

IN THE COURT OF THE ADDL. CIVIL JUDGE AND JMFC.,

GUNDLUPET

Present

Nagaraj Barki B.A. L.L.B.,

ADDL. CIVIL JUDGE AND JMFC., GUNDLUPET

Dated 16th day of November 2019

O.S. No. 88/2019

Plaintiffs : Shingegowda and another

V/s

Defendants : Swamy

ORDER ON I.A.NO III/2019

APPLICANT: Shingegowda and another
(Plaintiffs)

V/s

OPPONENT : Swamy (defendant)

ORDERS ON I.A.NO.III FILED BY THE PLAINTIFFS U/O 26
RULE 9 OF CPC.

This is an application filed by plaintiffs under order 26 rule 9 r/w 151 of CPC requesting the Court to appoint an advocate as Court Commissioner to measure the property of suit schedule property and the defendant's property and to submit rough sketch and Mahazar along with report in said properties.

2. The application is accompanied with the affidavit and duly sworn by the plaintiff. In the application and affidavit it is stated that, plaintiff has filed interim application seeking temporary, after service of summons, the defendant has filed one objection to the I.A. As per the said objection the defendant has baldly denied the contents of the affidavit and simply stated the measurement of his property, only in sq. mtrs, from which he has not given any title documents. The defendant has also given wrong boundary to his property, which is also not true and the defendant has no original title deeds to the said measurement. When at the

time filing the suit, the defendant had only partially dugged a sum to a measurement 6X7 feet and put a concrete slab, measuring 5X6 feet, but after filing his objection to IA No 1, he had put up temporary basement to a large extent, including the above said sump and slab by day night work and right now the application filed by plaintiff for the temporary injunction was also dismissed, utilizing the situation the defendant is making hectic efforts to construct more large extent. It is necessary to measure the extent with in which the defendant is putting up temporary construction, the measurement of already existing house of defendant and plaintiffs and also the vacant space of the plaintiffs to do justice to both parties. But the defendant is neither allowing the plaintiffs to measure the above said properties themselves, nor he himself submitting the east west measurement of existing house as well as the temporary construction. Hence it is necessary to appoint an advocate as court commissioner to visit, inspect and take measurement of said properties by local inspection and also to file

necessary mahazar, rough sketch, and a detailed report. Hence this application.

3. On the other hand, defendant has filed detailed objection to IA No III, and contended that present application filed by the plaintiffs is not maintainable. He denied all averments made in application and accompanied affidavit, it is denied that, the defendant has given wrong boundary to his property and original title deed to support his defense. It is further contended that, when there is no measurement is not mentioned in the sale deed of the plaintiff and plaintiff have failed to show prima facie case in their favour, it is not necessary to appoint to an advocate to inspect the properties of the plaintiffs and the defendant and measure the house property and vacant space independently and to submit the report with due mahazar and rough sketch. It is just wasting of precious time of the court. Hence, it is not maintainable under the law and fact of the case. Moreover, this Hon'ble court already dismissed the interim application filed by the plaintiff. Hence, application is not maintainable under the

law and fact of the case. Hence, I.A No 3 is liable to be dismissed in limine.

4. Heard, the learned counsels for the parties before the court and perused materials placed before the court.

5. The following points arises for my consideration are as under;

1. Whether plaintiffs shows that, there exists sufficient ground to appoint court commissioner in order to measure the suit schedule property and property of defendant, in order to elucidate the dispute between the parties?

2.What order?

6. My answer to the above points are as follows:-

Point No:1. Does not arise consideration at this stage.

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

REASONS

7. Point No: 1 :- The present application filed by the plaintiffs on the ground that, defendant has given false boundary to his property, he has not having title deeds to the said measurement. At the time of filing the suit defendant was partially digging a sump to a measurement 6X7 feet and put concrete slab. After filing his objection to IA No I, he had put up temporary basement to large extent including sump and slab by day night work. When IA No I is dismissed, defendant is making hectic efforts to construct more large extent. Hence it is necessary to measure the suit property and property of defendant. On the other hand defendant has contended that firstly he denied all averments as mentioned in affidavit of IA No III. Further contended sale deed of the plaintiff is not having specific measurement, hence plaintiff have failed to prima facie case in favour plaintiffs. It is not necessary to appoint an advocate for measure the suit property and property of defendant. If application is allowed

it is just and wasting of precious time of the court. Hence present application of the plaintiff is not maintainable.

8. Plaintiffs have filed present suit against the defendant for the relief of perpetual injunction and mandatory injunction over the suit schedule property. The main contention of plaintiffs is that defendant is constructing the sump in suit property, the suit property ought to have measure through an advocate for adjudication of matter and to know existing property either property of plaintiff or property of defendant. Perusing the records it discloses that which are produced the documents by the plaintiffs are not mentioned exact measurement. On the other defendant has produced E-Swattu extract measuring 15.90x5.80 meter. As such being plaintiff has apprehension that if the suit property is not measured, defendant is making hectic efforts to construct more large extent in suit property.

