

ORDERS ON COMMISSIONER'S REPORT

The plaintiff has filed this suit against the defendants for possession of suit schedule property and consequential relief of permanent injunction.

2. The defendants have resisted the suit by filing written statement denying the material averments made in the plaint. This court has framed the issues on 30.11.2018.

3. On behalf of plaintiff, three witnesses have been examined as P.W.1 to 3 and got the documents marked as Exs.P.1 to P.13. On behalf of defendants, 4th defendant has been examined as D.W.1 and got the documents marked as Exs.D.1 to D.5.

4. It is at this stage of proceedings and when the case was set down for arguments on merits, the learned counsel for the plaintiff has filed I.A.No.XV under the provisions of Order 26 Rule 9 of C.P.C. to appoint Assistant Director of Land Records, Karwar as Court Commissioner to to measure the suit schedule property and its encroachment

and to submit the report to the court. The said application was allowed vide Order dated 5.4.2021.

5. The Court Commissioner, after execution of Commissioner's warrant, has prepared the mahazar and sketch and submitted the report before the court and same has been made known to both the sides.

6. The learned counsel for the plaintiff has filed objections to Commissioner's report contending that the Court Commissioner has not submitted complete report and he has not shown the Kharab land. The Commissioner has not shown the encroachment of the land of the plaintiff and defendants. The Court Commissioner has not relied on Hissa No.IV and XI of the suit land including Kharab land entry. The Court Commissioner has not followed the procedure of survey manual and not shown the encroachment of the land. The Court Commissioner has not measured the compound wall of the defendants with P.T. map and he has failed to note as to whether the compound wall was constructed as per the approved plan and whether it tallies with the record of rights. The Court Commissioner has not verified the record of rights of plaintiff and defendants and

has wrongly mentioned that the plaintiff is not in possession of the land. It is on these grounds, the plaintiff has prayed for set aside the Commissioner report.

7. The learned counsel for the defendants No.1 to 4, 11(a) & (b) and 13 has also filed objections to Commissioner's report contending that the Court Commissioner has not submitted his reply specifically and precisely to the points submitted by the defendants in their memo of instructions. The point No.1 is as to whether the suit schedule property shown by the plaintiff in the plaint as belonging to her is true or correct, but he has answered that it cannot be said that it is true or false. The Court Commissioner did not draw the sketch of the suit land as per the boundaries mentioned in the sale deed in response to point No.3. It is on these grounds, the defendants have also prayed for set aside the commissioner's report.

8. The court Commissioner has been summoned and examined as C.W.1 and Exs.C.1 to C.7 were marked. C.W.1 was subjected for cross-examinations by the learned counsel for the plaintiff and defendants.

9. I have heard the arguments on both sides on Commissioner's report and perused the entire records.

10. Now the points that would arise for my consideration are as under :

1. Whether the objections raised by the plaintiff and defendants to the commissioner's report is sustainable under law and whether the commissioner's report is deserves to be set aside?
2. What order?

11. On considering the arguments canvassed on both the sides and materials on record, now my answers to the above points are as under:

Point No.1: In the **affirmative**.

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

REASONS

12. **Point No.1**:- The learned counsel for the plaintiff has argued with force that the Court Commissioner has not shown the encroachment of land and he has not complied the survey manual. The Court Commissioner has not

complied the memo of instructions filed by the plaintiff. The Court Commissioner has also not shown the kharab land and he has also not shown excess land.

13. It is further contended that the Court Commissioner has failed to follow the procedure of Survey Manual and not shown the encroachment of the land. The Court commissioner has not measured the compound wall of the defendants and he has failed to note as to whether the compound wall was constructed as per the approved plan or not. The court commissioner has not verified the record of rights of the plaintiff and defendants produced before the court and wrongly mentioned that the plaintiff is not in possession of the land. Hence, the commissioner's report is liable to be set aside.

14. The learned counsel for the defendants has contended that the Court Commissioner has not submitted his reply specifically and precisely to the points submitted by the defendants in their memo of instructions. The description of the suit schedule property is not true and correct and the Court Commissioner ought to have answered the points accordingly, but, in response to points

No.1 and 3, the Court Commissioner did not draw the sketch of the suit land as per the boundaries mentioned in the sale deed and therefore, it is liable to be set aside.

15. According to plaintiff that she is the owner in possession of suit property and the defendants have encroached 7 gunthas 4 annas in the suit property. But, the defendants have denied the title and possession of the plaintiff's over the suit schedule property and also alleged encroachment of 7 gunthas 4 annas and therefore, the plaintiff is not entitled for relief as sought for in the plaint.

16. It is important to note here that the Court Commissioner has been appointed to measure and to demarcate the suit schedule property and to ascertain as to whether any encroachment is made in the suit schedule property and to submit the commissioner's report along with sketch and mahazar.

