

ORDER ON I.A.No.X

Plaintiff has filed this application to appoint court commissioner to record the evidence of one Sri. Pavato S/o. Narsu Gurav in his residence through Court commissioner by appointing any of the Advocate of District Bar Association, Karwar.

2. Counsel for the defendants have filed objection statement to said I.A.No.X.

3. Heard the learned counsel for the plaintiff and defendants on I.A.No.X, perused the materials available on record.

4. The following point that arises for my consideration;

(1) Whether the plaintiff has made out ground so as to allow IA.No.X ?

5. My answer to the above said point is in the **Affirmative** for the following;

R E A S O N S

6. Plaintiff has filed the suit in O.S.No.42/2013 for the relief of declaration, permanent injunction and mandatory injunction against the defendants and

suit in OS No.101/2020 filed by Smt. Sannamma and others against Sri. Apa Sairoba Gurav, who is the plaintiff in OS No.42/2013 for the relief of partition and separate possession. The said OS.No.101/2020 clubbed with OS.No.42/2013 as per vide ordered dated: 04-07-2023.

That, the suit in O.S.No.42/2013 was once dismissed by this court as per vide Judgment and decree dated: 05-11-2018. Being aggrieved by the said Judgment and decree, the plaintiff has preferred an appeal before the Hon'ble Prl.Civil Judge, Karwar in RA No.43/2018, which came to be allowed on 04-02-2020 and the matter was remanded back this court for fresh disposal in accordance with law.

When the matter is posted for evidence, the plaintiff has come up with the application in question stating that, he is claiming right over the suit property by virtue of the registered Gift Deed executed in the year 2007 by his father. In the affidavit filed in support of said application in question, it is stated that, the court framed issues casting burden on him to prove the Gift deed and WILL executed by his father. However, one of the attesting witness on the Gift deed was no more and another attesting witness is not able to appear

before this court as he is suffering from ill-health and due to his old age. He further contended that, the examination of said witness is very much necessary and hence, he prayed this court to allow the application in question,

7. Per contra defendant in OS No.42/2013 have filed objection to the said application in question contending that, the plaintiff has already examined the scribe and the Sub-Registrar and the name of Sri. Pavato S/o. Narsu Gurav is not in the witness list and once he was examined as PW.2. That, the plaintiffs have not produced any document showing the ill-health of said proposed witness and sought for dismissal of the application in question.

8. It can be made out from the said application in question that, the age of the proposed witness as 80 years. On perusal of the records, it could be seen that, the said Sri. Pavato S/o. Narsu Gurav once examined as PW.2 before this court on 29-06-2015. Hence, it cannot be said that, the name of said Sri. Pavato S/o. Narsu Gurav is not shown in the witness list produced by the plaintiff. It is pertinent to state here that, on

careful perusal of the said evidence of PW.2, nowhere, he has spoken about the Gift deed and on the other hand, he has spoken about the only the WILL dated: 05-12-2007 and he had not given any evidence as to the execution of the Gift deed, which is subsequently, got marked as Ex.P.13 on 16-02-2023. It is the case of the plaintiff in OS.No.42/2013 is that, the deceased Sri. Sairoba Apa Gurav had executed a registered Gift deed dated: 23-09-2006 in favour of the plaintiff in OS No.42/2013. However, the said document got executed as Ex.P.13 only after the matter was remanded back to this court for fresh disposal.

9. It is pertinent to state here that, the defendants in OS No.42/2013 and the plaintiff in OS No.103/2020 have not disputed as far as the execution of Gift deed by the deceased Sri.Sairoba Apa Gurav in favour of the plaintiff herein. However, they have contended that, the said document was obtained and got executed by the plaintiff fraudulently to defeat the right of the defendants in OS No.42/2013 in the suit properties. Hence, it is clear that, it is not in dispute with regard to the execution of the Gift deed. However, it appears that, the plaintiff with an abundant

caution has sought summoning and to examine the attestator to the Gift deed in order to prove the due execution of Gift deed and the circumstances under which the Gift deed came to be executed. Purposes of summoning the witness as indicated in the application appears to be reasonable. If the witness summoned and examined no prejudice or hardship will be caused to the defendant for the reasons that, he has at liberty to cross-examine the said proposed witness sufficiently. Notably, the evidence that may be given by the witness is relevant to the case on hand. If the application is not allowed certainly, plaintiff will be put into loss and hardship. Therefore, the application deserves to be allowed and the contention of the plaintiff that, the said proposed witness is not shown in the list of witness to holds no water for reasons that, the said proposed witness once already got examined as PW.2 as discussed supra.

10. Order 26 Rule 1 of Civil Procedure Code provides that, *“Any court may issue a commission for the examination of any person who is exempted from attending the court or who is sick or who is due to sick or infirmity, unable to attend the court”*.

11. In the case on hand, as already noted the witness/PW.2 is aged about 80 years, it would be inconvenient for him to attend report before the court to give evidence. Therefore, it is a fit case to allow the application and dispense with the attendance of the witness before the court for recording his evidence and to appoint court commissioner to record his evidence, it appears to be necessary. Therefore, Point under consideration is answered in the **Affirmative** and this court proceed to pass the following;

ORDER

IA No.10 filed by the plaintiff in OS .No.42/2013 and U/Order 26 Rule 10 R/W Section 151 of CPC is hereby allowed as prayed for.

Attendance of Sri. Pavato S/o. Narsu Gurav who got already examined as PW.2 before the court for the purpose of recording his evidence including cross-examination and re examination if any is dispensed with. The PW.2 is ordered to be examined on a commission.

Advocate appearing for the plaintiff and the defendant directed to suggest the

name of an advocate to record the evidence of Sri. Pavato S/o. Narsu Gurav. Call on 12-02-2025.

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