

ORDERS ON IA NO.IV

The present application is filed at the stage of further chief examination of PW1. The plaintiffs have filed the present application under Order 26 rule 9 of CPC seeking appointment of Court Commissioner preferably an advocate to conduct local inspection and to note the situation of pathway in the suit property and surrounding area.

2. The plaintiffs have contended that they have filed the suit against the defendant for declaration of easement right of way in the suit schedule property. The Commission report is very much necessary to see the location and existence of pathway in the suit property. On these grounds, the plaintiffs have sought for allowing the application.

3. On the other hand, the learned counsel for defendant submits that he has no objections on the above application.

4. Now, the following points do arise for consideration:

1) Whether the plaintiffs have made out sufficient grounds that the appointment of Court Commissioner to conduct local inspection as sought for and his report is just and necessary to decide the matter in controversy?

2) What Order?

5. Heard both side and also perused the entire materials available on record. Now, this Court answers the above points as under:

Point No.1: In the Affirmative

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

REASONS

6. Point No.1: The plaintiffs have filed the present suit seeking for declaration of easement right of way i.e., suit 'B' schedule property to reach the suit 'A' property through the property of defendant which has fallen to their shares as per final decree of this Court and alleged obstruction to the said path way by the defendant. On the other hand, the defendant having admitted the partition and division as per the final decree, he has contended that he is in possession of the property which has been allotted to him but the plaintiffs are obstructing the defendant from enjoying his land. Learned counsel for plaintiff has argued that the properties are allotted as per final decree partition and though the defendant is put to possession of his share, the plaintiffs have to use the common road which is there in the property of defendant. This is not admitted by the defendant who states that he is in possession of entire property allotted to his possession and alleged interference by the plaintiffs itself. Thus, the parties who are the relatives to each other, are at dispute regarding road so as to reach the property divided as per FDP No. 11/2005.

7. It is germane here to refer the decision of our Hon'ble High Court in the case of **Sri. Shadaksharappa Vs Kumari Vijayalakshmi & Ors in W.P. No. 202174/2022 (GM-CPC)** D.D. 24.01.2023 wherein issued guidelines for consideration of application for appoint of Court Commissioner and it has been held as under:

"... the report under Order XXVI of the Code, in an appropriate case, is an effective tool available to the court and the party to the proceeding. The party to the proceeding, may use this tool for proving his/her case and the court to unravel the mystery surrounding the case."

8. Keeping in view the above decision of Hon'ble High Court, if the dispute between the parties are looked into, the plaintiffs have contended that the suit 'B' schedule road is a common passage or path way to reach 'A' schedule property but the defendant is claiming that5 property to be in his exclusive possession. Thus, survey of suit properties as well as property fo defendant so as to ascertain the road or pathway would play vital role in adjudication of the above suit. The circumstances being thus, appointment of Court Commission is necessitated to obtain the report regarding the status and location of suit schedule properties as well as property of defendant, allotted as per the FDP and to note the path way or road to reach the respective properties, would aid in full and final adjudication of the dispute between the parties. Hence, the Point No.1 is answered in **Affirmative**.

9. Point No.2: In view of the reasons recorded on Point No.1, this Court considers it fit to allow the above application. Hence, the following:

ORDER

I.A.No.IV filed by the Plaintiffs under Order XXVI Rule 9 of Code of Civil Procedure is hereby allowed.

AEE, PWD, Mudigere Taluk is hereby directed to depute a qualified person as Court Commissioner, to conduct Commission work to hold local inspection so as to conduct the following work:

- i. To conduct survey of the suit schedule properties as well as the property belonging to the defendant, as per the sketch which is part

and parcel of FDP No. 11/2005 on the file of Hon'ble Prl. Senior Civil Judge & CJM, Chikkamagaluru.

- ii. To note the location, extent and status of way/road/path way to reach the properties belonging to respective parties, as allotted under FDP No.11/2005.
- iii. While conducting the Commission work, the Court commissioner shall scrupulously follow the memo of instructions of respective parties, submit the detailed report with a sketch by mentioning the extent of respective properties, road/path way and with specific markings.

Issue Commissioner Warrant accordingly by enclosing the copy of this order, plaint, sketches in FDP No. 11/2005 and necessary documents which shall be furnished by the plaintiffs in the due course. Commissioner fee is tentatively fixed at Rs.3,000/-.

Both parties are hereby directed to file their respective memo of instructions by: 22.07.2024.

Sd/-

(VISHWANATH.A)
C/C ADDL. CIVIL JUDGE & JMFC.,
MUDIGERE.