

KABG600005462019



IN THE COURT OF THE SENIOR CIVIL JUDGE, HUKKERI.
ITINERARY COURT AT SANKESHWAR

Before: Sri, K.S.Rotter, B.Com. LL.B (Spl),
Senior Civil Judge, Hukkeri.

Dated this 1st day of March 2024

F.D.P. No.01/2020

Petitioner : Smt. Doddawwa W/o Balappa Nerali

V/S

Defendants: Shri Babu Balappa Magadum and others

PARTIES TO I.A. NO.VIII

Applicants/Petitioners:

1. **Smt. Doddawwa W/o Balappa Nerali,**
Age: 70 years, Occ: Agriculture & Household,
R/o: Kochari, Taluk: Hukkeri,
District: Hukkeri and others.
(By Shri A.C. Karoshi, Advocate)

-V/S-

Opponents/Respondents No.1 to 5:

1. **Shri Babu Balappa Magadum,**
Age: 75 years, Occ:Agriculture,
R/o: Kochari, Taluk: Hukkeri,
District: Belagavi,
and four others.
(By Shri C.B.Mathapati, Advocate)

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Nature of the IA : Appointment of Court Commissioner

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- i). *Provision under which the application is filed* : *U/Order XXVI Rule 9 R/w Section 151 and Section 54 of CPC*
- ii). *Relief sought for* : *Appointment of Court Commissioner*
- iii). *The date on which the Application is filed* : *08.06.2023*
- iv). *Number of the application* : *IA No.VIII*
- v). *The date on which the objections are filed by the different opponents:* *17.08.2023*
- vi). *The date on which orders were Passed on the said application* : *01-03-2024*

Stage of the case: hearing on IA.

-Sd/-

(K.S. Rotter)

Senior Civil Judge, Hukkeri.

**ORDERS ON IA NO.VIII FILED U/O XXVI RULE 9 R/W
SECTIONS 151 AND 54 OF CPC**

The applicants/petitioners have filed IA No.VIII under Order XXVI Rule 9 R/w Section 151 of Civil Procedure Code, praying therein for appointment of ADLR Hukkeri as Court Commissioner for effecting the division of the following suit properties as per the judgment and decree passed in O.S. No.71/2006 on the file of this court:

- (1) The lands situated at Kochari village of Hukkeri taluk bearing R.S.Nos. 6/5, 6/7, 6/8A, 6/9, 6/10A, 125/19+20, 125/22+23, 125/28, 125/30, 125/32/1, 125/33, 125/35, 125/37A, 140/1, 140/2, 140/3, 140/4, 140/5, 140/15, 70/21, 125/34, 125/29, 125/18, 125/36,
- (2) The lands situated in Hukkeri village bearing R.S.No.543/2, 544/2, 538/1 and
- (3) Land situated at Nerali village of Hukkeri taluk bearing R.S.No. 7/1A, 145/8, 145/9, 149/2

2. In support of the above said application, the petitioner Smt. Doddawwa W/o Balappa Nerali has filed her sworn affidavit stating that, she has filed this Final Decree Proceedings seeking a final decree in respect of the suit properties by effecting division as per Section 54 and Section 151 of the Civil Procedure Code by awarding her 1/7th share. The petitioner stated that, she had filed a suit against the respondents in O.S. No.71/2006 for the relief of

partition and separate possession in respect of the suit properties on the file of this and the said suit was came to be partly decreed vide judgment and decree dated 23.03.2019. As per the judgment and decree passed in O.S. No.71/2006, the petitioner is entitled to 1/7th share in the suit properties. Therefore, the applicant stated that, it is just and necessary to appoint Court Commissioner to adjudicate the matter in dispute. It is stated that, if the application is allowed, no hardship will be caused to the respondents and on the other hand, if the application is not allowed she will be put to irreparable loss and hardship. Accordingly, the petitioner prayed for allowing the application.

3. On the other hand, the advocate for the respondents No.1 to 5 has filed objections. The respondents No.1 to 5 in their objections have denied all the averments of the of the affidavit filed in support of the present application and FDP petition and contended that, the application filed by the petitioner is false, bogus and misconceived and misrepresented and the same is denied toto. It is stated that, the petitioner has added some persons without sinking permission of this Court who are no way concerned to the suit properties. Unless those persons were deleted from the petition, said application cannot go with the proceedings. It is stated that, the

petitioner has not impleaded all the necessary parties to this proceedings. Further it is stated that, the petitioner has filed this petition against the dead persons like petitioners No.41 and 55 who are dead long back by leaving their legal heirs, whose presence is necessary to dispose off the petition. Unless the petitioner taking steps for the same, the application is not sustainable under law. It is stated that, the respondents No.1 to 5 have filed an appeal against the order passed by this Court in RA No.311/2019 which is pending for consideration. Against which the present petitioner is seeking her share. It is stated that, the petitioner is not entitled for any share in the suit properties as those properties are not inherited from their ancestors but they are the self acquired properties of respondents No.1 to 5. Further it is stated that, the impugned judgment and decree is challenged in the appellate Court and pending for service for summon to the parties as some of the parties are died during the pending of appeal memo and some are avoiding to take the notice on the instigation of the petitioner. It is stated that, the petitioner has not brought all the legal heirs of respondents No.40 and 74 with an oblique motive. The application filed by the petitioner is pre-matured and not sustainable in the eyes of law. Therefore, with these among the other grounds, the

respondents No.1 to 5 prayed for dismissing the application filed by the petitioner.

