

**IN THE COURT OF CIVIL JUDGE AND J.M.F.C, JEWARGI.**

Present: **Sri. SHIVARAJ.V. SIDDESHWAR.**

*B.Sc., B.Ed. LL.B.(spl).*

Civil Judge and JMFC, Jewargi.

**DATED ON THE 14<sup>th</sup> DAY OF FEBRUARY-2020.**

**ORIGINAL SUIT No.165/2014**

- 1) Mallappa S/o Bailappa Heroor (Pujari),  
Age: 70 Yrs, Occ: Agriculture,  
R/o Halagadla Village, Tq: Jewargi,  
Dist: Kalaburagi and others.

**Plaintiffs.**

**V/s**

- 1) Nagappa S/o Somalingappa Kadkal,  
Age 50 Yrs, Occ: Agriculture,  
R/o Halagadla, Tq: Jewargi,  
Dist: Kalaburagi and others.

**Defendants.**

**PARTIES IN IA.No.4**

- 1) Mallappa S/o Bailappa Heroor (Pujari),  
Age: 74 Yrs, Occ: Agriculture,  
R/o Halagadla Village, Tq: Jewargi,  
Dist: Kalaburagi.

**Applicant/Plaintiff No.1.**

**V/s**

- 1) Nagappa S/o Somalingappa Kadkal,  
Age 50 Yrs, Occ: Agriculture.
- 2) Yenkappa S/o Somalingappa Kadkal,  
Age 40 Yrs, Occ: Agriculture.
- 3) Yellappa S/o Sidramappa Yeshagar,  
Age 40 Yrs, Occ: Agriculture.  
All R/o Halagadla, Tq: Jewargi,  
Dist: Kalaburagi.

**Respondents/Defendants.**

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Sri.B.B, Adv. for plaintiffs.  
Sri.J.V.H, Adv. for defendant No.1.  
Defendant No.2 and 3 Ex-parte.  
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### **ORDER ON I.A.No.4**

Plaintiff No.1 filed I.A.No.4 U/o 26 Rule 9 of C.P.C thereby, sought to appoint court commissioner to make local inspection to ascertain the possession of the plaintiffs over the suit property bearing panchayath No.3-207 measuring East-West:90 feet and North-South:100 feet situated at Halagadla village of Jewargi taluk.

**2.** I.A.No.4 is accompanied with sworn affidavit of plaintiff No.1, wherein plaintiff No.1 asserted that, plaintiffs are in possession over the suit property since long time and the defendants have denied the possession of plaintiffs over the suit property. Plaintiff No.1 also asserted that it is just and necessary to make local inspection to ascertain the plaintiffs' possession over the suit property. On these grounds plaintiff No.1 sought to allow the I.A.No.4.

**3.** The defendant No.1 has not filed his objection to I.A.No.4.

**4.** The following point arises for determination.

- 1) Whether applicant/plaintiff No.1 has made out sufficient grounds to appoint court commissioner?

5. Heard arguments from both side, perused materials placed on record.

6. My finding to the above point is in the Negative for the following-

### **REASONS**

7. **POINT No.1:** The plaintiffs filed present suit for the relief of declaration and injunction to declare them as owners and in possession over the suit property. Already evidence of plaintiffs and defendants is recorded and when case was posted for arguments the plaintiff No.1 filed the present application.

8. At this stage it is appropriate to refer a decision reported in AIR 1996 KARNATAKA 257 between Puttappa V/s Ramappa, wherein the Hon'ble High Court of Karnataka held as follows;

“Civil Procedure Code (5 of 1908), O.26, R.9-Appointment of Commissioner-Suit for permanent injunction-Question as to who is in possession of property, is in dispute-Commissioner cannot be appointed to give finding on said question of possession.”

9. In the above said decision the Hon'ble High Court of Karnataka held that commissioner cannot be appointed to find out as to who is in possession of the property. In a suit for declaration and injunction the question as to who is in

possession of the property, is a matter to be decided by the court on the basis of the evidence, either oral or documentary, to be adduced by the parties. The function cannot be delegated to a commissioner who cannot find out as to who is in possession of the property.

