

**IN THE COURT OF PRINCIPAL CIVIL JUDGE AT
KUNDAPURA**

Present: Smt. Anupama Laxmi . B., B.A., LL.B.
Prl. Civil Judge & JMFC
Kundapura

Dated this the 23rd day of June 2012

Parties to I.A. No.IX:

Applicants/plaintiffs :

1. Mahesh Matti, 40 years
Son of M. Madhava Rao
2. Smt. Shubadha, 33 years
Wife of Mahesh Matti
No. 1 is the proprietor
of M/s Matti Enterprises
No.2 is the Proprietrix of
M/s Matti Marbles and Granites
Both residing at Hosmatta of
Kedur Village, Kundapura Taluk
Udupi District, Post: Kedur

(By Advocate Sri M.M.H.)

//Vs//

Opponents/Defendants:

1. The Ministry of Shipping
Road Transport and Highways
of the Union of India,
Represented by its Project Director
National Highways Authority of
India, Project Implementation Unit
Bisshop Compound Valencia
Kankanady, Mangalore 575 002
2. The Authorised Officer-
The Assistant Commissioner and the
Special Land Acquisition Officer
National Highway No.17,

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3. The Union of India, represented
by the Deputy Commissioner
Udupi District, Udupi
4. M/s. Navayuga Engineering Co.Ltd.
No.1259, Lakshmi Towers
Road No.36, Jubilee Hills
Hyderabad, Andra Pradesh

(By Advocate Sri SNS for D1 & 4
D2 and 3 – A.G.P.)

Parties to O.S. No. 14/2011:

Plaintiffs: 1. Mahesh Matti and another

//Vs//

Defendants: 1. The Ministry of Shipping and 3 others

ORDERS ON I.A. NO. IX

The applicants/plaintiffs have filed an application under Order XXVI Rule 9 and Section 151 of CPC to appoint an Advocate Commissioner for local investigation of the lands mentioned in the application and their adjoining lands and to prepare an accurate sketch of the said lands and to report about the works mentioned in the application.

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2. The applicant No.1/plaintiff No.2 has sworn to an affidavit annexed to the application and prayed to read the plaint averments as part of the affidavit.

3. Case of the applicants is that they have no objection for defendants No.1 and 2 taking possession of the lands which have been acquired as per the notification made under the relevant provisions of The National Highways Act. In land bearing survey No.202/9A 6A3 -II, survey No.202/9A 6A2-II and survey No.202/9A 6A1 -II of Beejady Village, Kundapura Taluk which have been acquired by the defendants. There is no building of any sort and they are vacant lands. The building bearing door No.I-207 of Beejady Grama Panchayath is situated at a distance of 8 ½ meters from the eastern survey line of survey No.202 of Beejady Village and not less than 5 ½ meters from the eastern boundary of the land shown as survey No.202-9A 6A 2-II of Beejady Village. The said building is situated in the land bearing survey No.202/9A 6A2-I of Beejady Village, which is not acquired by the defendants.

4. Further case of the plaintiffs is that the defendants did not deny the fact that the above said building is situated 8 ½ meters to the west of survey line of survey No.202. The width of

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the land that is acquired is shown as survey No.202/9A 6A2 -II in the sketch is 3 meters east to west on the northern side and 2.8 meters east to west in the southern side. Hence, the said building is situated at a distance of not less than 5 ½ meters towards west of the land acquired. Therefore, it is evident that the said building is not situated on the land acquired by the defendants No.1 and 2.

5. But, the 2nd defendant has issued a notice dated 05.11.2011 to the plaintiffs showing that the plaintiffs have been ~~avoided~~ ^{ward} compensation of Rs.3,81,957/- in respect of the building situated in survey No.202/9A 6A2 measuring 42 Sq.meters and directing the plaintiffs to deliver the possession of the said land and also the building within 60 days from the date of service of the notice. Though the building is not situated in the land in survey No.202/9A 6A 2 , the defendants are contemplating that the said building is situated in the said survey number. This fact cannot be placed on record by adducing oral evidence. So, the applicants have submitted that a Commissioner should be appointed by the Court to report about the said fact and draw a sketch showing the relevant facts. According to the applicants, if Commissioner is not appointed immediately, there is every likelihood of the defendants demolishing the said building

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unlawfully. Hence, the applicants have prayed to allow the application.

6. The defendants No.1 and 4 on the other hand have filed their statement of objections and prayed to reject the application stating that the application is not maintainable. According to the opponents, the defendant No.1 had already produced the sketch prepared by the Government registered valuer alongwith his answer to the interrogatories filed by the plaintiffs, which itself is clear as to the description of the building, features and materials used for construction etc. Further, the plaintiffs with a view to delay the proposed road widening project of the National Highways Authority of India which is for the developmental work of the nation has filed the present application.

7. According to the opponents, the lands including the structure have been acquired as per the provisions of law by complying with all the requisites of Section 3-D of The National Highways Act 1956. Accordingly, compensation amount has been determined by the 2nd defendant as per Section 3-G of The National Highways Act 1956, which will be paid to the plaintiffs.

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Hence, no prejudice will be caused to the plaintiffs as they have been given opportunity as per the said Act.

8. According to the opponents, the application is premature as the issues are yet to be framed. However, the plaintiffs can very well establish their case during the course of the evidence. So, the opponents have prayed to dismiss the application.

9. Heard.

10. The points that arise for my consideration :

1. Whether the application filed by the plaintiffs/applicants under Order XXVI Rule 9 and under Sec.151 of CPC deserves to be allowed?
2. What order?

