

IN THE COURT OF THE II ADDL. CIVIL JUDGE &
JMFC, CHIKODI, AT: CHIKODI.

Present : **Sri. Nagesh Patil,**
B.Com.,LL.B.
II Addl. Civil Judge & JMFC,
Chikodi.

Dated this the 19th day of November 2022

Original Suit No.255/2019

Plaintiffs:

1. Shri. Chandrakant Shankarappa Kavalapure,
Age: 65 years, Occupation: Agriculture,
R/o: Guruwarpeth, Tq: Chikodi, & others

(By Shri. M.B. Ranabhare, Advocate)

//Vs//

Defendants:

1. The Government of Karnataka,
Public works department,
R/by D.C, Belagavi & others.

(By Sri Learned ADGP for D.1 & 2)

Parties To I.A.No.III/19

Applicants/Ori. Plaintiffs:

- 1) Shri. Chandrakant Shankarappa Kavalapure,,

//Vs//

Opponents/Ori. Defendants:

- 1) The Government of Karnataka,
R/by Deputy commissioner, Belagavi

ORDER ON I.A.NO.III/18:

The plaintiffs have filed this application under Order 26 Rule 9 and section 151 of CPC for appointment of Advocate as court commissioner to make local inspection of the suit lands and making report of the removal of the mud and soil from the suit lands and work of the creating road in the suit lands.

2) In support of the application, the plaintiff No.1 has sworn to an affidavit, wherein he has stated that they have filed the suit for permanent injunction and mandatory injunction against the defendants. Recently the defendant no.3 started widening the cart track into 10 meters width tar road in the suit lands by highhandedly digging and removing the mud and soil from the suit lands and creating tar road in the suit lands. The defendants no.2 and 3 have engaged huge number of labourers and machines for said construction to complete the same. So, the appointment of court commissioner for local inspection in respect of the suit property is urgent and necessary. If the application is allowed, no harm or prejudice will be caused to the plaintiffs. On the other hand, if the same is not allowed, they will be put to heavy and

irreparable loss which cannot be compensated in terms of money. Hence, prays to allow the application.

3) On the other hand, the defendants no.1 and 2 have resisted this application by filing objections. In the objections, the defendants have contended that, the said road is commencing from Bambalwad Honnugudd temple and same is connecting to main road i.e., Nippani-Mudhol road. The work allotted to the defendant no.3 is a government assignment which is useful to the people of the locality. The said road is belongs to the government and same is being used by the public at a large and the defendants no.2 and 3 are repairing the same and not causing any loss and damage or hardship to the adjoining owners of the lands. Except the plaintiffs, remaining owners i.e., adjoining lands have willfully consented to repair the road. The plaintiffs are claiming compensation from the defendants and they have filed the present suit and they are not sure whether the construction of the tar road has been constructed on their land. Accordingly, they pray to dismiss the application.

4) I have heard both side counsels.

5) The following points arise for consideration:

POINTS

- 1) *Whether the appointment of court commissioner is necessary?*
- 2) *What order?*

6) Upon having heard so, my answers to the said points are as under:

Point No.1: In the Negative.

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

REASONS:

7) Point No.1:- The plaintiffs have filed this application along with the suit. It is the case of the plaintiffs that the defendant no.3 is widening the cart track into 10 meters width tar road in the suit property highhandedly by digging and removing the mud and soil from the suit property and creating a tar road in the suit property. The defendants no.2 and 3 have engaged huge number of persons, labours and machines for constructing tar road and complete the construction as earlier as possible. Therefore filed this application to appoint court commissioner to make local inspection regarding the work of digging and

removing the soil form the suit land and creating the road in the sit lands. If the defendants have succeeded in creating the tar road in the suit property it is very difficult for the plaintiffs to prove the exact situation of the suit property and it would leads to multiplicity of proceedings. Hence, prays to allow the application.

8. On perusal of the pleadings and documents it reveals that the present suit is filed by plaintiffs against the defendants for the relief of permanent injunction by restraining the defendants and men on their behalf from creating the road by removing the mud and soil from the suit property and and mandatory injunction against the defendants to refill the mud and soil in the suit lands and bring the suit land to its original possession.

