

ORDERS ON I.A.XI

The applicant/defendant No.1 has filed I.A.No.XI under Order XXVI Rule 9 R/w Sec.151 of C.P.C., praying to appoint an advocate as a court commissioner and along with Taluk Surveyor by passing suitable orders.

2. In the accompanying affidavit the applicant/ defendant No.1 has stated that, the plaintiff has filed the suit against him and another for permanent injunction with respect to the schedule property. The plaintiff adduced his evidence as PW-1, at the time of cross of PW-1 the plaintiff admits the Sy.No.117 of Holekoppa village, Mutur Hobli, Thirthahalli Taluk. In the said survey number the plaintiff has encroached the Sy.No.117 land and Sy.No.116 of Holekoppa village, Thirthahalli Taluk, in the said survey numbers Government Kere (Pond) is there. He admits that kere (Pond) belonging to the Government. The plaintiff has been encroached the said Sy.No.116 and 117 belonging to the Government(Forest). In Sy.No.115 and 117 there are Devara Bana and one Devara Kottige is there.

3. The plaintiff encroached the Sy.No.116 and 117 and Devara Bana space and fenced the entire boundary situated in Sy.No. 116 and 117. These lands are government lands and some of the lands are in his peaceful possession and enjoyment in Sy.No.117. In the plaintiff evidence he admits the aforesaid facts and he has consented for appointment of court commissioner along with Taluk surveyor and advocate for the purpose of survey the suit schedule property along with encroached property of the plaintiff which are very important and necessary to prove the case.

4. In Sy.No.116 there is a Government Kere(pond) the plaintiff encroached the Sy.No.116 and fenced the entire Sy.No.116, 115 and 117 situated at Holekoppa Village, Muthur Hobli, Thirthahalli Taluk. In the said kere(pond) there are wild and petty animals are daily using the water for their drink. Now the plaintiff obstructed and fenced the entire property due to that, the wild and petty animals are not in a position to drink the water in kere (pond) and also created problems for the public for making use of Devara Bana and Devara Kottige and hence the appointment of court commissioner along with Taluk Surveyor to measure the suit schedule property and also for identification of the property is

very much necessary and hence he requested to allow the application.

5. The counsel for the plaintiff has filed objections by stating that, the application of the defendant is not maintainable either in law or on facts. It is liable to be dismissed. The defendant has sworn to a false affidavit in support of his application, his statement only about encroachment of the Government land by the plaintiff and etc., but he has not stated about where his alleged land exactly situated. The defendant in his evidence has stated the boundaries of his property and he has not at all stated about his land situated adjacent to the land of the plaintiff. The plaintiff has filed this suit with the documents and clarity of identity of the property through proper documents. Hence, the application of the defendant is not maintainable under law. He has filed this application just to drag on the proceedings of the case.

6. The defendant has every right to file a separate suit to protect his property. He could get his intended relief through proper suit. It is submitted that, under order 26 Rule 9 of C.P.C there are so many reported cases. The gist of the judgments that where and in which situation the necessity of court commissioner is required. This is a suit for bare injunction. The burden of the plaintiff is that as on the date of filing of the suit whether he is in possession and enjoyment of the property. The plaintiff clearly established through documents as well as evidence in this regard. There is no ambiguity or uncertainty regarding boundary and situation of the plaintiff's scheduled property. In this case, there is no necessity to appoint court commissioner. It is also settled that, at the whims and fancies of the parties such relief cannot be granted. If defendant has a case regarding encroachment and etc., he can approach the Hon'ble court in a separate proceedings as stated earlier and can seek such relief but not in this case.

7. It is further submitted that, since from the date of purchase, the plaintiff has been in possession and enjoyment of the scheduled property. The case is almost in the final end of the case, at this stage it is not just and necessary the relief as sought in this case. It is submitted for the sake of argument. If there is an encroachment by the parties, it is the duty of the appropriate authority to take action against those persons but not through

court commissioner. Therefore, he requested to dismiss the above application.

8. Heard both the counsels for applicant / defendant and respondent/plaintiff.

9. The points that arise for my consideration are:

1. Whether the applicant/ defendant has made out sufficient grounds for appointment of advocate as a Court Commissioner along with Taluk Surveyor under Order XXVI Rule 9 of CPC?

