

IN THE COURT OF THE | ADDITIONAL SENIOR CIVIL JUDGE
& J.M.F.C., HUBBALLI

Present:
Sri. Ganapathi Prashanth M.,
B.A.LL.B.,
I Addl. Senior Civil Judge & J.M.F.C., Hubballi.

Execution Petition No.17/2022

Dated this the 06th day of April, 2023

Decree holders : 1. Smt. Jyoti Subhash Madiman and
others.

.Vs.

Judgment Debtors : 1. Smt. Mangala Vivek Kilpadi and
others.

PARTIES TO I.A. DATED:06.12.2022

Applicant/s : Smt. Jyoti Subhash Madiman and
others.

Vs.

Opponents : Smt. Mangala Vivek Kilpadi and
others.

ORDERS ON I.A.

The DHR has filed this I.A. under Order 26 Rule 9
r/w.Sec.151 of C.P.C. seeking to appoint Court Commissioner to
demarcate the share of the petitioner as per the decree

2. The JDR has fled objections.

3. Heard, perused the pleadings and documentary
evidence placed on record.

4. The points for consideration are;
 1. Whether the appointment of Court Commissioner is just and expedient to decide the dispute involved herein ?
 2. What Order ?

5. The above point No.1 is answered in the affirmative and point No.2 as per final order, for the following:

REASONS

6. **Point No.1:** The learned counsel for the JDR has relied upon the decision reported in *ILR 2007 Karnataka 5106 (The State of Karnataka Vs. H.J. Shankunthamma)*, wherein it is held that under Sec.61 and Sec.63 of the Karnataka Land Revenue Act, the revenue Courts have exclusive jurisdiction regarding fixing of boundaries and the plaintiff has exhaust his right of appeal before instituting a suit or other proceedings against the Government. The said decision is not in dispute. However, the same is distinguishable of facts. This is not a suit or other proceeding against the Government or local authority concerned. This is a proceeding between the private parties to the suit to enforce the terms of the decree in the proper perspective.

7. It is to be noted that the dispute involved herein is very simple. The parties had entered into compromise as per the compromise petition filed in RFA 3066/2022 and the decree was drawn as per the compromise. As per the said decree, the portion ABCD marked in the sketch was given to the share of the plaintiff No.1 and 2 and defendant No.2 (excluding the shops already

sold). The remaining northern portion of the property in the said sketch is allotted to the defendant No.1. In respect of the property already sold, Rs.3,10,000/- with interest at 9% from the date of sale of the building bearing B-4, in the basement on 27.08.2005 was agreed to be paid by the defendant No.1 to the plaintiffs and defendant No.2. Thus, it is clear that only the ABCD portion marked in the sketch is allotted to the plaintiffs and defendant No.2.

8. The plaintiff No.1 and 2 and the defendant No.2 are Mangala, Tara and Chaitra, who are the respondents in the said RFA No.3066/2011. The defendant No.1 was the appellant in the said RFA No.3066/2011, his name is Subhash. The decree holders herein are the children of Subhash (defendant No.1 in the said suit, who is appellant in the said RFA No.3066/2011). The respondent No.4 herein is also another daughter of said Subhash. All the said children of Subhash had entered into deed of partition with Subhash on 27.08.2007, which is a registered partition deed and the said deed of partition was entered into during the pendency of O.S. No.200/2003. However, that suit was decreed by granting 1/6th each share to the plaintiff and the defendant No.2. That decree was challenged in RFA No.3066/2011 and ended with compromise. That share allotted as per ABCD appears to be in a portion of property bearing CTS No.170/A and with right over the road in CTS No.170/C, for ingress and egress to ABCD portion.

9. The registered partition deed entered into between the defendant No.1 and his children discloses that only certain shops and portion of the building are allotted to the sharers with undivided share over the immovable property to the extent of

percentage of the right mentioned therein. As per the said partition deed, the Khata was mutated. However, after the said compromise decree, the decree holders sought for mutation of Khata to their names as per the compromise decree. As such the name of Subhash is deleted entirely from city survey No.170/A, though in the very same document it is mentioned that the right in respect of the said plaintiff No.1 and 2 and defendant No.2 is only to the extent of ABCD portion. Similarly, in respect of city survey No.170/C also the name of the Katedar Subhash is deleted entirely, though the right to use the road was only given under the compromise decree, but 170/C is not given to the plaintiff and the defendant No.2.

10. Therefore, if there is excess delivery in favour of the plaintiff and defendant No.2 as per the compromise petition, that has to be adjudged by this very Court and not by separate Court or by separate suit. To ascertain whether entire 170/A and 170/C is covered by the portion ABCD mentioned in the sketch annexed to the compromise petition, it is necessary to allow the present application. Therefore, the present execution petition is in the nature of an application for restitution under Sec.144 of C.P.C. Hence, for proper adjudication of the claim, it is necessary to appoint Court Commissioner.

11. The learned counsel for the respondent No.4 by name Shantala, who is a sister of the petitioners herein, who is a party to the said registered partition deed supra, has vehemently argued that the present application might be intended at amalgamating the share already allotted to her in the registered partition deed and opposed the application. However, that is not the issue involved for appointing the present Court Commissioner.

Even if such an application for amalgamation is filed, the JDR No.4 can very well oppose the same, if so entitled under law. Hence, on such assumptions and presumptions, the application cannot be rejected.

12. Fact remains that proper identification of the portion ABCD and whether it entirely covers city survey No.170/A and 170/C, it is necessary to appoint a Court Commissioner as prayed for. Hence, **point No.1 is answered in the affirmative.**

13. **Point No.2:** In view of findings on point No.1, this court proceeds to pass the following;

ORDER

The I.A. dated:06.12.2022 filed by the DHR under Order 26 Rule 9 r/w.Sec.151 of C.P.C. is hereby allowed.

It is held that appointment of Court Commissioner for local investigation is just and necessary for the adjudication of the real dispute in controversy between the parties to this proceedings.

The name of the Court Commissioner will be decided and terms of appointment will be fixed after hearing the parties.

(Dictated to the Stenographer, transcribed and computerized by her, script corrected directly on computer and then pronounced by me in the Open Court on this the 06th day of April, 2023)

(Ganapathi Prashanth M.,)
I Addl. Senior Civil Judge & J.M.F.C.
Hubballi.