

**IN THE COURT OF THE PRL.CIVIL JUDGE AND JMFC.,
KARKALA**

Present: Smt. Poornima N.Pai, B.Com., LL.B.,
Prl. Civil Judge and J.M.F.C., Karkala.

Dated:- This the 16th day of February, 2016.

O.S.No.163 of 2014

Between:-

Mr. Frederick D'Souza
Reptd. by his G.P.A.holder
Mr. Robert D'Souza. ...Plaintiff.

And

Smt. Shantha Moily. ...Defendant.

PARTIES TO I.A.NO.II

Between:

Mdr. Frederick D'Souza,
aged about 62 years,
S/o. late Xavier D'Souza,
residing at Door No.1/15/D1,
1st floor, Opp: Lions Centre,
Surathkal, Mangalore taluk, D.K.
Represented by his G.P.A.holder
Mr. Robert D'Souza,
aged about 54 years,
S/o. Lawrence D'Souza,
residing at Kana Madarabettu Road,
Surathkal, Mangalore taluk. D.K. ... Applicant/ Plaintiff.

And

Smt. Shantha Moily,
aged about 37 years,
W/o. Sri Vasantha Devadiga,
residing at Kuddottu House,
Doopadakatte Post, Nitte
Village, Karkala Taluk,
Udupi District-574110.

... Opponent/ Defendnat.

**Order on I.A.No.II filed under Order XXVI Rule 9 and
Sec. 151 of C.P.C.**

The present I.A.No.II is filed by the plaintiff to appoint an advocate commissioner to measure and identify with the assistance of the taluk surveyor the 'A' and 'B' schedule properties of the plaintiff and to locate the 'B' schedule property and to report as to whether the 'B' schedule property is inside 450 links or 100 yards from the boundary of the plaintiff 'A' schedule property or whether the same is within the 450 links or 100 yards from the boundary of Sy.Nos. 61, 62/1, 62/5, 62/12 and 62/8 of Nitte village.

2. In the annexed affidavit the plaintiff has averred that the present suit is for possession of plaintiff 'B' schedule property on the basis that the said 'B' schedule property is situated in the kumki land of plaintiff 'A' schedule property belonging to the plaintiff touching his Sy.Nos. 58/3 and 58/4 of plaintiff 'A' schedule property within a distance of 450 links from the

boundary of Kadim agricultural land. The defendant's contention is that the 'B' schedule property is outside the said area and it is not inside the kumki land of plaintiff, but touching Sy.Nos. 61, 62/1, 62/5, 62/12 and 62/8 of Nitte village. The description of the 'B' schedule property was disputed by the defendant. The first issue also relates to same dispute burden of which is on the plaintiff. It is stated that the location of 'B' schedule property by survey measurement can only show that it is within the kumki area of plaintiff or not. Therefore, appointment of advocate commissioner to get the location of the plaintiff 'B' schedule property, to verify and report by verifying the sketch will be very helpful to decide the fact in issue. It would minimize the oral evidence. Hence he has prayed to allow the application.

3. The application has been opposed by the defendant's counsel stating that the portions of the property in Sy.No. 360 were granted to various persons as house sites by the Government and in the said property number of persons are residing by constructing the residential houses as unauthorized occupation. Some of them were granted house sites in EDR/HSR Scheme and for remaining persons, applications are pending for consideration under the regularization of unauthorized occupation scheme. The plaintiff 'B' schedule property is one of the house sites in which the defendant is

residing along with her family since several years. The plaintiff has to prove his case independently. The appointment of court commissioner is absolutely not necessary to decide the case. Infact the suit of the plaintiff itself is not maintainable. The commissioner cannot be appointed for collection of evidence. Inspite of leading the evidence the plaintiff filed this application only with an intention to drag on the matter. The application is totally misconceived one. Hence it is prayed to reject the application.

4. Heard arguments of both sides.

5. The points that arose for my consideration are:

1) Whether the plaintiff has made out any grounds for allowing the application for appointment of court commissioner at this stage?

2) What Order?

6. I have answered the above points in following ways:

Point No. 1:Negative.

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

REASONS

7. Point No.1: It is argued by the advocate for plaintiff Sri M.K.V.K. that the plaintiff is in possession of 450 links of land since 1971. Even though ownership is with Government, the possession is with plaintiff. The Tahsildar had issued notice to the defendant under section 192 of Karnataka Land Revenue Act and a criminal case was lodged against her in C.C.No. 508/2011. The case was acquitted due to technical defects only. The possession of defendant is as a trespasser and the earlier trespasser has got a better title over the subsequent trespasser. Earlier trespasser cannot be dispossessed. The Government can take his kumki privilege, not a trespasser. When the defendant has denied that it does not become a kumki land of plaintiff's Kadim land and it does not come within 450 links from plaintiff's land, any amount of oral evidence, a sketch with reference to F.M.B. would be available at the time of evidence. Hence he prays to allow the application.

8. On the other hand, Sri S.K.N. advocate for defendant has argued that the plaintiff has to prove his case independently. He cannot collect evidence through the court. The plaint 'B' schedule property is a Government land. The plaintiff has not produced any document or sketch till now from concerned survey department and the 'B' schedule property which is shown in the plaint cannot be identified as the description given

is not proper. Already some persons are granted properties. The defendant has also filed application under section 94(C) for regularization of her occupation. The Panchayath has given door number to her, electricity connection has been given to the house and she is regularly paying the tax and her application is pending for adjudication. Hence, the plaintiff cannot claim any right over a Government land which is not within his kumki privilege. The plaintiff has to produce the documents and appointment of commissioner is not needed. Hence, he prayed to reject the application.

Hence I proceed to pass the following:

ORDER

I.A.No.II filed under Or. XXVI rule 9
and section 151 of C.P.C. by the plaintiff is
hereby.....rejected.

Case is posted for defendants' evidence.

(Poornima N.Pai)
Prl. Civil Judge & JMFC., Karkala.

