



CNR: KAHC010028502021

NC: 2026:KHC:40202
WP No. 1351 of 2021

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JULY, 2026

BEFORE

THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL

WRIT PETITION NO. 1351 OF 2021 (GM-CPC)

BETWEEN:

RAMAKRISHNA
S/O LATE VASANTHAPPA
AGE. 71 YEARS
RESIDING AT NO.10/4
8TH CROSS, VITTAL NAGAR
G E F POST
BANGALORE - 560 026

...PETITIONER

(BY SRI. B.O. CHANDRA SHEKAR, ADVOCATE)

AND:

1. N KRISHNAPPA
AGE ABOUT 72 YEARS
RESIDING AT NO.10/5
8TH CROSS, VITTAL NAGAR
G E F POST, BANGALORE - 560 026
2. SHASHIKANTH
AGE ABOUT 65 YEARS
RESIDING AT NO.16/11
9TH CROSS, VITTAL NAGAR
G E F POST, BANGALORE - 560 026
3. THE COMMISSIONER
BRUHAT BANGALORE MAHANAGARA PALIKE
HEAD OFFICE, N R SQUARE
BANGALORE - 560 002

Digitally signed
by
SHARADAVANI
B
Location: High
Court of
Karnataka



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4. ASSISTANT EXECUTIVE ENGINEER
BRUHAT BANGALORE MAHANAGARA PLAIKE
CHAMARAJPET SUB DIVISION
J.C. ROAD, BANGALORE - 560 002

...RESPONDENTS

(BY SRI. S.V. DESAI, ADVOCATE FOR R1
SRI. AZHAR MEER, ADVOCATE FOR R2
SRI. H. DEVENDRAPPA, ADVOCATD FOR R3 AND R4)

THIS WP IS FILED UNDER ARTICLES 226 AND 227 OF
THE CONSTITUTION OF INDIA PRAYING TO-QUASH THE
ORDER DATED 01.12.2020 PASSED ON INTERIM APPLICATION
NO.1/2018 FILED UNDER ORDER XXVI RULE 9 R/W SECTION
151 OF THE CODE OF CIVIL PROCEDURE IN O.S.NO.3137/2010
BY THE HONBLE COURT OF XL ADDITIONAL CITY CIVIL AND
SESSIONS JUDGE, CCH-41, BENGALURU PRODUCED AT
ANNEXURE-A AND ETC.

THIS PETITION, COMING ON FOR PRELIMINARY HEARING
IN 'B' GROUP, THIS DAY, ORDER WAS MADE THEREIN AS
UNDER:

CORAM: HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL



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ORAL ORDER

This writ petition is filed challenging the order dated 01.12.2020 passed on I.A.No.1/2018 in O.S.No.3137/2010 by the XL Additional City Civil and Sessions Judge, CCH-41, Bengaluru (hereinafter referred to as the 'trial Court' for short).

2. Sri B.O Chandrashekar, learned counsel appearing for the petitioner submits that the petitioner/plaintiff has filed O.S.No.3137/2010 against the respondents seeking the relief of declaration, mandatory injunction, possession of the suit schedule properties and other reliefs. In the said suit, a specific assertion is made that defendant Nos.1 and 2 have encroached upon the plaintiff's suit schedule properties. The parties have adduced evidence. After conclusion of the trial, the plaintiff filed an application I.A.No.1/2018 under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure (for short 'CPC') seeking appointment of a qualified engineer



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as a Court Commissioner to conduct a local investigation to ascertain the encroachment made by defendant Nos.1 and 2 over the suit schedule properties. The said application was opposed by the defendants.

3. The trial Court, under the impugned order dated 01.12.2020, rejected the application mainly on the ground that the application for appointment of a Court Commissioner is sought for collection of evidence, which is impermissible, and that the application was filed after conclusion of the evidence. It is submitted that the plaintiff has made a specific assertion of encroachment, which has been denied by the defendants both in the written statement as well as in the evidence and the same can be noticed. It is contended that the trial Court would not be able to ascertain the truth with regard to the assertions and encroachment by the defendants unless an independent Commissioner conducts a local investigation and submits a report. The object of Order XXVI Rule 9 of the CPC is to elicit the truth in the dispute between the



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parties, and on oath to oath basis, the plaintiff and defendants would not be able to establish the same. Therefore, appointment of a Court Commissioner is necessary. Hence, he seeks to allow the petition.

