

ORDER ON I.A.No.XIV

The plaintiff has filed this application U/O.26 Rule 9 R/w Sec.151 of CPC seeking to appoint the Court-Commissioner to make local investigation of the suit property and submit the report to the court.

2. The learned advocate appearing for defendant and submits no objection to the above said I.A.No.XIV.

3. In support the arguments of the learned counsel for plaintiff and defendant, they have produced following decisions.

Decisions relied upon by the plaintiff are as under;

1. AIR 1982 Karnataka 233 between B.Jagannath Vs N.C Narayanappa and another.
2. ILR 2001 KAR 5013 between Anil Kamalakar Shirodkar Vs Dudhappa Santu Patil and Another.
3. ILR 2007 KAR 3029 between Miss. Renuka Vs Sri. Thammanna and others.

Decisions relied upon by the defendant is as under;

1. W.P.No.100200/2018 (GM-CPC) between Sri. Nanda S/o. Babu Talakar Vs Sri. Prabhakar S/o. Pandurang Naik and others. (decision of Hon'ble High Court of Karnataka)

With due respect to the above decisions, relied upon by the plaintiff and defendant, I have carefully followed the law laid down in the above said decisions and applied the same to the case in hand.

4. Heard the arguments of the learned counsel appearing for the plaintiff and defendant, perused the pleadings and materials placed on the record. The

5. The points that arises for consideration is as follows:

(1) Whether the plaintiffs made out sufficient ground so as to allow IA.No.XIV?

6. My findings to the above point is in the **Affirmative** for the following:

REASONS

7. Plaintiff has filed the present suit against the defendant seeking for the relief of permanent injunction. During the pendency of the suit, the plaintiff by way of an order IA No.5 dated: 28-04-2018 incorporated the relief of mandatory injunction and for recovery of possession. After the closure of trial, when the matter is set down for arguments on merits, the plaintiff has come up with the present application seeking for the appointment of court-commissioner for the local inspection of the suit property.

8. In support of the application in question, the plaintiff has filed affidavit, contending that the plaintiff has filed the present suit for the relief of permanent injunction and to direct the defendant to hand over the possession of land bearing Sy.No.629/2B1 measuring an area of 0.0.2 out of 0.4.1 of Baad-II village in Karwar Taluk and that, to prove the case, the plaintiff got examined the competent surveyor as PW.2 and the defendant has seriously disputed the survey conducted by the PW.4. That, he is the owner of the suit property and the defendant is owner of the land comprised in Sy.No.629 Hissa 2B2 measuring 0.2.0 area which is

situated at Baad-II Village in Karwar Taluk. That in the circumstances of the present case, for better appreciation of the facts on record, it is just necessary to survey the above said lands belonging to the plaintiff and defendant by appointing ADLR, Karwar as Court-Commissioner and along with the application he has filed the memo of instructions. Hence, he sought for allowing the application in question.

9. Defendant has filed objection statements to the said application contending that, the defendant has come up with the present application at the fag end of the proceedings that, when the matter is posted for arguments on merits. The case of the plaintiff is entirely based on the alleged map drawn and prepared by Taluka Surveyor and then in appeal by ADLR, Karwar who has cancelled the map drawn by Taluka Surveyor in appeal and modified the map holding that, defendant has encroached 0-0-1.12 anas and not 0-0-2 anas. That against the said order the defendant has preferred an appeal before the DDLR, Karwar and the matter is pending for disposal and in the said proceedings the ADLR is made as party and since, the ADLR being the interested person, the plaintiff is not entitled to seek the appointment of very ADLR in the present suit as court-commissioner. Moreover, when the matter is posted for

arguments the plaintiff cannot maintain application for the appointment of court-commissioner. When the ADLR having reached the conclusion as stated above in the appeal, it is absolutely not possible to have impartial commission report from the hands of ADLR or survey authorities which may cause serious injustice, vitiating all further proceedings of the suit and the litigation will prolong years together without any justification. He further contended that, both the parties have led their evidence and the evidence which is already available on record is very much sufficient to dispute with regard to the encroachment, measurement and identification. Hence, on these and other grounds he sought for dismissal of the application in question.

