

**ORDER ON IA NO. 14**

The counsel for the plaintiff has filed this I.A. No.14 U/order 26 rule 9 R/w Sec. 151 of CPC praying for this court to appoint any advocate as court commissioner directing him to inspect and report whether the defendants have left open space measuring 5 feet (3.5 mola) i.e., suit property towards the eastern side of the property of the plaintiff or not to meet the ends of justice and equity.

2. In the accompanying affidavit sworn by the power of attorney holder of the plaintiff has stated that, the plaintiff has filed this suit seeking the relief of declaration and injunction against the defendants. During the pendency of the above said suit, the defendants have effected the construction covering the entire suit property and there by they are causing the obstruction of the use of the suit property. Further, the defendants in their evidence denied the same. Therefore, to know exactly whether they have effected construction by keeping the suit property keep open for the use of plaintiff or not the appointment of court commissioner is very much necessary and essential if this application

is not allowed, they will be put to irreparable loss. On the other hand no prejudice or hardship will be caused to the defendants.

3. The defendants have filed objection to this I.A submitting that, the stage of the suit is for argument. The court commissioner cannot be appointed for the purpose of collecting evidence from the alleged suit spot. It is the plaintiff has to prove his case and for that purpose court commissioner cannot be appointed etc., and prayed to dismiss the I.A.

4. Heard. Perused, the plaintiffs have filed this suit against the defendants seeking the relief of declaration and Injunction.

5. Perused the pleadings and the issues. The additional issue No.8 is framed placing the burden on the plaintiffs to prove that during the pendency of the suit the defendants have illegally constructed the building in the suit property. In so far as the I.A in hand is concerned the plaintiffs prayer in other way is similar to the additional issue No.8.

6. As it is rightly argued by the counsel for the defendant a court commissioner cannot be

appointed to collect the evidence it is the parties who have approached the court regarding the lis have to prove their respective cases. In this case already I have said an issue with respect to the illegal construction if any has been framed and the burden is on the plaintiffs to prove that the defendant has constructed the building covering the suit property. Therefore, for that purpose a court commissioner cannot be appointed it is settled in law that a court commissioner cannot be appointed to collect the evidence. It is the parties who have to prove their case by adducing oral or documentary evidence. In this regard counsel for the defendant has relied upon the decision in **ILR 1996 KARNATAKA 1443** wherein, the Hon'ble High court of Karnataka has held that in a suit for injunction the question as to who is in possession of the property is matter to be decided by the court and the bases on the evidence either oral or documentary to be adduced by the parties that function cannot be delegated to a commissioner who cannot find out as to who is in possession of the property.

7. The facts of the case on hand and case relied by the defendant may be different but, the ratio laid down by the Hon'ble High court of

Karnataka in this case is helpful in deciding this application because as it is observed in the said decision, the case of the plaintiff has to be decided on the basis of the evidence either oral or documentary as discussed above to be adduced by the parties that function cannot be delegated to a commissioner, because it is not the duty of the court to collect the evidence, rather it is the duty of the parties to adduce evidence and the court's duty is to decide the case on the basis of evidence. Therefore, this application is devoid of merits. Hence, this needs to be dismissed. Hence, I proceed to pass the following:

**ORDER**

IA No. 14 filed U/order 26 rule 9 R/w Sec.151 of CPC by the plaintiff is hereby dismissed with cost of Rs.200/-.

For arguments by: 04.12.2021.

Sd/-  
(Smt. Anuradha H. T)  
C. J & JMFC., Kundgol.