4. Sri S. V. Desai, learned counsel appearing for respondent No.1, supports the order of the trial Court and submits that defendant No.1 had constructed the property purchased by him way back in the year 1981, which is much prior to the property purchased by the plaintiff. It is submitted that no fresh constructions have come up and the suit was filed in the year 2010, which is barred by law of limitation. It is further submitted that in the cross-examination, PW1 has clearly admitted that he does not know the exact extent of his site and the encroachment at the time when defendant No.1 put up the construction. It is also contended that the plaintiff has not produced any document to substantiate the alleged encroachment. Hence, under these circumstances, the trial Court has



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rightly rejected the application filed by the plaintiff, which does not call for any interference.

5. Sri Azhar Meer, learned counsel appearing for respondent No.2, also supports the impugned order of the trial Court and submits that the trial Court has assigned cogent reasons while rejecting the application. Firstly, it has recorded a clear finding that the evidence on record is sufficient to decide the rival claims. If the trial Court has arrived at such a conclusion, the plaintiff cannot insist on the appointment of a Court Commissioner to establish certain assertions, which are imaginary in nature. It is further submitted that the trial Court has rightly recorded that filing an application for appointment of a Court Commissioner at the fag end of the proceedings, after conclusion of the trial, which is impermissible. Hence, he seeks to dismiss the petition.

6. I have heard the arguments of learned counsel for the petitioner, learned counsel for the respondents and meticulously perused the material available on record.



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7. The petitioner had filed O.S.No.3137/2010 against the respondents herein, including Bruhath Bangalore Mahanagara Palike, seeking the relief of declaration that the plaintiff is the absolute owner of Schedule 'B' and 'C' properties and that defendant Nos.1 and 2 have encroached upon the portions of the said properties and sought for a relief of demolition and consequential possession of the same. In the said suit, the defendants filed written statements denying the plaint averments as well as the assertion of encroachment. The trial Court framed issues and the parties led evidence. After conclusion of the trial, the plaintiff filed an application I.A.No.1/2018 under Order XXVI Rule 9 read with Section 151 of the CPC seeking to appoint a qualified engineer as a Court Commissioner for the purpose of conducting a local investigation in respect of the encroachment made by defendant Nos.1 and 2. To substantiate the said prayer, factual assertions are made in paragraph Nos.2 and 3 of the affidavit filed in support of



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the application. The aforesaid averments in the affidavit indicate that the plaintiff is categorically contending that the defendants have encroached upon a certain portion of the property of the plaintiff. The said application was opposed by the defendants by filing objections. The Trial Court, under the impugned order, rejected the said application on the ground that filing an application for appointment of a Court Commissioner amounts to collection of evidence and is not permissible after conclusion of the trial.

8. It is required to be noticed that the dispute between the parties is that the plaintiff has made a specific assertion that he is the owner of the suit schedule 'A' property and that schedule 'B' and 'C' properties have been encroached upon by defendant Nos.1 and 2. The said averments in the plaint have been denied by the defendants in the written statement. The evidence on record also indicates the same stand between the parties.



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9. In my considered view, when one party makes a specific assertion with regard to encroachment by the other party, any amount of oral evidence would not suffice to arrive at a correct conclusion as to whether there is encroachment or not, unless a Court Commissioner is appointed, who would be an independent person, and would measure the property in the presence of both the parties and submit a report.

10. It would be useful to refer to the decision of this Court in the case of Sri **SHADAKSHARAPPA vs. KUMARI VIJAYALAXMI AND OTHERS**¹. The relevant paragraph Nos.20, 21 and 22 reads as under:

"20. In the backdrop of the discussions made above, this Court cannot lose sight' of the fact that in a large number of suits before the Trial Court, the applications are filed for the appointment of a Commissioner. In other words, this is one of the frequently invoked provisions of the Code. For this reason, this Court deems it desirable to summarise the broad guidelines that can be followed while exercising the power under Order XXVI Rules 9 and 10 of the Code of Civil Procedure.

¹ ILR 2023 KAR 3983



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a) The power of the Court to appoint the Commissioner for local inspection or any other purpose provided in Order XXVI of the Code is discretionary. However, the said discretion is guided by not only Order XXVI Rules 9 and 10 of the Code but also the provisions of the Indian Evidence Act dealing with relevancy, expert opinion, and the burden of proof.

b) The discretion to exercise the power under Order XXVI of the Civil Procedure Code is not governed by the form of the suit. The Court can appoint the Commissioner in any kind of suit, provided a report of the Commissioner under Order XXVI of the Code is necessary for elucidating the matter in dispute.

