

IN THE COURT OF THE SENIOR CIVIL JUDGE AND ACJM,

KARKALA

Present: Smt.Sharmila C.S., B.A.L., LL.M.,
Senior Civil Judge and ACJM, Karkala.

Dated: This the 2nd day of December , 2024.

O.S.No.67/2017

Smt. Rathnamma and others. ..Plaintiffs
Versus -
Sri. Namiraja Pandi and others ..Defendants

PARTIES TO I.A.NO.29

Sri. Namiraja Pandi,
Aged 84 years,
S/o. Jinnappa Hegde,
R/at. Chikkalbettu, Sanur Village,
Karkala taluk, Udupi District. . .. Applicant/
1st defendant

- vs. -

1. Smt. Rathnamma
Aged 74 years,
W/o. Late Devaraj Jain,
R/at. Rajagiri House, Kanchana Village
and Post, Via Uppinangady,
Puttur Taluk, D.K. District.
2. Smt. Saraswathi,
Aged 71 years,
W/o. Prabhakara Athikari,
D/o. Jinnappa Hegde,
R/at. Shanthinilaya, Jayanthinagara,
6th Cross, Kukkundoor Village,
Karkala Taluk, Udupi District.
3. Mrs. Surekha V. Hegde,
Aged 46 years,

D/o. Late Sumanaji Amma,
W/o. Vijay Kumar Hegde,
R/at. Padmavarna, Post Kallabettu,
Gantalkatte, Moodabidri,
Mangalore Taluk, D.K. District.

4. Mrs. Sujatha Shivakumar,
Aged 40 years,
D/o. Late Sumajani Amma,
W/o. Shivakumar,
R/at. Kurpady House, Ajekar,
Marne Village, Karkala Taluk,
Udupi District.

.. Opponents/plaintiffs

i.	Provision under which the application is filed	Order 26 Rule 1 and Section 151 of CPC
ii.	Relief sought for	To issue commission for examination of 1 st defendant
iii.	The date on which the application is filed	20-11-2024
iv.	Number of the application	I.A.No.29
v.	The date on which the objections are filed by different opponents	22-11-2024
vi.	The date on which the orders were passed on the said application.	02-12-2024

ORDER ON I.A.NO.29 FILED UNDER ORDER 26 RULE 1

AND SECTION 151 OF C.P.C.

Application is filed by 1st defendant seeking issuance of commission for examination of 1st defendant.

2. The daughter of 1st defendant has deposed that the 1st defendant is unable to physically move and not in a position to appear before this court. Thus prays to issue commission for his examination.

3. The plaintiffs filed objections and denied the entire averments made in the affidavit and prays to dismiss the I.A.

4. Heard from the counsel for plaintiffs and counsel the 1st defendant .

5. The following point arise for my determination.

“Whether appointment of commissioner for examination of 1st defendant is necessary?”

6. My answer to the above point is in ‘affirmative’, for the following

REASONS

7. The present suit was filed in the year 2017 and in view of the settlement in between the parties, the matter was adjourned , where it lead to no fruitful result. Accordingly the

plaintiffs got examined and now the case is posted for defendants evidence. Defendant No.1, in view of his ill-health, got executed the Special Power of Attorney in favour of his daughter. Now the 1st defendant himself is intending to lead the evidence and accordingly has sought for appointment of the commissioner to examine him.

8. The daughter of the 1st defendant has deposed that 1st defendant is aged, ailing and immobile and is not able to physically move and is diagnosed with cervical spondylotic myelopathy with paraparesis. That he is not in a position to physically attend the court.

9. Per contra the counsel for the plaintiffs urges that when the 1st defendant has executed the Special Power of Attorney in favour of his daughter, the Special Power of Attorney Holder herself can be examined in the place of the 1st defendant. Thus has sought for dismissal of the application.

10. The 1st defendant is one of the senior counsel who was appearing before this court, but has stopped his practice in view of his ill-health. The 1st defendant is also shown to be

aged person with 80 plus years and thus appears to have executed the Special Power of attorney dated 15-03-2024, which is produced before this court . Even P.W.1 also admits that 1st defendant is not in a position to attend the court. In so far as examination of the Power of attorney Holder is concerned, the law is very clear that the Power of Attorney Holder must have the personal knowledge of the facts and circumstances of the case. The Power of Attorney Holder appears to be not aware of the history and other allied circumstances based upon which the present suit is filed. Such evidence of her can only be an hear say . Even otherwise, the Special Power of attorney executed in favour of daughter of 1st defendant clearly goes to show that she is entitled only to do all the necessary works connected with the present including the compromise, filing of applications etc. When the Special Power of attorney is executed for a limited purpose, this court cannot force the Special Power of Attorney Holder to give evidence before this court. The burden to prove the defence is upon the 1st defendant and he has to bear the expenses pertaining to the appointment of the commissioner. No hardship

will be caused if the application is allowed , since the suit is seeking the relief of partition and the parties are the relatives. Accordingly holding that there are sufficient grounds in order to appoint the commissioner for examination of the 1st defendant, the above point is answered in the affirmative.

11. In view of the above reasoning, I proceed to pass the following :

ORDER

I.A.No.29 filed by the 1st defendant under Order 26 Rule 1 and Section 151 of C.P.C., is here with allowed.

Commissioner is appointed to record the evidence of the 1st defendant.

(Dictated to the Stenographer, transcribed by her , transcript corrected and then pronounced in Open Court on this the 2nd day of December, 2024.)

(SHARMILA C.S.)
Senior Civil Judge & ACJM, Karkala