

KABK210021982023



**IN THE COURT OF ADDL. CIVIL JUDGE & J.M.F.C.,
MUDHOL, AT: MUDHOL**

PRESENT:

SMT.SARASWATI HOTAKAR,

B.A., LL.M.7

Addl. Civil Judge & JMFC., Mudhol.

Dated this the 26th day of March-2024

O.S.No:232/2023

Plaintiff/s:

1. Smt. Shobha Suryavanshi and others.

- V/s -

Defendant/s:

1. Umesh S/o Hanamant Pujari and others.

I.A.No.II

Applicant/Defendant:

1. Umesh S/o Hanamant Pujari
Age: 48 years, Occ: Agriculture,
2. Shankar S/o Hanamant Pujari
Age: 46 years, Occ: Agriculture,
3. Sanju S/o Hanamant Pujari
Age: 44 years, Occ: Agriculture,
All are R/o: Behind Bus stand,
Harijan Keri, Mudhol, Tal: Mudhol.

- Vs -

Opponents/plaintiffs:

1. Smt Shobha W/o Anil Suryavanshi
Age: 50 years, Occ: Household work,
2. Manjula W/o Subhas Gayakawad
Age: 42 years, Occ: Household work,
3. Swati D/o Subhas Gayakawad
Age: 24 years, Occ: Household work,
4. Adarsh S/o Subhas Gayakawad
Age: 21 years, Occ: Student,
All are R/o: Ward No-5, Shivajinagar,
Mudhol, Dist: Bagalkot.

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Applicants by Sri.M.M.T., Advocate
Opponents by Sri. S.M.B., Advocate

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ORDER ON I.A. NO.2

This is the application filed by applicants/defendants U/Or. XXVI Rule 9 and U/Or. XXXIX Rule 7 R/w. Sec. 151 of CPC seeking to appoint City Surveyor as a Court Commissioner for conducting survey.

2. In the affidavit annexed to the application it is stated that, the plaintiffs have filed suit for injunction and claimed that they have purchased suit properties under registered sale deeds dated 10-10-2013 and plaintiffs have obtained status quo order in the suit. Further stated that defendants with their

mother residing in R.S.No 547 since long time and the TMC Mudhol taking into consideration the service of father of the defendant in water supply department granted open space for the defendants and their mother. The defendant and their mother prior to the grant on lease by TMC they have been staying in an area measuring 80X68 in RS.No 547 and it was subsequently acknowledged by the TMC. Plaintiffs after obtaining status quo are interfering with their property which is situated in property bearing CTS No.3274 and Municipal No.992. In order to resolve the dispute it has become very much necessary to note the exact situation of CTS properties Nos.3274 and 3275 and also whether there exists any open space as claimed by the plaintiffs in para 3 of plaint. Hence for that purpose, City Surveyor, Mudhol be appointed as a Court Commissioner to note the points framed in the application. The pending application U/Or. 39 R.1 & 2 cannot be decided unless knowing the exact situation of the property of plaintiffs and defendants. Further plaintiffs knew very well that defendants and their mother residing in open space granted to them by TMC since 40 to 50 years never raised in any objection and about 2 to 3 months back the plaintiffs are claiming that they

have purchased the suit properties which are extending up to the property of defendants.

Further when the vendor of the plaintiffs sold their properties to the plaintiffs there was no open space and neither the vendor the plaintiff nor the plaintiffs ever made any attempts to get their property measured by survey authority. These plaintiffs having no right in the property of the defendant unnecessarily interfering with the possession of the defendants. On these grounds prays to allow the application.

3. On the other hand plaintiff files objections to the above application and stated that, the defendants with mala fide intention filed said application and wanted to appoint Commissioner to ascertain with regard to possession in respect of the suit properties. There is no such property is situated as alleged by defendant and on the contrary case of plaintiffs and documents produced there with are very clear that suit properties are exclusively belongs to plaintiffs and who are in lawful possession and enjoyment of the same and there is no any ambiguity in the same. Under these circumstances no way report of commissioner will be helpful to decide the question involved in this case. That Commissioner

