

ORDER ON IA NO.21

The plaintiffs have filed the present application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (Hereinafter referred to as 'CPC', for brevity) seeking to appoint an advocate as Court commissioner and direct him to note and report about the points mentioned in the application.

2. It is averred in the affidavit annexed to the application that, the 1st defendant in the above suit had put up the illegal construction by making encroachment of the plaint 'B' schedule road. The plotting relating to the property sold in favour of defendants No.1 to 3 was plotted contrary to the composite final decree and the same is not in accordance with the survey sketch annexed to the composite final decree and topography of the land.

Due to the encroachment made by the defendant width of plaint 'B' schedule road is also reduced. The defendant No.1 in his written statement had contended that the road reserved in the final decree has been in the same location. The existence, location and encroachment of the plaint 'B' schedule road is a matter in controversy involved in the suit. Therefore, the issuance of commission is very much necessary and will not amount to collection of evidence. With these, prayed to allow the application.

3. Per contra, the defendant No.1 resisted the application by filing objection, wherein he contended that he was not a party to the composite final decree. It is not for the commissioner to report the correctness of the composite final decree and sketch annexed to it. He can only report the relevant facts. Without prejudice to contentions taken by him, the errors or mistakes if any in plotting are subject to correction, without causing any prejudice or hardship to the right, title and possession of this defendant. He may be permitted to file a separate and detailed work memo to be

referred by the commissioner during the inspection. Therefore, the defendant No.1 prayed to direct the commissioner to consider the work memo to be filed by him.

4. The points that would arise for consideration are:-

1. Whether the application deserves to be allowed?
2. What order?

5. I have heard the learned counsel for the parties to the lis and meticulously perused the material on record.

6. My answer to the above said points are as under:

Point No.1: In the Affirmative;

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

REASONS

7. **Point No.1:** The plaintiffs have filed the present suit against the defendants for mandatory injunction directing the defendants to remove the encroachments made on 20 links width road/plaint

'B' schedule property and restore the same to its original position as shown in the sketch annexed to the composite final decree dated 28.01.2004 passed in O.S. No.168/1998 and also grant permanent injunction restraining the defendants, their men, agents and all persons claiming through or under them from in any way committing trespass and making encroachment on the plaint 'A' schedule properties. On the other hand the defendant No.1 contested the suit by filing written statement. Wherein, he has denied the entire plaint averments and specifically contended that he is a bonafide purchaser of written statement schedule property and he been in actual, lawful and exclusive possession and enjoyment of the said property. The vendors i.e., defendant No.4 to 6 acquired the written statement schedule property under the composite final decree passed in O.S. No.168/1998 on the file of the 3rd additional Civil Judge, Karkala. He has purchased the said property after verification of the concerned court records. The road reserved in the aforesaid final decree has been in the same location. It is reserved for the use of all the sharers and their respective successors and heirs. He and his

vendors have not disturbed the said road at all. It is the plaintiffs and their instigator dhushyantha Shetty who have been obstructing and damaging the said road by digging pits and by dumping granite size stones on the said road, with an intention to prevent the defendants and others from using the said road.

8. The Learned Counsel for the plaintiffs argued that the plotting relating to the property sold infavour of defendant No.1 to 3 was contrary to the composite final decree and the same is not in accordance with the survey sketch annexed to the composite final decree. The defendant No.1 has encroached the portion of suit 'B' schedule road. In view of above encroachment width of the road reserved in the composite final decree reduced. In order to ascertain the factum of encroachment and to decide suit an appointment of commissioner is very much necessary. As such he prayed to allow the application. Counter to that, the Learned Counsel for the defendant No.1 argued that they have no objection to appointment of advocate commissioner to ascertain the road in question. Moreover, the road

reserved under composite final decree is not in dispute and the plaintiffs have not produced single documents to show alleged encroachment of road. If this Court orders to appoint advocate commissioner, direct the commissioner to consider the work memo filed by this defendant.

9. When the matter was posted for further hearing on IA No.II, at this stage the plaintiffs have filed the present application seeking to appoint an advocate as Court commissioner and direct him to note and report about the points mentioned in the application. Order XXVI Rule 9 of C.P.C., empowers the Court in any suit where it deems local investigation is required for the purpose of elucidating any matter in dispute, may appoint Commissioner directing him to make such investigation and to report there on the Court. As alleged by the plaintiffs that, plotting of the written statement schedule property is contrary to the sketch annexed to the composite final decree. The defendant No.1 reduced the width of the road by encroachment. The road reserved in the composite final decree passed in O.S. No.168/1998 is not in

dispute. A bare perusal of copy of the order passed by the Deputy Director, Land Records, Udupi in Tam. Bhoo. U. Ni. Appeal 23/18-19 dated 17.09.2019 shows that the plotting related to the Sy. No.241/4 was cancelled. Wherein, it is observed that, the plotting of Sy. No.241/4 of Nitte Village is contrary to the sketch annexed to the composite final decree. On the other hand, the defendant No.1 has not produced any contra documents to rebut the same. It is worth to refer judgment of the Hon'ble High Court of Madhya Pradesh in the case of Durga Prasad -Vs- Praveen Foujdar reported in 1975 MPLJ 801, wherein their lordships have held that, **where there is a dispute as to encroachment, the fact whether there is such an encroachment or not cannot be determined in the absence of an agreed map, except by the appointment of a Commissioner under Order XXVI Rule 9 of C.P.C.,** It is also worth to refer judgment of the Hon'ble High Court of Karnataka in the case of Bhimappa Rayappa Chougala -Vs- Shrikant and Others reported in 2014 (2) KCCR 1652, wherein their lordships have held that **any amount of oral evidence is not a substitute or sufficient to**

prove the encroachment. In view of above sacred ratio, in order to ascertain the area of encroachment and to arrive at a proper conclusion warrants to appointment of commissioner. Accordingly, I answer point No.1 in the **Affirmative.**

10. **Point No.2:** In view of discussion and the findings arrived at point No.1, I proceed to pass the following:

ORDER

IA No. 21 filed by the plaintiffs under Order XXVI Rule 9 of the C.P.C., is allowed.

Consequently, an Advocate-Commissioner is appointed to make a local inspection as stated in the application with the help of surveyor.

Issue intimation to the Tahasildar, Karkala to depute any one of the surveyor to assist the advocate commissioner.

Commissioner fee is fixed at Rs.3,000/- and Surveyor fee is fixed at Rs.1,000/-

The plaintiffs are directed to complete the commission work within three months from the date of appointment of advocate commissioner. Failing which, the commission warrant shall stand cancelled without any further order.

It is needless to say about extra care and caution shall be taken because of Covid-19 pandemic.

No order as to costs.

For Memo of instructions by :

II Addl. Civil Judge & J.M.F.C.,
Karkala.