11. My answer to the above points is as follows:

Point No.1 : in the negative

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

REASONS

12. Point No.1 : The plaintiffs have instituted the suit against the defendants for permanent injunction restraining them from encroaching upon the schedule property and taking possession of any land in excess of the land acquired under the

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notification dated 16.08.2010 and detailed in the sketch prepared by the defendants No.1 and 2 and also from demolishing any portion of the building in the land bearing survey No.202-9A 6A2-I which is lying on the western side of the portion marked and shown as survey No.202-9A 6A3-II and survey No.202-9A 6A2-II and survey No.202-9A 6A1-II in the sketch prepared by the surveyor as per the directions of defendants No.1 and 2 and for costs and other relief.

13. The case of the applicants/plaintiffs is that the defendants No.1 and 2 have acquired some portions of land in survey No. 202/9A6A2-II , 202/9A6A3-II and 202/9A6A1-II where the building which is under the threat of being demolished by the defendants is not situated. The said building is situated in the land bearing survey No.202/9A6A2-I. The defendants according to the plaintiffs have not acquired the said land. However, the defendant No.2 has issued a notice to the plaintiffs awarding compensation with respect to building situated in survey No.202/9A6A2 directing the plaintiffs to deliver the possession of the said land and also the building. So, according to the plaintiffs, the defendants have no authority to demolish the said building which is not acquired by the defendants. So, the plaintiffs in order to show that the said building is situated in

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a land which is not acquired by the defendants has sought for the appointment of the Court Commissioner.

14. According to the opponents, as per Sub Section (2) of Section 3-D of The National Highways Act 1956 "on the publication of the declaration under sub section (1), the land shall vest absolutely in the Central Government free from all encumbrances" and as per Section 3 -D (4) of the said Act, the declaration made by the Central Government under sub section (1) of Section 3-D of The National Highways Act 1956 for acquisition of land shall not be questioned in any Court or by any other authority. So, according to the opponents, the application is not maintainable. However, whether the authority of the National Highways Authorities can be questioned or not cannot be decided in the present application. At present, whether appointment of Commissioner for local investigation is necessary or not is the only question that has to be decided.

15. In the case on hand, issues are not yet framed. But, the plaintiffs before adducing evidence are pressing the appointment of Commissioner pleading urgency in the matter that the building under question will be demolished by the defendants if an order in this regard is not passed.

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16. This is a suit for permanent injunction. In suits of such a nature, Commissioner cannot be appointed to know who is in possession of the property. But if there is any boundary dispute, then as per the decision of our Hon'ble High Court of Karnataka, Commissioner can be appointed to survey and measure the property.

17. The learned counsel for the plaintiffs has furnished the decision rendered by the Hon'ble High Court of Karnataka in

ILR 2001 Kar 5013 (Anil Kamalakar Shirodkar Vs Dudhappa Santu Patil and another), wherein the Hon'ble High Court of Karnataka has held that *"in a suit for injunction, wherein parties alleged encroachment of property, where correct extent and boundaries of the property are in dispute, it is just and necessary that a survey has to be conducted and the boundaries of the property are to be identified, in such a situation, appointment of the Commissioner should not be mistaken for collecting evidence. However, the Commissioner cannot go into the question as to who is in possession of the property."*

18. Here in the case on hand, there is no dispute with regard to the boundary, but the dispute of the plaintiffs is with

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regard to the building situated over the property which according to the plaintiffs is not acquired by the defendants. So, with great respect to the Hon'ble High Court of Karnataka , I submit that the above decision is not application to the case on hand.

19. The learned counsel for the defendant has submitted that the suit filed by the plaintiffs itself is not maintainable, as the plaintiffs cannot question the acquisition proceedings. But, according to the learned counsel for the plaintiffs suit is maintainable. The learned counsel for the defendants has furnished a decision reported in 2012 AIR SCW 1177 (State of Punjab Vs Amarjit Singh) , wherein their lordships have held that *"(A) Civil Procedure Code (5 of 1908), S.9-Jurisdiction of civil Court-Suit involving challenge to acquisition of land under Land Acquisition Act, 1894-Cannot be entertained by civil Court"*.

So according to the plaintiffs, the suit is maintainable and according to the defendants, the suit is not maintainable. Further according to the defendants, the sketch prepared by the Government Registered Valuer is clear as to the description of the building features and materials used for construction etc. so appointment of Advocate Commissioner for local inspection is not necessary.

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20. Be that as it may, in the suit for permanent injunction, both the parties to the suit have yet to adduce evidence and issues are also not yet framed. The plaintiffs during the course of their evidence can put forth their contentions with regard to the ^{location} placement of the building over the property which according to them is not yet acquired by the defendants. Prior to the stage of evidence, appointment of Court Commissioner is not necessary. If after closure of evidence, the Court is not in a situation to adjudicate the suit on the basis of the evidence of the parties, then only the Commissioner can be appointed. So, the application is premature. Accordingly, I answer point No.1 in the negative.

21. **Point No.2:** In view of findings on point No. 1, I proceed to pass the following:

ORDER

I.A. No. IX filed by the applicants/plaintiffs under Section 151 and Order 26 Rule 9 of CPC is disposed of .

(Dictated to the stenographer directly in the computer, corrected and signed by me and then pronounced in the open Court on this 23rd day of June 2012)

Principal Civil Judge & J.M.S.C.
Kundapura

bsr/-