for local inspection in suit for permanent injunction is impermissible and if appointed and report is secured, it amounts to collection of evidence which is also impermissible under law. Application for local inspection before framing issues and before completion of trial is not contemplated in scheme of Order XXVI of CPC. That defendants are neither owners nor in possession of CTS No.3274 and also Municipal No.992 and whatever documents produced in support of their case are not at all related to defendants. Under these circumstances appointment of commissioner is not at all necessary. The defendants without there being any right title and interest whatsoever in the suit properties are misleading the court by producing unrelated and fabricated documents in order to harass the plaintiffs and to collect the evidence which cannot be permissible under the law. Defendants have not come before Hon'ble court with clean hands and not produce any single documents to show that, they are owners and having title or interest over the properties as alleged in their affidavit filed in support of application. Defendants appeared on 10-01-2024 but till today not filed any written statement. Unless defendants file their WS and show their title and

possession over the properties as alleged it is not required and necessary to appoint commissioner as prayed in the application. No single document is produced to show that defendants are either neighbors of plaintiffs or residing in the same locality. Defendants without any justification and valid reasons trying to trespass in to the properties of the plaintiffs. Conduct of defendants itself dis-entitles them to file such false and frivolous application and same deserves to be dismissed. There is no any property belongs to TMC coming in and around the area of plaintiffs properties, hence question of admitting occupation/possession of the property granted to defendants by TMC under resolution does not arise. Defendants counsel under the wrong impression are trying to suppress the real fact and misguiding the court in order to get benefited for appointing the commissioner. It is contended that the defendants have misconceived the fact of plaintiffs case and filed the application. On these grounds prayed to dismiss the application with cost, in the interest of justice and equity.

4. Heard the arguments and perused the materials

5. Now the points that arises for my consideration are as under:

- 1) Whether the application is
deserves to be allowed?
- 2) What Order?

6. My answers to the above points are as under:

Point No.1: In the Affirmative,

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

:: REASONS ::

7. POINT NO.1: I have already narrated the facts stated in the affidavit annexed to the application and also the contentions of the plaintiffs in his objection statement. This is the suit filed by the plaintiffs for seeking the relief of perpetual injunction against defendants from interfering and causing any sort of obstructions to the plaintiffs in their peaceful possession and enjoyment of the suit properties.

8. On the other hand defendant has filed present application seeking appointment of City Surveyor as Commissioner for inspect and note whether there exists open space or site measuring 71-22 Sq.Mtrs (eastern side) out of CTS No.3275A/1/2/2 -H1A.

Further to inspect and note whether there is a open space plus shed in western side of an area measuring 71-22 Sq.Mtrs in CTS No.3275A/1/2/3- H1B and to note if any necessary by conducting survey CTS No.3274 and 3275 that whether the open space situated within the following boundaries comes with CTS No.3274 or 3275.

9. On the contrary it is the objections of plaintiffs that there is no such property is situated as alleged by defendant and on the contrary case of plaintiffs and documents produced there with are very clear that suit properties are exclusively belongs to plaintiffs and they are in lawful possession and enjoyment of the same and there is no any ambiguity in the same. Under these circumstance no way report of commissioner will be helpful to decide the question involved in this case. That Commissioner for local inspection in suit for permanent injunction is impermissible and if appointed and report is secured, it amounts to collection of evidence which is also impermissible under law. Application for local inspection before framing issues and before completion of trial is not contemplated in scheme of Order XXVI of CPC. That defendants are neither owners nor in possession of CTS No.3274 and also

Municipal No.992 and whatever documents produced in support of their case are not at all related to defendants. Under these circumstances appointment of commissioner is not at all necessary. The defendants without there being any right, title and interest whatsoever in the suit properties are misleading the court by producing unrelated and fabricated documents in order to harass the plaintiffs and to collect the evidence which cannot be permissible under the law.

10. I have carefully gone through the pleadings of the plaintiff and defendants, and documents available on record. It is the argument of the learned counsel for the plaintiffs that, defendants are no way concerned to the suit properties are trying to obstruct the peaceful possession and enjoyment over plaintiffs properties and defendants are not having any properties as claimed in their application. Further the present application filed U/o. 26 Rule 9 of CPC is not maintainable at this stage and in suit of bare permanent injunction application to appoint Court Commissioner is not proper which amounts to collection of evidence and prays to reject the application as it had been filed before completion of trial. In support of his case the counsel for plaintiffs relied upon decisions reported in...

- 1) AIR 1982 KAR 233,
- 2) ILR 2007 KAR 3029,
- 3) ILR 1996 KAR 1443,
- 4) Ravi Ahuja Vs. Rajukumar and another
reported in 2018 Allhabad HC.
- 5) Silk wala dying and printing mills Vs.
Deepak Bhai Piprodiya 2013 Gujarat HC.
- 6) Miss. Renuka Reddy Vs. Tammanna
Dyavappa Bhattal reported in 2007
Karnataka HC.
- 7) Sanjaya Khandare Vs. Sahebarao Khandare and
others reported in 2000 Bombay HC.