c) The issue framed in the suit, or where the issue is not yet framed, the pleadings which give rise to issue/s and the documents placed on record would be a guide to ascertain the 'matter in dispute' referred in Order XXVI Rule 9 of the Code

d) The power to appoint the Commissioner for local inspection or scientific investigation/expert's opinion can be invoked even suo motu by the Court, without there being an application by either of the parties, if the Court deems it appropriate to secure the report of the Commissioner. However, the appropriate reasons must precede the order appointing the Commissioner. And such orders are to be passed only after hearing the parties before it.

e) The Commissioner can be appointed either before or after the commencement of the trial. However having due regard to the nature of the controversy, if the report is essential for elucidating the matter in dispute, it is desirable



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to have the local inspection before the commencement of trial as it is likely to reduce the volume of oral evidence in a given case.

f) In addition to the report, having regard to Order XXVI Rule 10 of the Code, the evidence taken by Commissioner reduced in writing can also be taken on record and examined by the Court while considering the report.

g) The report of the Commissioner is not conclusive proof of what is stated therein. The report is only a piece of evidence, that the Court has to examine based on the other materials on record.

h) Report of the Commissioner need not be formally marked for being considered as evidence. Once submitted to the Court, the report is part of the Court record and can be looked into by the Court.

i) The Court may in its discretion examine the Commissioner on any matter concerning the report. There is no compulsion to examine the Commissioner. However, if the objection is filed to the report, and the party filing objection seeks to examine the Commissioner then the Commissioner should be examined. In either case, once the Commissioner is examined, the Court having due regard to the evidence, may reject or accept the report in its entirety or in part, provided there are materials to justify such a finding on the report. In appropriate cases, the merit of the report can be considered at the final hearing. While considering the report at the final hearing, if the Court finds that the report is erroneous and fresh commission is required, the Court may pass appropriate order in this regard.



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j) If the Court is dissatisfied with the proceedings of the Commissioner 'as found in Order XXVI Rule 10 (3), it may direct further inquiry depending on the facts. As a matter of caution, it is clarified that examination and order under order XXVI 10 (3) are only to verify if the Commissioner has followed the proper procedure while carrying out his task.

k) The person who has filed an objection to the report has the option of cross-examining the Commissioner to substantiate his objections or even without cross-examination, it is open to establish that the report is inadmissible in evidence.

21. *Having examined the provisions referred to above and given the fact that Order XXVI of the Code of Civil Procedure is often invoked in the Trial Court, this Court is of the view, broadly speaking in the following cases, the appointment of an appropriate Commissioner as provided under Order XXVI of the Code is desirable.*

- (i) The dispute relating to the easement of air, light, pathway, road, watercourse etc.*
- (ii) The dispute relating to the boundary, encroachment;*
- (iii) The dispute relating to forgery;*
- (iv) The dispute relating to the existence or otherwise of a steam, pond, drainage, watercourse, road, pathway, pollution, or nuisance.*

22. *The examples given above are not exhaustive but merely illustrative. The guidelines in this order should not be construed as having exhaustively listed*



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the cases in which the Commissioner can be appointed. Nor the observations should be construed as having diluted or expanded the discretion vested with the Trial Court in such matters."

11. The enunciation of law by this Court in the aforesaid decision makes it clear that not providing an opportunity for local inspection in the given case would amount to denying an opportunity to a party to lead evidence. The other side would have every right to question the said Commissioner's report by filing objections, if the report goes against them and would also have the right to cross-examine the Court Commissioner.

12. Keeping in mind the enunciation of law laid down by this Court in the aforesaid decision supra, and taking note of the dispute between the parties, in order to elicit the truth in the dispute, the appointment of a Court Commissioner is necessary in the facts and circumstances of the case. The contention of other side on limitation, factual dispute etc., are required to be gone into the trial



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Court while deciding the suit of merits. Hence, I proceed to pass the following:

ORDER

- a) The writ petition is ***allowed***.
- b) The Impugned order dated 01.12.2020 passed on I.A.No.1/2018 in O.S.No.3137/2010 by the XL Additional City Civil and Sessions Judge, CCH-41, Bengaluru is hereby set aside.
- c) Consequently, I.A.No.1/2018 filed by the plaintiff under Order XXVI Rule 9 read with Section 151 of the CPC stands allowed.
- d) The trial Court is directed to immediately appoint a competent engineer/surveyor to measure the suit schedule property and submit the report in a time-bound manner.
- e) The parties are at liberty to file a memo of instructions.



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No orders as to costs.

Sd/-
(VIJAYKUMAR A. PATIL)
JUDGE

SHS
List No.: 1 Sl No.: 21