



CNR: KAHC010270652022

NC: 2026:KHC:39641
WP No. 12278 of 2022

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF JULY, 2026

BEFORE

THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL

WRIT PETITION NO. 12278 OF 2022 (GM-CPC)

BETWEEN:

SRI. K.N. RAJESH
SON OF LATE NARASIMHARAJU
AGED ABOUT 35 YEAS
RESIDING AT MAHAVEERA NAGARA
KUNIGAL TOWN
TUMAKURU DISTRICT
PIN CODE: 572 130

...PETITIONER

(BY SRI. P.M. GOPI, ADVOCATE FOR
SRI. SIDDAMALLAPPA P.M., ADVOCATE)

AND:

SRI. K.N. GANESH
SON OF LATE NARASIMHARAJU
AGED ABOUT 60 YEARS
RESIDING AT MAHAVEERA NAGARA
KUNIGAL TOWN
TUMAKURU DISTRICT
PIN CODE: 572 130

...RESPONDENT

(RESPONDENT SERVED AND UNREPRESENTED)

THIS WP IS FILED UNDER ARTICLE 227 OF THE
CONSTITUTION OF INDIA PRAYING TO-QUASH THE IMPUGNED
ORDER DATED 10.03.2022 PASSED IN O.S.NO.61/2015

Digitally signed
by
SHARADAVANI
B
Location: High
Court of
Karnataka



**NC: 2026:KHC:39641
WP No. 12278 of 2022**

CNR: KAHC010270652022

PASSED BY THE LEARNED SENIOR CIVIL JUDGE AND JMFC, KUNIGAL AS PER ANNEXURE-E AND ORDER TO ALLOW THE APPLICATION FOR APPOINTMENT OF COURT COMMISSIONER AS PER ANNEXURE-C ETC.

THIS PETITION, COMING ON FOR ORDERS, THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

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

ORAL ORDER

This writ petition is filed challenging the order dated 10.03.2022 passed in O.S.No.61/2015 by the learned Senior Civil Judge and JMFC, Kunigal (hereinafter referred to as 'trial Court' for short).

2. Heard Sri P.M. Gopi, learned counsel appearing on behalf of Sri Siddamallappa P.M, learned counsel for the petitioner. There is no representation on behalf of the respondent, though served.

3. The petitioner/plaintiff had filed a suit in O.S.No.61/2015 against the respondent/defendant seeking the relief of declaration that the plaintiff is the absolute



CNR: KAHC010270652022

**NC: 2026:KHC:39641
WP No. 12278 of 2022**

owner of the suit schedule 'A' property; to direct the defendant to remove the illegal construction put up on the suit schedule 'B' property and to hand over physical possession of the schedule 'B' property to the plaintiff by granting a mandatory injunction; further direction to the defendant to remove the illegal construction put up on the 'C' schedule galli and to clear the obstructions caused therein, and allowing the general public and the plaintiff to use the said galli; and for consequential relief of permanent injunction against the defendant.

4. In the said suit, the defendant filed a detailed written statement denying the factual assertions made in the plaint and specifically contending that he has not encroached upon any portion as alleged in the plaint. The trial Court framed issues, and the plaintiff adduced evidence. When the matter was posted for the defendant's evidence, at that stage, the plaintiff filed I.A.No.7 under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure (for short, 'CPC') seeking prayer to appoint



CNR: KAHC010270652022

**NC: 2026:KHC:39641
WP No. 12278 of 2022**

a PWD Engineer to measure the suit 'A', 'B' and 'C' schedule properties as well as the property of the defendant, and to report the encroachment as per the memo of instructions filed by the parties.

5. The said application was opposed by the defendant contending that the application has no merit and the plaint indicates the actual measurements. The trial Court, under the impugned order dated 10.03.2022, affirmed the objections of the defendant and rejected the application filed by the plaintiff seeking appointment of a Court Commissioner, assigning the reason that the application was filed even before the conclusion of the trial, i.e., when the defendant was yet to adduce the evidence. The trial Court further observed that the plaintiff has specifically stated the extent of encroachment by the defendant and, though the defendant has denied the same, it is unnecessary to appoint a Court Commissioner.

6. It is to be noticed that the plaintiff is seeking a specific relief of declaration of ownership with regard to



CNR: KAHC010270652022

**NC: 2026:KHC:39641
WP No. 12278 of 2022**

the schedule 'A' property and is making a specific assertion that the defendant has put up construction over the Schedule 'B' property, which forms part of the Schedule 'A' property, and has also illegally constructed on the Schedule 'C' property, which is a galli measuring 3 feet x 57 feet, as stated in the schedule 'C' property. To substantiate the said averments, the plaintiff has specifically stated the same in the body of the plaint. The defendant has denied the assertions of encroachment as well as the alleged illegal construction.