11. I have respectfully gone through the all the afore mentioned decisions wherein the Hon'ble courts pleased to held that Court Commissioner cannot be appointed to collect evidence in support of a claim. Further held that after completion of the evidence of both sides, if it is found that there is an ambiguity in the evidence adduced by the parties, then the court may appoint a commissioner for the purpose of clarification of such an ambiguity. Further in another decision

relied by plaintiffs it was held that in a suit for injunction, the question has to who is in possession of the property, is a matter to be decided by the court on the basis of evidence, either oral or documentary, to be adduced by the parties. That function cannot be delegated to a commissioner who cannot find out as to who is in possession of the property and appointment of commissioner in such cases and such stage amounts to collection of evidence.

12. On the contrary it is the argument of the learned counsel for the defendant that defendants are not disputing the ownership and sale deeds of the plaintiffs but they dispute the existence of open space and to decide this dispute appointment of court commissioner is proper. The main contention of the plaintiffs that in suit for permanent injunction court commissioner cannot be appointed but the provision order 26 Rule 9 refers **any suit** which means court can appoint court commissioner in any suits irrespective of nature of suits. Further argued that, plaintiffs have objected the application on the ground of pri trial as the application is pri matured and it cannot be entertain at this stage and also objected on the ground that appointment of court commissioner at this stage

amounts to collection of evidence and relied upon a decision of our own High Court in **WP No.201274/2022 dated 24th January 2023 between Sri.Shadaksharappa Veranna - Vs - Kumari. Vijayalaxmi D/o. Pampanna & others**, wherein the Hon'ble High Court held that order 26 Rule 9 is not "stage centric" and it can be invoked either commencement of the trail or after trail. Further such application can be entertained in any form of the suits but the guiding factor is 'whether the report is necessary for elucidating matters in dispute'. It can be any kind of suit. Be it suit for injunction, mandatory injunction, declaration and injunction, possession, partition, specific performance or any suit for that matter. The form of a suit is never the guiding or deciding factor while considering the application for the appointment of a commissioner. Further counsel for defendant also relied upon decision in **Civil Revision Petition No.3760 of 2014 dated 11-11-2014 between K. Dayanand and another - Vs- P.Sampath Kumar**, wherein the Hon'ble Court held that when there is a dispute or issue with regard to identity of a property in a litigation it is necessary to appoint a commissioner for localizing the property which may even by taking necessary

assistance from a qualified surveyor or which will not amounts to collecting evidence which is prohibited.

13. Therefore, on going through the pleadings and documents and the rulings relied by both the parties, wherein the rulings relied by plaintiffs as to appointment of court commissioner at this stage in the suit of injunction is not proper at this stage, which amounts to collection of evidence cannot be sustainable as the decisions relied by the plaintiffs and the ratio in the said decisions are not applicable in this case in view of the decisions given in WP No.201274/2022. As per the said decision court commissioner can be appointed at any stage in any form of suits if court on going through the facts and circumstances of the suit thinks it necessary to appoint the court commissioner.

14. In the present suit defendants are not denying the ownership or sale deeds but only they disputing the existence of open space. Hence to decide the same appointment of court commissioner is necessary. Further the report of court commissioner is not Sacrosanct. The plaintiffs having opportunity to object the same.

15. Therefore, in the facts and circumstances it appears that the applicants/ defendants have made out grounds to appoint City Surveyor as Court Commissioner to inspect and note whether there exists open space etc sought in his application. Hence, I answer Point No.1 in the Affirmative.

In the facts and circumstances of the case no order as to costs.

16.POINT NO.2: on the above discussion, I proceed to pass following:

:ORDER:

I.A.No II filed by the Applicants/defendants U/Or XXVI rule 9 R/W Or. XXXIX Rule 7 R/w Sec. 151 of C.P.C is hereby allowed.

Accordingly City Surveyor, Mudhol is hereby appointed as Commissioner for local inspection and to note the points as prayed by the applicants/defendants in their application.

The defendant shall bear and deposit the commissioner fee of Rs.2,000/-.

**(Smt. Saraswati Hotakar)
Addl. Civil Judge & JMFC,
Mudhol**

