

ORDERS ON I.A.XX

The Plaintiffs through their counsel have moved the present application under Order XVI Rule 1 and 2 r/w Section 151 of CPC seeking to issue summons to the following witnesses -

1. Assistant Director of Land Records, Kumta.
2. Tahashildar, Kumta (Survey Section).
3. Deputy Director of Land Records, Karwar.

2. The said application is supported by an affidavit of plaintiff No.3 wherein he stated that the witnesses he intends to examine are very much essential in order to prove their case. The first witness has conducted hadbandobast by measuring Sy.No.180 and A sheet in this regard is already produced before the Court which got marked at Ex.P.63 and P.64. Ex.P.63 is the survey report in respect of measurement and fixing boundaries done on 25/11/2009 and the name of surveyor is mentioned as Channabasavayya, land surveyor verified by Tahasildar office, Kumta. Ex.P.3 reveals that hissedars of Sy.No.197 have committed an encroachment in Sy.No.180. It is further stated that he has produced the certified copy of A sheet in respect of the report of measurement and hadbandobast in which it is mentioned as Taluk Land Surveyor, Tahasildar office, Survey department and the said report is in respect of boundaries pertaining to Sy.No.180 and the same discloses that owners of Sy.No.197

have encroached to an extent of 0-3-12. Likewise, Ex.P.65 is the survey report in respect of fixing the boundaries of Sy.No.180 on 21/01/2011 by DDLR, Karwar as per the Appeal No.45/2009-10 wherein the encroachment has been shown in the said property bearing Sy.No.180.

3. It is further stated that since the counsel for defendants raised the objections while marking the said documents, as such burden to prove the same lies on him and he got issued the summons to ADLR, Kumta to prove Ex.P.63 to P.65 but Ex.P.63 and 64 are prepared by A.D.L.R, Kumta and Ex.P.65 is prepared by DDLR. Earlier mistakenly he sought for issuance of summons only to ADLR, Kumta in IA NO.18 but he ought to have sought to issue summons to others who have prepared Ex.P.63 and Ex.P.65 to give evidence. Further stated that burden lies on him to prove the sanctity of Ex.P.63 and P.64, as such the surveyors who have affixed their signatures on the said documents needs to be examined.

4. It is further stated that in pursuant of issuance of summons as per the order of the Court passed on I.A.NO.18, one by name Sundar on behalf of ADLR, Kumta has appeared before the Court and stated before the Court that he has not conducted any survey work pertaining to the said documents but the answer given by him without entering into witness

box and without giving evidence is not sustainable and since Ex.P.63 is prepared by ADLR, Kumta, they will be having clear knowledge regarding the same. His evidence is very much essential and if the application is not allowed, he would suffer irreparable injury or loss which could not be compensated in terms of money. On the other hand, if the said application is allowed, no harm or injury would cause to the defendants. Hence prays to allow the said application.

5. Per contra, the objections came to be filed on behalf of defendants refuting the said application as not maintainable and contrary to the law and true facts of the case. It is contended that the plaintiffs have been filing one or the other applications only to prolong the proceedings and already a commissioner has been examined before the Court. No valid reason has been assigned for the delay in filing the said application seeking summons to the witnesses. The plaintiff sought to examine the witnesses without any valid reasons and the burden is on the plaintiffs to prove the facts asserted by him in the plaint independently, as such at this stage, the said application cannot be entertained. Hence prays to dismiss the said application.

Point No.1: Whether the plaintiffs have made out the grounds to allow IA..No.XX ?

Point No.2: If so what order?

6. My answers to the above points is as under;

Point No.1: In the Affirmative.

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

REASONS

7. Point No.1: The instant case is filed by the plaintiffs seeking the relief of mandatory injunction directing the defendants to handover the vacant possession of encroached property, declaration of easementary rights and consequential relief of permanent injunction. Plaintiff No.2 and 3 have been examined as P.W.1 and 2 and got marked the documents Ex.P.63 to P.65 which are the survey maps. Now the instant application has been moved seeking to summon the witnesses mentioned in the application to prove Ex.P.63 to P.65 in order to prove his case.

8. In this regard, on perusal of Order XVI of the Code of Civil Procedure, no doubt the said provision contemplates that the list of witness which the party intends to examine to prove his case shall be filed within the period of 15 days from the date of framing of issues but however that does not preclude the party from examining the witness on his behalf with the leave of the Court and the Court may consider such

application moved by the party at a belated stage if sufficient grounds are made out. Hence, it is very clear that even though the application seeking to issue summons to the witness is filed at a belated stage, still the Court may consider the same based upon the facts and circumstances of the Court. Mere delay in filing the application cannot be a sole ground to reject the said application.

9. In the backdrop of this, if we assess the present case on hand, it is not in dispute that present suit has been filed seeking the relief of possession of encroached area and for removal of construction by way of mandatory injunction, declaration of easementary rights and consequential relief of permanent injunction. The issue of an encroachment has also been framed casting burden of prove on the plaintiffs. Hence, the plaintiffs are bestowed with the burden to prove an alleged encroachment as asserted by them in their plaint.

10. The plaintiffs have examined 3 witnesses on their behalf as P.W.1 to P.W.3 and got exhibited the documents, among which Ex.P.63 to Ex.P.65 are the survey reports showing the alleged encroachment committed by the defendants according to the plaintiffs. They have relied upon the survey reports to prove an encroachment and now he intends to examine the witnesses to prove the sanctity of the said reports.

11. If any survey report is produced and marked in respect of the controversy arising between the parties, then the Court cannot adjudicate the matter effectively only on the basis of such report without examining the concerned witnesses in respect of the said report. It is also to be noted that mere production of records does not make the documents admissible and would not amount to proof of the same and the burden lies on the party to prove the same in accordance with law. No doubt, the plaintiffs have moved a similar application seeking to issue summons to ADLR, Kumta and the surveyor by name Sundar appeared before the Court and stated that he do not have knowledge regarding the survey done in respect of the said report. However, it is to be noted that on perusal of the Ex.P.63 to P.65, the names of ADLR, Kumta, Tahasildar and DDLR, Karwar are forthcoming and also their respective signatures are affixed. While hearing the matter, the Counsel for the plaintiffs has submitted that the name of the surveyor who has conducted the survey is not known. But the reports discloses that survey has been conducted by the concerned survey department ADLR, Tahasildar and DDLR, Kumta. Under such circumstances, according to my opinion, the said witnesses are competent witnesses and they may be in a position to speak regarding the validity of the said reports which may assist the Court in coming to the proper conclusion. If in case the said application is dismissed, it amounts to denial of giving

permission to the plaintiffs to adduce evidence which is violation of natural justice. On the other hand, if the said application is allowed, the defendants will be having ample opportunity to cross-examine the witnesses in order to falsify the contents of the survey reports. But if in case the said application stands dismissed, it is having far reaching consequences shutting the doors to the plaintiffs to put-forth the evidence, with full and complete opportunity. Considering all these aspects of the matter, I am of the opinion that, the Plaintiffs have made out a case to allow the said application. Accordingly, **Point No.1 is answered in the Affirmative.**

12. Point No.2: For the foregoing reasons, **this Court proceeds to pass the following;**

ORDER

IA.No.XX filed on behalf of the Plaintiffs under Order XVI Rule1 and 2 r/w Section 151 of CPC is hereby allowed.

Issue W/S to the witnesses mentioned in I.A No.XX if process fee is paid.

Call on : 30/09/2024.

Sd/-

Addl. Civil Judge, Ankola.