7. It is required to be noticed that, in order to ascertain whether the assertions made by the plaintiff in the plaint with regard to the illegal construction by the defendant over the Schedule 'B' and 'C' properties is required to be factually ascertained by the trial Court while considering the reliefs sought by the plaintiff in respect of 'B' and 'C' schedule properties. This Court, in the case of



CNR: KAHC010270652022

NC: 2026:KHC:39641
WP No. 12278 of 2022

SHADAKSHARAPPA VS. KUMARI VIJAYALAXMI AND

OTHERS¹ at paragraph Nos.19, 20 and 23 held as under:

19. Considering the controversy involved in this case, the Trial Court on its own accord could have passed an order appointing the Commissioner for local inspection. Such power is very much there in the provision. However, such an order to appoint a Commissioner for local inspection has to be preceded by a reason as to why the Court deems it appropriate to have a local inspection through a Court Commissioner.

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.

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.

¹ ILR 2023 KAR 3983



CNR: KAHC010270652022

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 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.



CNR: KAHC010270652022

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.

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. xxx

22. xxx

23. *This Court is also conscious of the fact that in quite a large number of cases, the Commissioners are appointed by the Trial Courts. By the time the report is submitted to the Court, quite often, if not all the time, a lot of time is spent awaiting the report. To save the precious time of the Court and to streamline the procedure, as far as practicable, the following procedures may be adopted;-*



CNR: KAHC010270652022

a) The Court may fix the date and time for local inspection, directing the parties to be present at the disputed property, to avoid the process of issuance of notice to the parties by the Court Commissioner.

b) The Court shall also fix the time frame for the parties to file a memo of instructions and shall scrutinize the instructions submitted and if need be reframe the instructions to focus the attention on the matters in dispute.

c) If the Court feels that the Commissioner is required to submit a report on a particular matter or a question, the Court shall also frame the specific question to be answered by the Commissioner.

d) It is desirable to specify in the order whether or not the parties are entitled to submit an additional memo of instructions to the Commissioner at the time of local inspection

e) The time frame be fixed for submitting the report to the Court and while fixing the time, due regard must be had to the nature of the commission work and the urgency involved in the matter;

f) If the survey of any land is ordered to be conducted by a head of the survey department or any other designated officer, the Court having regard to the nature of the work may also specify in the order, whether the Commissioner appointed is authorized to delegate the work to some other person in the same department.

g) Wherever practicable, the Court shall direct the Court Commissioner, to furnish a number of true copies of the report to the counsel representing the parties to the suit, while submitting the report to the Court.



CNR: KAHC010270652022

**NC: 2026:KHC:39641
WP No. 12278 of 2022**

h) Time schedule should also be fixed for filing objections to the report of the Commissioner if any.

l) In all cases, where the report of the Commissioner is awaited, the Court may if practicable proceed with the trial or other stages of the proceeding.

8. Keeping in mind the enunciation of law laid down by this Court in the aforesaid decision and considering the nature of the dispute between the parties, wherein the plaintiff is making specific assertion that the defendant has illegally constructed over portion of the property of the plaintiff, which is shown as schedule 'B' property and has also encroached upon the galli shown as schedule 'C' property and said factual assertions are required to be ascertained by way of spot inspection by a competent person. Any amount of evidence, either oral or documentary, may not be sufficient to arrive to a correct conclusion. The report of the Court Commissioner would aid the trial Court in deciding the dispute between the parties. Hence, I am of the considered view that the trial Court has committed a grave error in rejecting the



CNR: KAHC010270652022

application for appointment of a Court Commissioner. However, it is required to be noticed that the application for appointment of a Court Commissioner can be considered and a Court Commissioner can be appointed only after the conclusion of the trial.

9. In view of the above, I proceed to pass the following:

ORDER

- a) The writ petition is ***allowed***.
- b) The impugned order dated 10.03.2022 passed in O.S.No.61/2015 by the learned Senior Civil Judge and JMFC, Kunigal is hereby set aside.
- C) Consequently, the petitioner's application I.A.No.7 under Order XXVI Rule 9 read with Section 151 of the CPC seeking appointment of a Court Commissioner is allowed.



CNR: KAHC010270652022

NC: 2026:KHC:39641
WP No. 12278 of 2022

d) The trial Court is directed to appoint a PWD Engineer of the jurisdiction or the Taluka Surveyor of Kunigal Taluk as a Court Commissioner, only after the conclusion of the trial, to measure and report the alleged encroachment in terms of the application, after receipt of the memo of instructions from the parties.

No orders as to costs.

Pending applications, if any, stands disposed of.

Sd/-
(VIJAYKUMAR A. PATIL)
JUDGE

SHS
List No.: 1 Sl No.: 14