

I.A. NO.XV

Applicant : 1. Smt. Parvati W/o. Shivappa
Plaintiff Punnuswamy, **L.R.'s of plaintiff.**
1(A) Sri. Manjunath S/o. Rang Swami.
Vs.

Opponents : 1. Vanita W/o. Keshav Naik
Defendants and others.

ORDERS ON I.A. NO.XV

This is an application filed by the learned counsel for the plaintiff under the provisions of Order 26 Rule 9 of C.P.C. seeking appointment of Assistant Director of Land Records, Karwar as Court Commissioner to inspect the suit schedule property, to measure the suit schedule property and its encroachment and to submit the report to the court.

2. The plaintiff has sworn to affidavit and stated that her mother Smt. Parvati Shivappa Punnuswamy has filed Writ Petition No.106000/2014 before the Hon'ble High Court of Karnataka, Dharwad bench against the revenue authorities to direct the Tahasildar of Karwar to survey the land of the plaintiff, in which, the Hon'ble High Court of Karnataka has directed to seek appropriate remedy before

the civil court, if the dispute is not finally decided. Therefore, the plaintiff has filed the suit for possession and injunction against the defendants after measurement done by the revenue authorities. The revenue authorities have submitted that the disputed land is in possession of the defendants and unable to divide the land. Therefore, it is necessary to measure the suit lands, compound wall, Kharab land and portion of land left for construction of road to CMC, Karwar. It is also necessary to measure the suit land to find out the boundaries and also encroachment of area. Therefore, it is necessary to appoint the ADLR as Court Commissioner to inspect the suit land and to give his report.

3. The defendants have resisted the application by filing objections contending that the application is not maintainable either under law or on facts. It is for the plaintiff to prove that she is the owner of the suit schedule property. The plaintiff has purchased the land bearing Survey No.231 measuring 16 gunthas of Baad-I village as per the sale deed dated 20.1.1965 vide Ex.D.3. The suit land should be within the boundaries mentioned in the sale deed at Ex.D.3. As per the sale deed, the property purchased by the plaintiff is bounded on East by Survey

boundary, South by Survey boundary, West by boundary of the land purchased by Sri. Shesu Havaladar and North by boundary of 5 ft. width pathway running from East to West, situated in the land retained by the vendor. These boundaries make it clear that the land of the plaintiff is situated within these boundaries and it never stretches on the Northern side of 5 ft. width pathway. But, in the plaint, the plaintiff has mentioned that the suit land is bounded on North by Survey No.238, South by portion of Survey No.231A/1A1 originally belongs to the plaintiff and subsequently sold to Sri. Nagappa Govind Naik and two others, East by Municipal Road of Vijay Nagar and West by Survey No.231/A1 belongs to defendants. There is no suit land belongs to the plaintiff as described in the plaint.

4. It is further contended that the plaintiff had filed suit bearing O.S.No.35/1972 against Sri. Ragjpbba Metu Talekar and others alleging encroachment of 6 gunthas 8 annas of land. In the said suit, the court has given a finding that she was in a possession of 8 gunthas 12 annas only. The plaintiff has sold 2 gunthas 7 annas to Sri. Narayan Nagappa Naik, 3 gunthas 13 annas to Smt. Laxmi Bommayya Naik and 2 gunthas $7\frac{1}{2}$ annas to Sri. Narayan

Govind Naik. Now, the plaintiff is not in possession of any land. P.W.1 had admitted that 5 ft. pathway is situated on the Northern side of land sold to Sri. Narayan Nagappa Naik and it is clear that the land owned by plaintiff was situated on the Southern side of 5 ft. width pathway. Therefore, the plaintiff cannot claim any land situated on the Northern side of the said 5 ft. width pathway where the land of the defendants is situated. In O.S.No.35/1972, the Survey Commissioner was appointed by the court at the instance of plaintiff who has submitted the report that the plaintiff is in possession of 8 gunthas 12 annas and never stated that the land of the plaintiff is situated on the Northern side of 5 ft. width pathway. Therefore, the appointment of Survey Commissioner would be a futile exercise and question of survey of the entire land does not arise. It is on these grounds, the defendants have prayed for dismissal of the application.