2. What Order?

10. My findings to the above points are as under:

Point No.1: In the Affirmative,

Point No.2: As per the final order,

for the following:

REASONS

11. **Point No.1:** The plaintiff has filed the suit seeking for permanent injunction against the defendants with respect to the suit schedule property.

12. In this case both side evidence completed. When the matter is posted for arguments on main matter the defendant No.1 has filed the above application seeking for appointment of court commissioner for the purpose of measurement and identification of the suit schedule property. The plaintiff has denied the above application by filing the objections.

13. Perused the materials available on record. The plaintiff in the plaint he has stated that, he is the owner in possession and enjoyment of the suit schedule property. The defendants are tried to encroached the southern side of the suit schedule property. On the other hand, the defendant No.1 has disputed the claim of the plaintiff and he has stated that, the suit schedule property has not been phoded. By encroaching the Government property the plaintiff has given the boundaries, in the suit schedule property Government Lake, Temples and the pathway for a public use are

situated and the plaintiff has not disclosed the said fact in the plaint.

The counsel for the plaintiff has produced 2 decisions of our *Hon'ble High court in 2016 (4) KCCR 3736. In this case the Hon'ble High Court upheld the dismissal order for appointment of court commissioner in a suit for permanent injunction passed by the trial court.*

In WP No.21800/2017 connected with W.P.No. 13822/2017. In this case the Hon'ble high court confirmed the dismissal of the order passed by the trial court for appointment of court commissioner in a suit for declaration and for possession.

14. In the present case though the suit is for permanent injunction the defendants specifically have denied the identity and encroachment of Government land by the plaintiff. The facts and circumstances of the aforesaid 2 decisions are entirely different to the present case. Therefore, the above 2 decisions are not applicable to the case on hand.

15. While cross examining the PW-1 by the counsel for the defendants has put the questions with respect to the existence of temple, lake and pathway in the suit schedule property.

Order 26, Rule 9 of C.P.C. reads as follows:-

“Commissions to make local investigation:- 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 rule.”

16. A reading of Order 26, Rule 9 of C.P.C. reveals that, the said provision enables the Court to issue a commission for local investigation, if it is satisfied that such local inspection is requisite or proper for the purpose of elucidating any matter in dispute, etc., such a course may be necessary to enable the Court to resolve the dispute and to take a right decision in the matter.

17. In the instant case the defendant disputed the identity of the suit schedule property of the plaintiff and has stated that, the plaintiff has encroached the Government land and in the suit schedule property Government lake, temples and pathway are situated. ***In ILR 2001 KAR 5013, the Hon'ble High Court of Karnataka held that, in cases of dispute with regarding to identity of immovable property the Court may not be in possession to resolve the dispute effectively.*** In the present case, the dispute between the parties only with respect to the identity and the encroachment of Government land.

In Shreepat Vs Rajendra Prasad and other, the Hon'ble Supreme Court has held that when there is a serious dispute about identity of property the court should not decree the suit only on the basis of oral evidence.

18. Though, the parties have adduced their evidence and produced the documents may not help the Court to render a correct finding on the above dispute. Therefore, to appoint Commissioner for the purpose of ascertaining certain facts to make it clear intelligible and to through light upon the matter in issue relating to the main case as well as facts leading to the real controversy between the parties, it is just and necessary to allow the above application. The main object of Order 26, Rule 9 of C.P.C. is not to assist a party to collect evidence, where the party can procure the same an Advocate Commissioner can be appointed under the above provision inter alia for elucidating any matter in dispute. In the present case, the parties have given their evidence, therefore the appointment of Court Commissioner at this stage does not amounts to collecting of evidence. If the above application is allowed no prejudice will cause to the defendants. Hence, Point No.1 is answered in the affirmative.

19. **Point No.2:-** In view of the discussion made in the aforesaid point, I proceed to pass the following:-

ORDER

I.A.No.XI filed by the defendant No.1 under Order XXVI Rule 9 R/w Sec.151 of C.P.C., is hereby allowed.

The Taluk surveyor is appointed as Court Commissioner for the purpose of measurement and identification of the suit schedule property.

To suggest the name of the advocate.

II Addl. Civil Judge & J.M.F.C.,
Thirthahalli.

