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**IN THE COURT OF THE ADDITIONAL CIVIL JUDGE AND
J.M.F.C., AT TARIKERE**

Present: Sri Shivakumar.R. B.A.L., LL.B.,
Addl. Civil Judge & JMFC, Tarikere.

Dated: 29th Day of September 2022

ORIGINAL SUIT NO.182/2019

PLAINTIFF/s :

- 1) Mohammed Ismail S/o late Mohammed Akbar Sab, aged 58 years,
- 2) Mohammed Dasthagir S/o late Mohammed Akbar Sab, aged 55 years,
- 3) Mohammed Ibrahim S/o late Mohammed Akbar Sab, aged 53 years,
- 4) Mohammed Shafi S/o late Mohammed Akbar Sab, aged 51 years,
- 5) Arshid Unnisa D/o late Mohammed Akbar Sab, aged 50 years,
- 6) Smt.Saida W/o late Mohammed Ghouse Sab, aged 55 years,

All are Agriculturists, R/o Halasuru Village,
Lakkavalli Hobli, Tarikere Taluk,
Chikkamagaluru District.

(Reptd. By : Sri T.L.P., Advocate.)

Vs.

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**DEFENDANT/s:**

Hayath Khan S/o late Kashim Khan, aged 62 years, Black Smith, R/o Halasuru Village, Lakkavalli Hobli, Tarikere Taluk, Chikkamagaluru District.

(Reptd. By : Sri A.A., Advocate.)

PARTIES TO I.A.NO.X

Applicant/s : Mohammed Ismail and others

Vs.

Opponent/s : Hayath Khan

ORDER ON I.A.NO.X

The plaintiffs have filed the instant I.A., under Order XXVI Rule 9 r/w Section 151 of CPC with prayer be pleased to appoint the court commissioner preferably a Surveyor attached to the office of ADLR, Tarikere Taluk to report the features and topography of plaint schedule property in the above suit.

2. The I.A., is annexed with the affidavit of plaintiff No.1. It is stated in the affidavit that the plaintiffs have filed the present suit against the defendant for the relief of declaration of 'A' schedule property, recovery of possession of 'B' schedule

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property and for permanent injunction. It is stated that the defendant has contended that the plaint 'B' schedule property is not part and parcel of the plaint schedule property. The said property is belongs to Halasuru Grama Panchayath and the same was granted in favour of defendant on upset price and entered in his name as assessment No.286 and property No.86 measuring 20 x 28 feet by considering the long possession and enjoyment of the said property. Under these circumstances, in order to adjudicate the matter between the parties, it is just and necessary to ascertain the property which is in possession of the defendant as shown in the plaint schedule is the part and parcel of the 'A' schedule property or it is part of Halasuru Grama Panchayath. Hence, this application.

3. The copy of the I.A., served to the other side. The counsel for the defendant orally submitted that he has no objections to allow the aforesaid I.A. filed by the plaintiffs.

4. Heard arguments on both sides.

5. On perusal of the materials placed on record, the following points that would arise for my consideration are :

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- 1) Whether the I.A.No.X filed by the plaintiffs under Order XXVI Rule 9 r/w Section 151 of CPC is deserves to be allowed?
- 2) What order?

6. My findings on the above points are as follows :

Point No.1 : In the Negative,

Point No.2 : As per the Order,

for the following:

REASONS

7. **POINT NO.1** : On perusal of the materials available on record, admittedly the plaintiffs have filed present suit against the defendant for the relief of declaration of 'A' schedule property, recovery of possession of 'B' schedule property and consequential relief of permanent injunction. When the matter is set down for further evidence of plaintiffs side, the plaintiffs have filed this I.A. It is the urge of the plaintiffs that the defendant has contended in his written statement that the 'B' schedule property is not a part and parcel of the plaint schedule property. The said property belongs to Halasuru Grama Panchayath and the same was granted in favour of defendant by collecting the upset price by considering the long possession and enjoyment to an extent of 20 x 28 feet in assessment No.286.

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8. The learned counsel for the defendant orally submitted that he has no objections to allow the aforesaid I.A., filed by the plaintiffs. It is well settled law that, mere non-objecting the I.A., by the other side is not a ground to allow the I.A., but it has to be decided on merits. The plaintiffs have filed this I.A., and sought for be pleased to appoint the court commissioner preferred Surveyor attached to the office of ADLR, Tarikere to report the features and topography of plaint schedule property in the above suit. It is the urge of the plaintiffs that to ascertain that in which property the defendant is in possession, whether in the plaint 'B' schedule property which is part and parcel of the 'A' schedule property or it is the part of the Halasuru Grama Panchayath. It is very significant to note that, the plaintiffs themselves categorically pleaded in their plaint that, the defendant was doing blacksmith work, in the month of 2015 the defendant requested the plaintiff to give plaint 'B' schedule property for doing blacksmith work. The plaintiffs have permitted to make use of 'B' schedule property for the purpose of doing blacksmith work at Halasuru village on monthly rent of Rs.200/- agreeing to hand over the possession of the plaint 'B' schedule property whenever the

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plaintiffs demanded to deliver the possession of plaint schedule property.

9. In a suit for declaration, recovery of possession and consequential relief of injunction, the onus is always lies upon the plaintiff to prove that he is the title holder of the suit schedule property by adducing cogent and credible evidence, but, the plaintiff cannot take the weakness of the defendant as a trump card. In the present suit, the evidence is not concluded.

10. It is very significant to note that the plaintiffs have sought for the relief of appointment of court commissioner as stated in the application and affidavit to ascertain that in which property the defendant is in possession i.e., either in the plaint 'B' schedule property which is part and parcel of the 'A' schedule property or the property which is part and parcel of Halasuru Grama Panchayath. It is well settled law that the question of appointment of commissioner arises only after adducing evidence of both parties. If the evidence available on record is not sufficient to decide the dispute between the parties, then only the court can appoint the court commissioner to ascertain the real facts. The plaintiffs have filed this application before concluding the evidence of

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both parties, it is nothing but a parallel proceedings for collection of evidence. At this stage, the plaintiffs have not made out prima facie case to allow the I.A., filed by the plaintiffs. The I.A., filed the plaintiffs is devoid of merits. For considering all these reasons, I answer Point No.1 in the Negative.

11. **POINT NO.2** : In view of my findings on Point No.1, I proceed to pass the following :

ORDER

I.A.No.X filed by the plaintiffs under Order XXVI Rule 9 r/w Section 151 of CPC is hereby rejected on payment on cost of Rs.200/-.

(Dictated to the Stenographer on computer, typed by her, corrected by me and then pronounced in the open Court, on this the day of 29th day of September 2022.)

sd/-

(SHIVAKUMAR.R)
ADDL.CIVIL JUDGE &
J.M.F.C., TARIKERE.