5. I have heard the arguments on both the sides and perused the I.A., affidavit and objections including materials on record.

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

1. Whether the plaintiff has made out sufficient grounds to come to the conclusion that local investigation and measurement of suit schedule property is requisite or proper for the purpose of elucidating the matter in controversy between the parties and therefore, it is necessary to appoint ADLR of Karwar as Court Commissioner to measure the suit schedule property and to submit the report and whether the application filed by the learned counsel for the plaintiff under the provisions of Order 26 Rule 9 of C.P.C. is deserves to be allowed?

2. What order?

7. On considering the arguments of both the sides and real controversy between the parties and also the materials placed 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

8. **Point No.1:-** The plaintiff has filed this suit against the defendants for possession of suit schedule property and consequential relief of permanent injunction. On service of suit summons, the defendants have appeared before the court and filed the written statement denying the material averments made in the plaint. This court has framed the issues on 30.11.2018. On behalf of plaintiff three witnesses have been examined as P.W.1 to 3 and got the documents marked at Exs.P.1 to P.13. On behalf of defendants, the defendant No.4 has been examined as D.W.1 and got the documents marked at Exs.D.1 to D.5. Both the sides have concluded the evidence. It is at this stage of proceedings, when the case is set down for arguments on merits, this present application is filed seeking appointment of court commissioner to measure and to demarcate the suit property and to submit the report to the court.

9. According to plaintiff that she is the absolute owner and in possession of the property and 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 property and also alleged encroachment of 7 gunthas 4 annas and further contended that the suit of the plaintiff is hit by res-judicata and therefore, the plaintiff is not entitled for any relief as sought for in the plaint. From the careful perusal of pleadings of both the parties, it is clear that there is a dispute between the parties in respect of title, possession, existence of suit schedule property and its encroachment.

10. The provisions of Order 26 Rule 9 of C.P.C. deals about commissions to make local investigations. As per this provisions of law, 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.

11. In the present case, the plaintiff claims to be the owner of the suit schedule property and the defendants

have encroached portion of suit schedule property. But the defendants have not only denied the alleged encroachment of suit schedule property, but also denied the very existence of suit schedule property including title of the suit property. Under these circumstances, whether the defendants have encroached the portion of suit schedule property or not and whether the suit schedule property is in existence or not within the boundaries mentioned in the suit schedule property attached to plaint or not is a matter which requires local investigation by the ADLR of Karwar and the report of the court commissioner is necessary to adjudicate the real controversy between the parties.

12. In fact, D.W.1 in his cross-examination has categorically admitted that he do not have any objections to appoint the court commissioner to measure of suit schedule property and to measure his converted land and to ascertain his land. Under these circumstances, it is necessary to appoint ADLR of Karwar as Court Commissioner to measure and to demarcate the suit schedule property and to submit the report along with sketch and mahazar. It is in this sense, I hold that a local investigation is requisite and also proper for the purpose of

elucidating matter in dispute and also in controversy between the parties and the application filed the learned counsel for the plaintiff under the provisions of Order 26 Rule 9 of C.P.C. is deserves to be allowed. Hence, ***I answer point No.1 in the affirmative.***

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

:ORDER :

I.A.No.XV filed by the learned counsel for the plaintiff under the provisions of Order 26 Rule 9 of C.P.C. is hereby allowed.

There is no order as to costs.

The Assistant Director of Land Records, Karwar is appointed as Court Commissioner to measure and demarcate the suit schedule property and also to ascertain as to whether any encroachment is made in the suit property and to submit the report along with sketch and mahazar.

The court commissioner fee is tentatively fixed at Rs.3,000/-.

Since the matter is relates to the year of 2015, which is more than 5 years old case, it is made it clear that both the sides shall furnish their respective memo of instructions within two days.

It is also made it clear that both plaintiff and defendants shall assist the court commissioner in execution of commissioner warrant within one month and also submit the report along with sketch and mahazar by furnishing necessary information to the court commissioner.

(Dictated to the Stenographer, transcribed by her, revised and corrected by me, signed and then pronounced in the Open Court on this the **5th Day of April, 2021.**)

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

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