9. It is pertinent to note that in this case the evidence is not yet commenced and along with the suit the plaintiffs have filed this application for appointment of advocate as a court Commissioner to make local inspection of suit property and making report of the removal of the mud and soil from the suit lands and work of the creating road in the suit lands and submit report to the Court.

10. In this case it is pertinent to note that the

plaintiffs are seeking appointment of Court Commissioner, to make local inspection of suit property. It is necessary to note that in the affidavit the plaintiffs stated that the defendants are creating road in the suit land, so it is necessary to know the exact position of the suit property. Therefore commissioner is to be appointed to make local inspection of suit property. This suit, is filed by the plaintiffs against the defendants for the relief of permanent injunction and mandatory injunction contending that the defendants are forming road by removing mud and soil in the suit property. The burden is on plaintiffs to prove that the defendants are forming road in the suit property by removing mud and soil. **It is also well-settled law that party who pleads his case has to prove his case.** In the present case plaintiffs have filed application-seeking appointment of Court Commissioner to make local inspection of suit property. If the Court Commissioner is appointed to make local inspection of the suit lands and making report of the removal of the mud and soil from the suit lands and work of the creating road in the suit lands it is nothing but collection of evidence and same is not permitted under law. Since evidence is

not yet commenced in the present case and issues are also not framed at this stage the plaintiffs have filed application to appoint the Court Commissioner to make local inspection of suit property and submit report.

11. The power to appoint the Court Commissioner is discretionary and depends upon the facts of each case and is to be exercised in order to appreciate evidence of the record. After conclusion of the trial if there is any confusion or ambiguity in the evidence of the party then it is necessary to appoint Commissioner to enable the Court to properly and correctly understood and asses the evidence on record and clarify any doubt whether there is a encroachment or not and it also helps the Court in arriving proper decision of case.

But in the present case the trial has not yet commenced and it is not just and proper to appoint Commissioner at this stage to make local inspection of suit property, if same allowed it is nothing but collection of evidence. This view of mine is well supported by the decision of our **Hon'ble High Court**

of Karnataka in case of “Mis Renuka V/s Thammanna and others reported in ILR 2007 Karnataka 3029” wherein it has been held that “Para No:7 it is settled position of law that the Court Commissioner cannot be appointed to collect the evidence in support of the claim. After completion of evidence of both sides if it is found that there is any ambiguity in the evidence adduced by the parties then the Court may appoint Court Commissioner for the purpose of clarification of such an ambiguity. In the instant case evidence is not at commenced and therefore question of ambiguity in the evidence will not arise at all at this stage. The trial Court without considering the settled position of law committed an error in passing the impugned order appointing a Court Commissioner. On this ground impugned order is liable to be quashed”.

12._Keeping in mind the dictum laid down by their lordship in supra decision and also facts of the case on hand there is no proper ground to allow the application at this stage. As result in this case also

plaintiffs evidence is not yet commenced and case is posted for hearing, the plaintiffs filed this application and the plaintiffs have not produced any piece of document to show that the defendants are forming road and removed the mud and soil in the suit property except pleadings, It will be premature to appoint the Court Commissioner under order 26 rule 9 C.P.C. In view of the above my considered opinion is that this is not a proper stage to appoint Court Commissioner. Accordingly, the plaintiffs have not made out valid grounds at this stage to allow the application for appointment of court commissioner. **Accordingly, Point No.1 is held in the Negative.**

13. **Point No.2:** For the foregoing reasons discussed, this court proceed to pass the following;

ORDER

The I.A.No.III/19 filed by the plaintiffs U/Order 26 Rule 9 of C.P.C is hereby dismissed.

No order as to costs.

(Dictated to the Stenographer directly on computer, typed by her, corrected & then pronounced by me in the Open Court on this the 19th day of November 2022).

Sd/-

**II Addl.Civil Judge & JMFC.,
Chikodi.**