17. The plaintiff in the memo of instruction has instructed the court commissioner to measure, to draw the map of the suit land, to fix the boundaries of survey No.231A and find out the encroachment in the land of plaintiff measuring 7 gunthas 4 annas out of 16 gunthas and

the land of defendants measuring 1 acre 8 gunthas and to find out the excess land. The plaintiff has also instructed to measure the compound wall of the defendants with P.T. map and to note as to whether the compound wall was constructed as per the approved plan or not and also to demarcate the road portion left by the defendants to the CMC, Karwar and also to note the Kharab portion of the land in Survey No.23A and existing way to the land of plaintiff.

18. The defendants in their memo of instructions have also instructed the Court Commissioner to find out as to whether the suit schedule property shown by the plaintiff in the plaint as belonging to her is true and correct and if it is true and correct, on the basis of which document. The defendants also instructed the Court Commissioner to draw a sketch of land bearing Survey No.231B/1A1 of Baad-I village with boundaries and also to mention the boundaries of southern side of the land of defendants.

19. But, the Court Commissioner has not complied with memo of instructions with respect to purpose for which the Court Commissioner is appointed. As could be seen from the report of the Court Commissioner mentioned in Ex.C.4

sketch, he has not shown the Kharab land situated in Survey No.231A1A measuring 1 acre 34 gunthas and Survey No.231A/1A1B measuring 6 gunthas totally 2 acres.

20. As could be seen from the sketch vide Ex.C.4 prepared by the court commissioner, he has not shown the encroached portion of the suit land by the defendants. The real controversy between the parties is with respect to encroachment of road and construction of compound wall and therefore, the court commissioner has been appointed for the said purpose. But, the Court Commissioner has not mentioned the encroached area in the sketch.

21. Even according to Court Commissioner that he has not obtained any documents from the court for verification. The Commissioner has stated in his evidence that he has not at all measured the non-agricultural property and also not shown the converted land in the sketch in respect of survey No.231A/1A1.

22. Even according to Court Commissioner that he has not shown the properties of Vanita Keshav Nayak, Sarita Shantaram Nayak, Madan Bhikaro Nayak, Mohan Bikaro Nayak, Ganapati Anant Nayak, Manohar Anant Naik, Satish

Anant Naik, Sushila Mahadev Naik, Dinesh Mahadev Naik, Vinod Mahadev Naik and Sunita Mahadev Naik in the sketch.

23. It is forthcoming in the evidence of Court Commoner that Smt. Mangala Irappa Naik was not present at the time of measurement of suit schedule property and suit schedule property is not subjected for phodi and the measurement of property of plaintiff and defendants can be ascertained only after phodi and he has not shown the Kharab land in the sketch.

24. It is also forthcoming in the evidence of Court Commissioner that the suit schedule property has not been fully converted into non-agricultural land and he has not received the copy of the plaint. The Court Commissioner has admitted in his evidence that on 26.2.2015, the plaintiff has sought for Kammi Jasthi patrike by filing application and therefore, he has issued an endorsement and he has also not measured the compound constructed by the defendants. He has also not verified the sale deed of the land belongs to plaintiff and he has not mentioned the boundaries of the properties.

25. From these materials facts elicited in the evidence of C.W.1/Court Commissioner, it is crystal clear that the Court Commissioner has not properly executed the Commissioner's warrant and he has not measured the construction of compound wall by the defendants including the alleged encroachment of the suit schedule property.

26. At the cost of repetition, it is to be noted here that the Court Commissioner has been appointed to measure and demarcate the suit schedule property and also to ascertain as to whether any encroachment is made in the suit schedule property and to submit the report. The learned counsel for the plaintiff and defendants have instructed the court commissioner to measure and to demarcate the suit schedule property and also to ascertain as to whether any encroachment is made in the suit schedule property or not.

27. But, as admitted by the court commissioner in his evidence that he has not measured the compound wall and also encroachment of the suit schedule property. Neither the plaintiff nor the defendants have accepted the court commissioner's report submitted before the court and

both the parties have filed their objections to the court commissioner.

28. So, it is crystal clear that the purpose for which the court commissioner is appointed has not been subserved and therefore, the report submitted by the court commissioner is deserves to be rejected and an opportunity has to be given to the parties to get one more court commissioner for measurement and demarcation of the suit schedule property and also to ascertain as to whether any encroachment is made in the suit property or not.

29. Therefore, for the reasons discussed above, I hold that the Court Commissioner has not complied the Order of the court properly and not properly executed the Commissioner's warrant and the objections raised by the learned counsel for the plaintiff and defendants to the Court Commissioner is sustainable under law and consequently, the Commissioner's report is deserves to be rejected. Hence, **I answer point No.1 in the affirmative.**

30. **Point No.2:-** In view of my findings on point No.1, I proceed to pass the following:

:ORDER :

Commissioner's report submitted by
the Court Commissioner is hereby
rejected.

(Dictated to the Stenographer, transcribed by her, revised and corrected by me, signed and then pronounced in the Open Court on this the **25th Day of February, 2022.**)

(N.M. Ramesha)
Prl. Senior Civil Judge,
Karwar.