

IN THE COURT OF PRINCIPAL CIVIL JUDGE & JMFC
AT: HONNAVAR

Present: Sri. Chandrashekar Banakar.,
B.A., LL.B., LL.M.,
Pri.CJ & JMFC.,Honnavar

Dated this the 09th day of June, 2023
O.S. No. 169/2018

Plaintiffs:

Timmappa bin Ganapayya Gouda and another,

//Vs//

Defendants:

01. Government of Karnataka, R/by Deputy
Commissioner Uattar Kannada, Karwar and
others,

Parties to I.A. No. IV:

Applicants/plaintiffs:

Timmappa bin Ganapayya Gouda and another,

(By Advocate Sri.GVB)

//Vs//

Opponents/defendants:

01. Government of Karnataka, R/by Deputy
Commissioner Uattar Kannada, Karwar and
others, .

(By Def No.1 to 3 Sri. AGP
advocate Def No.4 absent)

ORDERS ON I.A. NO. IV

The applicants/plaintiffs have filed an application under Order XXVI Rule 9 of CPC seeking for the appointment any advocate as Court Commissioner to visit the schedule property to perform works mentioned in the application.

2. The plaintiff No. 2 has sworn to an affidavit annexed to the application and contended that he has filed this suit seeking for the relief of mandatory injunction. The defendant No.4 has already completed the formation of the suit road. But, the defendant No.4 has not put any drainage stones about the place measuring 10 feet. Now it is very much necessary to note the works mentioned in the application in order to bring the actual picture of the said road before the Court. Hence, they have filed this application.

3. The defendant Nos. 1 to 3 have filed their objections and contended that this application is filed only with an intention to collect evidence. The plaintiffs have to prove his case on their own strength. Further they have reiterate the contentions raised in the written statement. On these grounds, they prayed to dismiss the application.

4. I have heard the learned advocate for the plaintiffs and the learned AGP and I have perused the records.

5. The point that arises for my consideration:

1. Whether the applicants made out sufficient grounds for appointment of Commissioner to visit the suit schedule property as sought for?
 2. What order?
6. My answer to the above points are as follows:

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

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

REASONS

7. **Point No.1:-** The plaintiffs have instituted the suit against the defendants for the relief of mandatory injunction. The learned advocate for the plaintiffs has contended that the defendant No.4 already formed the road and almost the formation of the said road is completed. But, he has not put the drainage stones over the land measuring 10 feet. Therefore, it is necessary to bring the exact picture before the Court and therefore they filed this application.

8. Under this application, the plaintiffs are seeking for the appointment of Court commissioner to visit the suit schedule property and to record the aspects mentioned in the application. At this point of time, it is necessary to cite the following judgment. In Annappa Mestha Vs Mutayya Achari reported in ILR 2002 Kar 3599, wherein the Hon'ble High Court of Karnataka has held that,

“8. The need to have resort to Order 26, Rule 9 ought to be felt by the Court for purpose of elucidating certain details

which, in its opinion, can neither be had from the records and nor can be produced by the parties by way of oral and documentary evidence. The details so required by the Court ought to be such that in their absence determination of issues in dispute cannot be effectively adjudicated upon necessitating the appointment of Commissioner on its own or at the instance of either of the parties. Where the Court is of the opinion that the matters in dispute could be effectively adjudicated upon by having resort to the evidence available on record, the Court at its discretion can refuse to direct appointment of Commissioner. In the case on hand the Court-below on more than one occasion referred to the sufficiency of evidence on record for deciding the rival claims of the parties. When the Court itself is of the view that elucidation of any matter is not required for purpose of deciding the case, the order passed by it rejecting the I.A. XI filed for appointment of Commissioner cannot be found fault with. In the view that I have taken, I find that the Court below has not exercised its jurisdiction illegally or with material irregularity calling for interference at the hands of this Court."

9. I have perused the above decision. As held by the Hon'ble High Court of Karnataka, when there are pleadings and documents in the suit, there is absolutely no scope for the Court to allow the commission application. In this case, the existence of aspects alleged in the application is available over the suit schedule property or not, is to considered. For this, appointment of

Court commissioner is very much necessary. Without the assistance of the report of the Court commissioner, this Court cannot presume about the existence of the situation as alleged and contended by the plaintiffs. Therefore, for the above said reasons the plaintiffs have made out grounds to allow the application. Hence, I answered point No. 1 in the **affirmative**.

10. **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 applicants/plaintiffs under Order XXVI Rule 9 read with section 151 of CPC is hereby allowed.

Sri.VGY, advocate, Honnavar is hereby appointed as Court commissioner. Rs. 2,000/- is hereby fixed as Commissioner fee.

Plaintiffs are hereby directed to deposit the commissioner fee and the plaintiffs and defendants are directed to file memo of instructions.

Office is hereby directed to issue commissioner warrant after fixed fee deposited by the plaintiffs.

Both the parties are directed to submit their work memo to the Court commissioner.

Await Commissioner report
Call on 25/07/2023.

(Typed by me in my laptop, corrected and signed by me and then pronounced in the open Court on this 9th day of June, 2023).

**Principal Civil Judge & J.M.F.C.
Honnavar.**