cross-examined C.W.1. In their cross-examination, he has admitted that he cannot say in which side the KJP is effected to the survey No.98. He has further admitted that he has not shown the survey stones in the eastern, western and southern side of the survey No.99. Further, he has admitted that he has not shown the fact of alleged encroachment made by the defendants in his report. Therefore, from the admissions of the C.W.1 in his cross-examination, it is clear that he has not conducted the commission work as per the memo of instructions. Further, he has stated that there is difference in the area in actual possession of the plaintiffs and the area of the property shown in the sale-deed of the plaintiffs are different. But, this fact has not been brought to the notice of this Court.

11. Further, it is clearly admitted by the C.W.1 that he had not shown the set-back area left by the owners of the buildings situated in the western side of the suit property. This suit is filed for permanent injunction and mandatory injunction. The commissioner is appointed to ascertain as to whether there exist any encroachment in

the suit land or not. The entire report of the commissioner will not state anything as to the alleged fact of encroachment alleged to have been made in the suit property. The Court commissioner has admitted that he has not measured the buildings in the suit property. He has stated that since there is difference in the area shown in the sale-deed and the area in actual possession of the plaintiffs, hence he cannot determine the alleged encroachment in the suit property. The plaintiffs have not shown the width and length of the road. Admittedly he has not carried out the commission work as per the memo of instructions. The learned counsel for the defendants No.1 and No.2 in his argument has relied on three rulings reported.

12. In the first ruling in the case of **Gopalkrishnan Vs. P. Shanmugam, reported in AIR 1995 Madras 274**, it is stated that the appointment of Court commissioner on mere request of one party without application of mind is illegal.

This ruling is not applicable to the case on hand, because both the parties have objected the commission report on the ground that the Court commissioner has not carried out the commission work as per the memo of instructions. Further, the commissioner himself has admitted that he has not carried out the commission work as per the memo of instructions. Further, he has

not answered the quarries regarding the alleged encroachment. He has further admitted that he has not measured the buildings in the suit property. He has further stated that it is not not possible for him to show the suit property on account of the difference in area shown in the sale-deed and the area in the actual possession of the plaintiffs. The defendants have also objected the commission report on the ground of not carrying the commission work as per the memo of instructions. The Court commissioner has admitted that he has not carried out the commission work as per the memo of instructions.

13. In the second ruling in the case of **Sri. M. Chandayya Vs. Sri. A. Raghunatha Rai and Others, ruling reported in 2000 (1) KCCR 210**, the Hon'ble High Court has stated that the additional report can be called from the same commissioner.

This ruling is not applicable to the case on hand, because the Court commissioner has not carried out the commission work as per the memo of instructions.

14. In the third ruling in the case of **Kalaiselvan Vs. Gunaseeli, reported in C.R.P.(NPD)(MD) No.897/2015**, the Hon'ble Madras High Court has held that the mechanical rejection of the application is not proper.

This ruling is not applicable, because of the reason that the commissioner has not carried out the commission work as per the memo of instructions. This fact is apparent on face of record and the Court commissioner has admitted the same. Hence, the ruling relied by the learned advocate for defendants is not applicable to the case on hand.

15. Since the commissioner has carried out commission work as per law, the commission report is not acceptable. In this case, the Court commissioner has stated some difficulty in carrying the commission work in the suit property. Hence, it is just and essential to hear the parties on these aspects. Hence, I proceed to pass the following :

ORDER

***The report of Court Commissioner
dated 09.12.2021 is hereby rejected.***

**Prl. Civil Judge & J.M.F.C.,
Belagavi.**

For further hearing. Call on 30.11.2022.

**Prl. Civil Judge & J.M.F.C.,
Belagavi.**