**10.** Further, it is important to rely upon a decision of the Hon'ble High Court of Karnataka at Dharwad Bench in W.P.No.31503/2008 (GM-CPC) between SHRI JAMBU S/O NEMAGOUDA MALAGOUDANAVAR V/S SHRI MALAGOUDA S/O RAMAGOUDA MALAGOUDANAVAR dated 23-11-2012, wherein the Hon'ble High Court of Karnataka at Dharwad Bench held as follows;

“The suit of the plaintiff is for declaration declaring that he is owner of the property measuring 29 guntas in R.S.No.301/34B allotted to him in the family partition. However, defendant claims that he was granted with 0.37 guntas of land and 0.23 guntas of land was granted to the plaintiff. The record of right and other documents show that R.S.No.301/34C is measuring 0.37 guntas. The dispute between the parties has to be dissolved by leading evidence. It is not boundary dispute between the parties. The dispute with regard to the extent of land cannot be decided by

appointing a court commissioner. The plaintiff has to prove the case on the basis of the oral and documentary evidence. The court commissioner cannot be appointed for collecting the evidence.” Para No.8.

**11.** A meticulous perusal of above said decisions of Hon’ble High Court of Karnataka it is crystal clear that commissioner cannot be appointed to find out as to who is in possession of the property. It is already noted that plaintiff No.1 has filed present application to appoint court commissioner to ascertain their possession over the suit property. Principles laid down in the above said decisions are aptly applicable to the facts of the present case. Law mandates that the person who seek the relief of declaration of his possession over the property it is imperative to him to prove his title and possession over the suit property.

**12.** It is important to note here that the plaintiff No.1 has filed the present application at belated stage. In a decision reported in AIR 2004 Kar. 92 between B.S.Nazir Hassan Khan V/s Aswathanarayana Rao and others, the Hon’ble High Court of Karnataka held as under;

‘2. The learned Judge has pointed out in the order passed that the suit is of the year 1991. The evidence of the plaintiff was commenced on 4-11-1996 and the evidence was closed on 22-2-1999. In the course of

these three years, if the plaintiff and the learned Advocate desired that any Commissioner was necessary or desirable, it was at this point of time that the application ought to have been made and most certainly before the plaintiff's evidence was closed. If the application was justified, the Court would have granted it or else it could have been rejected. Thereafter, the defendant's evidence was taken up and this was also closed on 19-9-2000 and the order-sheet shows that the case was posted to 10-10-2000 for arguments. The present application has been filed on 2-11-2000 i.e., three weeks after the trial has reached the stage of finality and the case was fixed for arguments. To my mind, it is necessary that all applications of this type even if they are bonafide and genuine, have to be filed at a proper point of time in the proceedings. This is very necessary also from the point of view of the stage of the proceedings because, the learned trial Judge is perfectly right when he pointed out that if this application were to be entertained, even assuming that was the position, it would mean that the trial which has reached the argument stage, would get dilated, evidence will have to be reopened

and all the procedures from that stage onwards would again have to be recommenced. The Law does not permit such ill-timed applications which would only have the effect of disrupting the trial and dilating the proceedings. The Courts have been virtually struggling to ensure that civil proceedings are heard and disposed of within a reasonable time and applications of this type only disrupt the proceedings and dilate them. Under these circumstances, not only was the trial Court fully justified but, to my mind, the challenge presented through Civil Revision Petition to that order is totally misconceived. Having regard to this position the Civil Revision Petition is dismissed with costs quantified at Rs.1000/-.'

In the present case the plaintiffs side evidence was closed on 21-3-2018 and defendants side evidence was closed on 1-8-2018 and case was posted for arguments on 6-8-2018. Subsequently after expiry of 6 months on 4-2-2019 learned Advocate for the plaintiffs filed the present application. Principles laid down in the above referred decision are aptly applicable to the facts of the present case. Further, this is a suit more than 5 years old. The plaintiff No.1 has filed the present application at belated stage. Under these circumstances this court is of considered opinion that

plaintiff No.1 has not made out sufficient grounds to allow the present application. With these observations above point is answered in the Negative. For the forgoing reasons this court proceed to pass the following-

**ORDER**

I.A.No.4 filed by the Plaintiff No.1  
under order 26 Rule 9 of C.P.C is  
rejected.

No order as to costs.

(Dictated to the Stenographer, directly on laptop,  
corrected and then pronounced by me in the open court on  
14<sup>th</sup> day of February-2020)

Civil Judge & JMFC,  
Jewargi.