9. Learned counsel of the defendant submitted that defendant has constructed in the property of defendant,

there is no constructing in the property of plaintiffs. Further submitted that those properties are adjoining to each other. Plaintiffs have not in their hand which extent he was in possession over the suit property. It is not easy to ascertain the measure of the property. Defendant is having exact measurement of the property of him. Hence plaintiff has not come with clean hands. It is just to dismiss the present case. During the course of hearing learned counsel of defendant relied the decision of the Hon'ble High court of Karnataka, Writ Petition No 105084 of 2015 dated 7th April 2016, Vidya Veerabhadra Jannu V/s Seeta Kom Jayaram Hiregange. The lordship observed that after recording the evidence of both sides, there was any ambiguity or necessity, both parties were at liberty to make appropriate application for appointment of court commissioner.

10. Per contra learned counsel for plaintiff has submitted that defendant has not having title documents in his favour. Plaintiff has purchased the suit property. At the time of purchasing the suit property, boundaries were fixed,

but measurement of suit property is only in sq meter. Since filling of this suit defendant has been constructing the sump and slab as stage by stage. Hence it is necessary to measure the suit property. During course of hearing on application relied the decision of the Hon'ble High court of Karnataka, 2017(3) KCCR 2666, T.M.Srinivasmurthy V/s Vinayaka Naik and another. The lordship observed that,

“ The location of the suit schedule property and Sy No 11/1 in respect which the petitioner has claimed to have purchased the site and the same being adjoining to each other, it is noted that the burden is cast on the plaintiff to prove their case. They have sought for dual relief, one, is for permanent injunction and the other, is for mandatory injunction as against the defendants. Therefore, the plaintiffs would have to establish that they are in possession of the suit schedule property and that the defendant has interfered with their possession and that the defendant has in fact put up an illegal construction on the said property. In order to establish those facts, plaintiffs sought appointment of court

commissioner. The mere appointment of court commissioner as well as the submission of the report would not imply that either the case of the plaintiffs or the case of the defendant is established. The commissioner's report would have to be considered by the trial court as an additional piece of evidence and thereafter the matter is to be adjudicated."

11. As supra the lordship observed that if the opportunity has given to measure the property, it easy to ascertain the suit property of plaintiff and property of the defendant. Moreover plaintiffs have also apprehension that if not permitted to measure, defendant has been constructing step by step in the suit property as illegally. Further lordship observed that report of court commissioner is an additional piece of evidence and help to adjudication of the matter. But in this case defendant has filed written statement and objection to IA No I and III, still issues are not framing in the present suit, the matter is kept for framing of issues. Moreover plaintiffs have not shown clear measurement and possession of suit property. Under such circumstances this

court has opined that at this stage appointment of court commissioner is not necessary still recording of the evidence on both sides.

12. It is settled principle of law that, court can appoint court commissioner only when the available oral and documentary evidence on record are insufficient to adjudicate dispute between the parties effectively and conclusively. Further, report submitted by the court commissioner can be used to appreciate the evidence already on record. In this regard I supported by ratio laid down in decision reported in ILR 2002 Karnataka 3599 in case of Annappa Mestha Vs. Mutayya Achari Wherein it is held that Appointment of Commissioner can be resorted to only in cases where, either from the records, or from the evidence, it is not possible for the Court to determine the dispute.

13. On careful perusal of observation made by Hon'ble High Court of Karnataka in above mentioned decisions. It is held there it ought to be felt by the court for the purpose of

elucidating certain details which, in its opinion, can neither be had from the records and nor can be produced by parties by way of oral and documentary evidence. The details so required by the court ought to be such that in their absence determination of issues in the dispute cannot be effectively adjudicated upon necessitating the appointment of commissioner on its own or at the instance of either of parties.

14. Considering ratio laid down in the above decision, it is clear that only after considering the oral and documentary evidence adduced by the parties to the suit if court is of the opinion that, said evidence on record is not sufficient to resolve the dispute between the parties effectively then only court can appoint court commissioner. Hence at this stage application filed by plaintiffs is premature one. Hence I answer point **No.1** does not arise consideration at this stage.

15. Point No:2:- On above made discussion on point No:1, I proceed to pass following:-

ORDER

I.A.No.III filed by the plaintiffs under order 26 rule 9 r/w 151 of C.P.C is hereby kept in abeyance till recording of evidence.

The plaintiffs are at liberty to file such application after closure of evidence of both side, in case, in the opinion of court the available evidence of records not sufficient for the effective adjudication of dispute involved in the suit.

No order as to costs.

For framing of Issues.

Call on:- .

(Nagaraj Barki)
Addl.Civil Judge and JMFC,
Gundlupet.