4. Heard the arguments.
5. The points arise for my considerations are as under:-
 1. *Whether the applicant/petitioner has made out sufficient grounds for appointment of ADLR Hukkeri as the Court Commissioners as prayed for?*
 2. *What order?*
6. My findings on the above points are as under:-
 1. In the Affirmative
 2. As per final order for the following;

REASONS

7. **Point No.1:** Admittedly, this is a Final Decree Proceedings filed by the petitioner/plaintiff on the basis of the judgment and decree dated 23.03.2019 passed in O.S. No.71/2006 by this court seeking final decree in respect of the suit properties by effecting the division as per Section 54 of the Civil Procedure Code by awarding 1/7th share to the petitioner by appointing the Court Commissioner. Upon service of notices in this petition, the respondents No.1 to 5, 7, 74 and 86 have appeared through their respective counsels and other respondents remained absent. Now, the petitioner has filed this application for appointment of ADLR Hukkeri as Court

Commissioners for effecting division in respect of the suit properties as per the judgment and decree dated 23.03.2019 passed in O.S. No.71/2006 by this court. On the other hand, in their objections the respondents No.1 to 5 contended that, the petitioner has filed O.S. No.71/2006 against the respondents on the false grounds and she has not added all the necessary parties in the said suit and obtained by the judgment and decree. Further respondents stated that, as against the judgment and decree passed in O.S. No.71/2006 dated 23.03.2019, they have preferred an appeal in RA No.311/2019 before the Hon'ble VII Addl. District & Sessions Judge, Chikkodi and the said appeal is pending. Until disposal of the said appeal, the petitioners cannot entitle final decree in this case. However, these objections of respondents cannot be acceptable one, because, in O.S. No.71/2006 this court discuss the matter in detail and thereafter decreed the suit. On the other hand, in this case the respondents have not produced any stay order of the Hon'ble District Court passed in RA No.311/2019. This court also not received any stay order from the appellate court. It is the settled principle of law that, an appeal shall not operate as stay. Therefore, mere filing of appeal would not operate as stay, unless granted by the appellate court. In this respect Order 41 Rule 5 is very clear that, an appeal shall not operate as a stay of proceedings

under a decree or appealed from except so far as the appellate court order, not shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree. In this respect I am also relying on the following decision;

M/s. Atma Ram Properties (P) Ltd. Vs M/s.Federal Motors Pvt. Ltd.) 2005(1) Civil Court Cases 454 (S.C.): 2005(1) Apex Court Judgments 426 (S.C.) wherein it is held that:

“ Mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the Court below - Appellate Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made - Appellate Court while passing an order of stay may put the parties on such terms that enforcement whereof would satisfy the demand for justice of the party found successful at the end of appeal.

I have perused the ratio laid down in the above refer decision along with the facts of the case and the said decision is squarely applicable to the present case on hand. Hence, the objection of the respondents cannot be acceptable one. Therefore, this court cannot go behind the preliminary decree passed in O.S. No.71/2006 while considering the final decree proceedings. Therefore, I come to the conclusion that, for effecting partition in suit properties as per the preliminary decree passed in O.S. No.71/2006, appointment of court commissioner is just and necessary. Accordingly, I answer point No.1 in the **affirmative**.

8. **Point No.2:** For the foregoing reasons, I proceed to pass the following:-

ORDER

The I.A. No.VIII filed by the petitioners under Order XXVI Rule 9 R/w Section 151 of Civil Procedure Code are hereby allowed.

The Taluka Surveyor attached to the Tahasildar/ADLR Hukkeri, is hereby appointed as Court Commissioner for dividing and prepare watap taktha of the suit schedule properties as per preliminary decree passed in O.S. No.71/2006 on the file of this court.

The court Commissioner Fee is fixed at Rs.2,000/-.

Issue Commissioner warrant if commissioners' fee is deposited, necessary documents for commission work supplied and PF paid.

No order as to costs.

(Dictated to the stenographer, typed by her, corrected by me & then pronounced in open court on 1st day of March 2024).

-Sd/-

(K.S. Rotter)

Senior Civil Judge, Hukkeri.
Itinerary Court at Sankeshwar.