

OS 96/2016
Dt:06-09-2021

ORDERS ON I.A.NO.VIII

The counsel for the plaintiff filed the present application under Order 26 Rule 9 r/w Sec 151 of CPC seeking prayer to appoint an Advocate Commissioner with the aid of surveyor to submit report as mentioned in the said application

accompanying with affidavit duly sworn by the plaintiff.

2. It is further averred by the applicant that, he has filed the present suit against the defendant for mandatory injunction directing the defendants to restore the land of the plaintiff by newly formed road by removal of the encroachment and for prohibitory injunction not to trespass into his property, alternatively to pay the market value of the encroached land made while widening 9 feet mud road into more than 9 meter road in their private property. It is further averred by the plaintiff that, the defendants have illegally encroached substantial portion of his land measuring not less than 1.50 acres of land while widening the 9 feet road. Hence, it is absolutely necessary and proper to elucidate the real extent and area of land encroached by the defendants while widening the said road in the suit property. The encroachment can only be ascertained by survey measurement with the assistance of competent surveyor under the supervision of an Advocate Commissioner. This will minimize the evidence and facilitate the Court to decide the issues involved in the suit. Hence, prays to allow the said application.

3. Per contra, the counsel for the defendants filed objections and denied the affidavit averments as

false, frivolous and not maintainable under law or on facts. It is further contended that, the reasoning of the plaintiff seeking for appointment of commissioner is unjustifiable. The court commissioner cannot be appointed for the purpose of collecting evidence in a suit for injunction. This Court has to decide the case on the basis of possession as well as the documentary evidence produced before this Court. It is further contended that, the suit is filed in the year 2016 and now being lapse of around 5 years, this application is filed only to drag the proceedings and to waste precious time of this Hon'ble Court. Hence, prays to dismiss the application with costs.

4. Heard both sides.

5. The counsel for the plaintiff filed the following citations in support of the application;

- 1) ILR 2010 KAR 897
- 2) ILR 2001 KAR 5013
- 3) 2014(2) KCCR 1652
- 4) (2015) 1 KCCR 887.

6. I have perused the materials placed before me. The counsel for the defendants vehemently argued that, construction of 9 meter road is admitted by both sides. Alleged 9 feet road as averred by the plaintiff is not proved. Hence, there is no need to appoint Court Commissioner when the 9 feet road

itself is not in existence. The counsel for the defendants further argued that, at this stage evidence has to be conducted to prove the encroachment.

7. Per contra, the counsel for the plaintiff vehemently argued that, if the Court Commissioner is appointed, it helps in administration of justice. Hence, the application filed for the appointment of court commissioner can be allowed. It is further argued by the plaintiff counsel that, to lessen the burden to the Court and to prove their case by leading evidence, the said application deserves to be allowed. It is further submitted that, without following due process of law the defendants have acquired the land and constructed the road.

8. On hearing both sides and perusal of the citations furnished therein, I am of the opinion that, it is well-settled law that in application involved under Order 26 Rule 9 of CPC, the plaintiff is required to prove his case by giving evidence first and only then the commission can be assigned.

9. It is further made out clear by the Hon'ble High Court that, during pendency of the trial and before the Judgment if the Trial Court finds that any issue requires clarification or elucidate, the Court may suo-moto appoint Commissioner to submit the report for which no application is required. It is said

that the scope of Order 26 Rule 9 of the CPC is very limited. It is further required to prove their own case by way of evidence in support of their case. After the evidence of parties, if Court deems it proper that any issue requires clarification then the Court may appoint a Commissioner. The report of Commissioner is merely a piece of evidence and not binding on the court. It can be used for the purpose of appreciating the evidence came on record. Hence, at this earliest stage, the said application filed by the plaintiff deserves to be dismissed. Hence, I proceed to pass the following;

ORDER

The I.A.No.VIII filed by the plaintiff under Order 26 Rule 9 r/w Sec.151 of CPC is hereby dismissed.

Call on for plaintiff's side evidence call on 23.09.2021.

sd/-

CIVIL JUDGE & J.M.F.C.,
MOODBIDRI