10. It is pertinent to state here that, this suit is filed by the plaintiff against the defendant for the relief of permanent injunction as aforesaid. Subsequently, the plaintiff got amended the plaint by making allegation with regard to the alleged encroachment of the suit land by the defendant by relying on the survey documents. To prove the alleged encroachment, the defendant got examined the surveyor as PW.2. However, if the evidence of PW.2 is perused, the defendant has seriously disputed the alleged encroachment. Further, the defendant seriously disputed the manner of survey conducted by

the PW.2 has also disputed the survey sketch got prepared by the PW.2 at the spot which is marked as per Ex.P.18 and P.19. Even, the defendant in his objection statement admitted that, he has prepared an appeal before the Deputy Director of Land Records, Karwar against the order passed by the ADLR, Karwar. On over all appreciation of the materials available on record it gets clear that, there is serious dispute with regard to encroachment between the plaintiff and defendant. Apart from the above the perusal of the records, it reveals that there is dispute with regard to identification and topography of the properties belongs to the plaintiff and defendant.

11. Further, the defendant categorically denied the alleged encroachment and specifically contended that description of the suit property furnished by the plaintiff is not proper and correct. Hence, from the perusal of the materials available on record, it could be seen that, there is a dispute with regard to encroachment, identity, measurement and boundaries of the suit property and when there is a dispute of such kind in a litigation it is necessary to appoint a Commissioner for localizing/inspection of the property by a qualified surveyor and the same will not amount to collecting evidence. The provision of Order 26 R 9 of CPC

contemplates 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. Hence, a local investigation is the best way to find out the exact position of the suit property. As already stated above, the boundaries of the suit property are in dispute and plaintiffs are alleging regarding the encroachment and no amount of oral and documentary evidence in the present case is not sufficient to decide the alleged encroachment. It is pertinent to state here that the respective parties are entitled to file objection to the commission report and to cross examine the court commissioner if they are aggrieved by the commissioner's report after local investigation.

12. However, it is apprehension of the defendant that, since the defendant has preferred an appeal against the order of ADLR, Karwar before the DDLR, Karwar as aforesaid, there is absolutely not possible to have an impartial commission report from the hands of ADLR or any survey authorities. The plaintiff has not disputed that, an appeal is pending before the DDLR. Under such circumstances, it is just and proper to appoint a competent Civil Engineer of PWD, Karwar in this case as Court-Commissioner to avoid any future

complications or apprehension of defendant that, the impartial commission report may be submitted by ADLR or survey officials could be met with. Therefore, I am of the view that, absolutely there was no prejudice would be caused to the defendant by appointing the competent PWD, Civil Engineer/Assistant Executive Engineer, PWD, Karwar for the purpose of inspecting the property and by making spot inspection and submit his report on physical features, measurements etc.,. In fact though the Commissioner cannot decide the dispute, his inspection and report would helpful for the court in deciding the dispute. Hence, a local investigation is the best way to find out the position of the property. Therefore, the appointment of the Court Commissioner is maintainable in this case, even the suit is filed by the plaintiff for Mandatory Injunction and for recovery of possession. In view of the above the Point under consideration is answered in the **Affirmative** and I proceed to pass the following;

ORDER

I.A.No.XIV filed by the plaintiffs
U/o 26 Rule 9 R/W Sec.151 CPC is
hereby allowed as modified as under.

The Executive Engineer, PWD, Karwar
is hereby appointed as Court

Commissioner to make local investigation of the suit property and to submit the report to the court.

The Commissioner Fee is fixed at Rs. 2,000/-. The Court Commissioner shall submit Commission report on or before 01-07-2024.

Both the plaintiffs and defendant are directed to file memo of instructions if any at the time of execution of Commission work at the spot.

Issue Commissioner warrant if PF is paid and Commissioner fee is deposited.

Call on : 01-07-2024

**Prl.Civil Judge & JMFC-II,
Karwar**