

ORDER ON I. A. NO. IV

The instant application has been filed by the learned counsel for the plaintiff for appointment of the Court Commissioner for the local inspection.

In the affidavit, the plaintiff has stated that he has filed the present suit in respect of 'A' schedule property. It is stated that the entire 'A' schedule property is enclosed with common enclosures and entire plot forms a single compact block. The defendants are trying to destroy the boundary enclosed and also trying to form a new road, water channel etc. The defendants have under taken such local act high-handedly and the existence of enclosures around the 'A' schedule property is under threat. The plaintiff is in lawful possession and enjoyment over the 'A' schedule property and if the defendants have successfully destroyed

the enclosures, the plaintiff will be prevented from proving the existence of said material evidence. The plaintiff has to prove the existence of old enclosures and also existence of old trees. The leading of oral evidence would be voluminous and expensive and consume valuable time of this Court. If the application is not allowed the plaintiff suffer hardship and hence, prayed to allow the application.

The learned counsel for the defendants has filed objection by stating that the application is not maintainable. It is stated that the plaintiff is trying to collect evidence in the guise of present application. The suit is for bare injunction and the plaintiff ought to prove the possession of the 'A' schedule property for which no commission can be appointed. The averments of the affidavit show that the plaintiff is trying to prove his possession over the 'A' schedule property. The application is

not maintainable. Hence, prayed to dismiss the application with costs.

Heard, both sides.

The following points would arise for my consideration:

- 1) *Whether the plaintiff has made out grounds to allow the application?*
- 2) *What order?*

My answer to the above Points are as under:

Point No.1: In the Negative,

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

RE A S O N S

Point No.1: In the instant application the plaintiff as sought for appointment of Court Commissioner for local inspection.

In the affidavit it is clearly admitted by the plaintiff that he intends to collect evidence in respect of existence of

enclosures around the entire suit 'A' schedule property. It is the apprehension of the plaintiff that the defendants are trying to destroy the said enclosures. On the other hand defendants have clearly denied the allegations made in the application and prayed to dismiss the application, as it is not maintainable.

On perusal of the records and on hearing both sides it is evident that the plaintiff has already filed I.A.No.II under Order XXXIX Rule 1 and 2 of CPC to restrain the defendants from causing any damage to the 'A' schedule property by trespassing over the same. This Court has already granted ex parte temporary injunction in favour of the plaintiff and temporary injunction has been extended till further orders.

It is settled possession of law that a Court commission cannot be appointed for collection of evidence. In a reported case in ILR 2007 KAR 3029, Miss Renuka V/s Sri Tammanna and others, the Hon'ble High Court of Karnataka has clearly held that the Court Commissioner

cannot be appointed for collection of evidence in support of same. It is further held that after completion of evidence on both sides, if the Court found that there is any ambiguity in the evidence adduced by the parties, then the Court may appoint a Commissioner for the purpose of clarification of such an ambiguity. I have gone through the above decision and in this case the evidence is not yet commenced and therefore the question of ambiguity in the evidence will not arise at this stage. The Hon'ble High Court of Karnataka has clearly held that a Court Commissioner cannot be appointed at this stage of the case. Hence, the above decision is clearly applicable to the case on hand.

In the affidavit the plaintiff has clearly admitted that the Court Commissioner has to be appointed for collection of evidence. The plaintiff has further contended that the leading of oral evidence will consume the valuable time of the Court. The plaintiff shall entered into witness box to prove his possession

over the suit property in a suit for permanent injunction. The plaintiff cannot evade to do so by appointment of Court Commissioner.

The learned counsel for the plaintiff relied upon the decision reported in ILR 2010 KAR 897, wherein it is clearly held that when there are conflicting versions regarding the location of the suit schedule property, no amount of oral and documentary evidence may enable the trial Court to adjudicate the matter. In the said decision it is further held that the appointment of Court commissioner is within the discretionary of trial Court. The counsel for the plaintiff has also relied upon the decision reported in 2000 Legal Eagle(SC) 454 wherein it is held that for identification of property the Court should have appointed survey commission. I have gone through above decision with due respect. The facts and circumstances of this case are entirely different from those cases. Moreover, in the first decision relied upon by the counsel for the plaintiff it is held that the

appointment of Court Commissioner is within the discretionary of the trial Court. In the present case I am of the considered opinion that such application can be considered after adducing of evidence by both sides. In view of this, I am of opinion that the application filed by the plaintiff is pre-matured and liable to be rejected. Hence, I answered **point No.1 in the Negative.**

Point No.2. In view of above discussions, I proceed to pass the following:

: O R D E R :

I.A. No.IV filed by the plaintiff is hereby rejected.

No order as to costs.

For list of witness and plaintiff evidence finally by 16-08-2018.

Prl. Civil Judge & JMFC.,
Kundapura.