

ORDERS ON I.A.NO.XX.

At the stage of Arguments this is the I.A.No.XX filed by the applicant/plaintiff No.1(c) under Order XXVI, Rule 9 R/w Section 151 of C.P.C., seeking to appointment of a Court Commissioner for the purpose of Spot Inspection of the suit schedule property and to submit report.

2. In I.A.No.XX, it is stated that for the reasons stated in the affidavit, prayed to appoint a Court Commissioner to conduct Spot Inspection of the suit schedule property. In the accompanying affidavit, it is also stated that, the plaintiff sought the relief of declaration, permanent and mandatory injunction. The plaintiff has been using suit schedule property as road as described as A, B, C, D area in the rough sketch relied by the plaintiff. There is no alternative road to reach their house from the main road. The defendant has no right, title or interest over the said road. Before filing of the suit the defendant has illegally encroached small portion in the road and constructed the building towards Northern side of said road. Hence, the plaintiff has filed this suit and obtained temporary injunction order against the defendant. Thereafter, this court has rejected the application filed by the plaintiff and vacate the interim order passed by this court. Further stated that, the defendant has misused the order of this court and

illegally encroached the entire road and constructed the building. Hence, in order to find out the suit schedule road and in order to find out the encroachment the present I.A. is to be necessary. Otherwise, the plaintiff will be put to inconvenience. Accordingly, prayed to allow the I.A.No.XX.

3. On the other hand, the learned counsel for opponent/defendant has filed objections to the above application and contended that, the plaintiff unlawfully claiming the road towards the Western side of the old Thotti House of defendant just adjacent to the old wall based on the alleged registered Partition Deed dated:07.05.1955, which was not acted upon nor brought into the day light to claim the alleged road. As on the date of filing of the suit the plaintiff by showing the said document has obtained an exparte order of Temporary Injunction against the defendant to restrain further construction in the alleged suit schedule property by the defendant, under the false and miss representation. The defendant has filed his detailed written statement and to show that the plaintiff has wrongly obtained equitable relief with substantial document in support of his defense exparte Temporary Injunction. Thereby in the interim stage itself the defendant prima facie shown to this Court regarding the non existence of any road

towards the Western side of the old Thotti House of defendant just adjacent to the old wall from time immemorial and also shown the existence of Galli towards the Northern side of the old Thotti house of plaintiff leading to Village cross road (Damber Road) situated just in front of the house of the plaintiff on its Western side. Due to which this Court was pleased to reject the application of the plaintiff filed Under Order 39 Rule 1 and 2 of C.P.C and also Vacated the interim Temporary Injunction Order on 10.04.2014. Further, in the deposition of PW's with Exhibit "P" series and in the deposition of DW's with Exhibit "D" series there are sufficient materials & evidence are available on record to determined the real questions in controversy between the parties. When such being the case, the above application is filed for the collection of evidence based on the document which was never acted upon at any point of time and also to drag on the proceedings and also harass the defendant. Hence, prays to dismiss the above application with exemplary costs.

4. Heard on both sides and perused the materials.

5. Now the only points that will arise for my consideration are:-

1. Whether the applicant/plaintiff No.1(c) has made out sufficient grounds to appoint a Court Commissioner as prayed in the I.A.No.XX filed by him under Order XXVI Rule 9 of C.P.C.?

2. What Order?

6. My answers to the above points are:-

Point No.1 :- In the **Affirmative**.

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

:: R E A S O N S ::

7. **Point No.1:-** In this case, I have completely gone through the entire suit file. This is the suit filed by the plaintiff for the relief of declaration, permanent and mandatory injunction. In this case, after institution of the suit, the suit summons issued to the defendant. The defendant appeared through his counsel and filed his written statement. When the case has been posted for arguments, the applicant/plaintiff No.1(c) has come up with this I.A.No.XX seeking appointment of Court Commissioner pending disposal of the suit.

8. In the I.A.No.XX, it is stated that for the reasons stated in the affidavit, prayed to appoint a Court Commissioner to conduct Spot Inspection of the schedule property and to submit report. In the accompanying

affidavit it is also stated that, the plaintiff sought the relief for declaration, permanent and mandatory injunction. The plaintiff has been using suit schedule property as road as described as A, B, C, D area in the rough sketch relied by the plaintiff. There is no alternative road to reach their house from the main road. The defendant has no right, title or interest over the said road. The defendant has illegally encroached the suit schedule road and constructed the building towards Northern side of said road. Hence, in order to find out the suit schedule road and in order to find out the encroachment the present I.A. is to be necessary. Otherwise, the plaintiff will be put to inconvenience. Accordingly, prayed to allow the I.A.No.XX.

9. I have also gone through the U/O.XXVI R. 9 of C.P.C. which reads as under:-

"9. Commissions to make local investigations.- In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

10. I have also gone through the rulings reported in:-

2001(2) K.C.C.R. Page 1283.

2002(2) K.C.C.R. Page 1424.

After going through the arguments on both sides on I.A.No.XX and I have gone through the above said rulings, wherein the Hon'ble High Court of Karnataka, the caption reads as under:-

"CODE OF CIVIL PROCEDURE, 1908-Order 26, Rule 9-Appointment of Commissioner-Trial Court allowed request and appointed surveyor as Commissioner to survey property-Discretionary order-Appointment of Commission justified-Revision Petition dismissed."

"CODE OF CIVIL PROCEDURE, 1908-Order 26, Rule 9-Appointment of a Commissioner-Court cannot prevent a party from adducing the best evidence, if such evidence can be gathered with the help of a Commissioner-However, when a party himself had stated in his Pleading the extent of the land that had been encroached upon by the other party, there is no need to have a Commissioner appointed for measurement, demarcation and filing a report thereon."

11. After careful scrutiny of the contents of I.A.No.XX and also after hearing on both sides on I.A.No.XX, I am of the opinion that, since the suit is for relief of declaration, permanent and mandatory injunction, if an Taluk Surveyor is appointed as a Court Commissioner to conduct inspection of the suit schedule property, no hardship will be caused to the opponent/defendant.

12. Therefore, in this case it is pertinent to note that, the plaintiff has filed this suit for the relief of declaration, permanent and mandatory injunction and the evidence has already completed. If this I.A. is allowed, the controversy involved in the suit is properly adjudicated and it avoids multiplicity of proceedings. Therefore, if an Taluk Surveyor is appointed as Court Commissioner to conduct inspection of the suit schedule property, no hardship will be caused to the opponent/defendant. Moreover there is no question of collection of evidence. Therefore, the applicant/plaintiff No.1(c) has made out sufficient grounds to allow the I.A.No.XX. Accordingly, Point No.1 is answered in the '**Affirmative**'.

13. **Point No.2:-** In the light of the above discussion, I proceed to pass the following:-

:: O R D E R ::

I.A.No.XX filed by the applicant/
plaintiff No.1(c) under Order XXVI,
Rule 9 R/w Section 151 of C.P.C., is
hereby **allowed**.

The Taluk Surveyor is hereby
appointed as a Court Commissioner.

The Court Commissioner fee is
tentatively fixed Rs.2,000/-.

The applicant/plaintiff No.1(c) is
hereby directed to deposit Court
Commissioner fee of Rs.2,000/-.

Both the plaintiff and defendant
are hereby directed to file their
respective memo of instructions in
the next date of hearing without fail.

Call on: 31.01.2025.

**Addl. Civil Judge & J.M.F.C.,
T.Narasipura.****