

KAUK620023552018



**IN THE COURT OF ADDL CIVIL JUDGE & J.M.F.C
AT: HONNAVAR**

**Present: Sri. Chandrashekhar Banakar.,
B.A., LL.B., LL.M.,
Pri.CJ & JMFC.,Honnavar
C/c Addl.CJ and JMFC.,Honnavar.**

Dated this the 30th day of July, 2022

O.S. No.166/2018

Parties to O.S. No. 166/2018:

Plaintiff:

Rama Timmappa Naik,
Aged about 46 years,
Occupation: Agriculturist,
R/o. Balakuru, Tq: Honnavar.

//Vs//

Defendant:

Goyda Yane Govind Hanmanth Naik,
Aged about 61 years,
Occupation: Agriculturist,
R/o.Balakuru, Tq: Honnavar.

Parties to I.A. No.IV:

Applicant:

Rama Timmappa Naik,
Aged about 46 years,
Occupation: Agriculturist,
R/o. Balakuru, Tq: Honnavar.

(By Advocate Sri.GSH)

//Vs//

Opponent:

Goyda Yane Govind Hanmanth Naik,
Aged about 61 years,
Occupation: Agriculturist,
R/o.Balkuru, Tq: Honnavar.

(By Advocates Sri.GGB/SVA)

ORDERS ON I.A. NO.IV

The applicant/plaintiff has filed this application under Order XXVI Rule 9 read with section 151 of CPC seeking for the appointment a Court Commissioner along with the assistance of surveyor to report about the works mentioned in the application.

2. The application is annexed with the affidavit of plaintiff, wherein he has deposed that the plaintiff has purchased the suit schedule property from its original vendor by name Ramesh s/o Parashuram Bhat vide registered sale deed dated 15/07/2007. The defendant is have no right over the suit schedule property. Thereafter, he has reiterated the plaint averments in the affidavit. Further he has deposed that in order to record the exact situation exist over the suit schedule property and to give clear picture about the encroachment made by the defendant, he is seeking for appointment of the Court commissioner.

3. The opponent/defendant has filed his statement of objections and submitted that the application is not maintainable. Further he has contended that earlier this defendant has filed O.S.No. 69/2007 relating to the property measuring 5 guntas of land. In that suit, this defendant had produced a sketch and the plaintiff of his suit has not objected to the said sketch. This plaintiff has filed this suit based on the judgment passed in regular appeal. In such situation, there is no necessity to appoint Court commissioner in this suit. Hence, he sought for dismissal of the application.

4. I have heard the learned advocates for the plaintiff and defendant and perused the records.

5. The point that arises for my consideration:

1. Whether the applicant has made out sufficient grounds for appointment of Commissioner to visit the suit schedule property for executing the works sought in the application?

2. What order?

6. My answer to the above points are as follows:

Point No.1: in the **negative.**

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

REASONS

7. Point No.1:- The plaintiff has instituted the suit against the defendant for the relief of mandatory injunction, vacant possession and permanent injunction.

8. I have perused the application, objections to the application and pleadings of both the parties. The suit is one for mandatory injunction, possession and permanent injunction. Before filing this suit, the defendant of this suit had filed O.S.No. 69/2007 seeking for the relief of declaration based on adverse possession. The plaintiff of this suit was the defendant No.1 in that suit. In that suit, the defendant No.1 had filed the counter claim praying for the relief of vacant possession of 2 guntas of land. The said suit of the plaintiff was dismissed and the counter claim was decreed and it was directed to deliver the vacant possession of 2 guntas to the defendants of that suit. Aggrieved by the said judgment, the defendant of this suit had preferred a regular appeal before the Hon'ble Senior Civil Judge and JMFC, Honnavar in R.A.No. 38/2009. In that judgment at para No. 13 and 14, the Hon'ble Senior Civil Judge had opined that the plaintiff of that suit had filed several applications seeking for appointment of Court commissioner, but the defendants of that suit have objected the appointment of Court commissioner and contended that the plaintiff of that suit had encroached 2 guntas of land as per survey sketch and therefore there is no necessity to appoint Court commissioner. Finally the said regular appeal was allowed in part. However, the relief of declaration based on adverse possession by the plaintiff of that suit was rejected and the relief of permanent injunction was

granted. However, in that judgment a liberty was granted in favour of the defendants of that suit to file fresh suit in respect of the same reliefs. For these reasons, the plaintiff of this suit had filed the present suit.

9. In that regard, the learned advocate for the defendant has contended that the plaintiff has no made any attempt to show the exact encroachment and he is imposing all the burden to prove the encroachment on the Court. Therefore, he sought for dismissal of the application.

10. In support of his contentions, the learned advocate for the plaintiff has filed two judgments. They are as follows,

a. Anil Kamalakar Shirodkar vs
Dudhappa Santu Patil and another, reported
in ILR 2001 KAR 5013.

b. Sree. Sreepadaraja Mutt vs Pyra
Ramiah and others, reported in ILR 1999
KAR 2231.

11. I have perused the above cited judgments. On perusal of these judgments, it appears that the principles laid down in those judgments are settled principles. But, those judgments are not applicable to the case on hand, because, the facts in those cases and fact in this case are differed.

12. I have perused all the documents on record. On perusal of the documents pertaining to the O.S.No. 69/2007, R.A.No. 38/2009 and plaint of this suit, it appears that the plaintiff of this suit had clearly admitted that the defendant of this suit had encroached 2 guntas of land. It is also clear that when the defendant of this suit, who is the plaintiff of O.S.No. 69/2007 had filed several applications seeking for the appointment of Court commissioner, the same was opposed by the plaintiff of this suit. Further, the judgment in R.A.No. 38/2009 was passed on 18/09/2014 and the present suit was filed on 10/12/2018. On calculation, there is a time gap of 4 years. In these 4 years, the plaintiff of this suit has not made any attempt to get surveyed the suit schedule property and he keep quite in these 4 years and filed this suit and now imposing the burden on the Court to get survey the suit schedule property, as if it is the duty of the Court to get survey the suit schedule property. Because, in the plaint, the relief portion starts with the words that Court has to get surveyed the suit schedule property. Therefore, conduct of the plaintiff is filing this application is not proper and the plaintiff wants to shift the burden of proof about the encroachment of the suit schedule property over the Court. This is not permissible in the law. However, in this case both the parties still have to adduce their evidences. Hence I answer point No. 1 in the **negative**.

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

ORDER

I.A. No. IV filed by the applicant/ plaintiff
under Order XXVI Rule 9 of CPC is dismissed.

Call on 17/08/2022.

(Typed by me in my laptop and corrected by me, and then pronounced in the open court on this the 30th day of July, 2022).