



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF JULY, 2026

BEFORE

THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL

WRIT PETITION NO. 14516 OF 2020 (GM-CPC)

BETWEEN:

MR. SALAUDDIN ARIF
S/O MR K ISMAIL,
AGED ABOUT 47 YEARS,
R/AT FLAT NO.203,
SURAJ DIAMOND APARTMENTS,
LOWER CAT STREET,
MANGALORE - 575 001

...PETITIONER

(BY SRI. ANANDARAMA K., ADVOCATE)

AND:

1. MR. K KHADER SHARIEF
S/O MR HUSSAIN SHERIF,
AGED ABOUT 64 YEARS,
R/AT AYSHA COTTAGE,
PADIL, KARMAR,
MANGALORE - 575 001

SINCE DEAD LR OF RESPONDENT NO.1 I.E. WIFE OF
RESPONDENT NO.1 IS ALREADY ON RECORD AS
RESPONDENT NO.2 AND IS THE SOLE LEGAL
REPRESENTATIVE OF RESPONDENT NO.1

AMENDMENT CARRIED OUT AS PER ORDER DATED
09.04.20206

2. MRS K SHARUNNISA SHARIEF
AGED ABOUT 57 YEARS,
W/O MR KHADER SHARIEF,
R/AT AYSHA COTTAGE,

Digitally signed
by
SHARADAVANI
B
Location: High
Court of
Karnataka



PADIL, KARMAR,
MANGALORE - 575 001

3. MR NOORULLA KAHAN
S/O ANWARULLA KHAN,
AGED ABOUT 45 YEARS,
R/AT NO.11,
CUNNINGHAM CRESCENT ROAD,
VASANTH NAGAR,
BANGALORE - 560 001
4. MRS SHABINA N KHAN
W/O MR NOORULLA KHAN,
AGED ABOUT 40 YEARS,
R/AT NO.11,
CUNNINGHAM CRESCENT ROAD,
VASANTH NAGAR,
BANGALORE - 560 001

...RESPONDENTS

(VIDE ORDER DATED 02.08.2024,
NOTICE TO R3 AND R4 ARE HELD SUFFICIENT
VIDE ORDER DATED 02.08.2024,
NOTICE TO R3 AND R4 ARE HELD SUFFICIENT
VIDE ORDER DATED 09.04.2026,
R2 IS TREATED AS LR OF DECEASED R1)

THIS WP IS FILED UNDER ARTICLES 226 AND 227 OF
THE CONSTITUTION OF INDIA PRAYING TO-CALL FOR
RECORDS ON THE FILE OF II ADDITIONAL CIVIL JUDGE AND
JMFC, MANGALORE IN EX.CASE.NO.59/2014, SET ASIDE THE
ORDER DATED 01.02.2020 ANNEXURE-F PASSED BY THE III
ADDITIONAL CIVIL JUDGE AND JMFC, MANGALORE, ON THE
I.A. UNDER ORDER XXVI RULE 9 OF CPC FILED BY
PETITIONER, IN EX.CASE NO.59/2014 AND CONSEQUENTLY



ALLOW THE IA UNDER ORDER XXVI RULE 9 FILED BY THE PETITIONER 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

ORAL ORDER

This writ petition is filed challenging the order dated 01.02.2020 passed on an application filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short, 'CPC') in Ex.Case No.59/2014 by the III Additional Civil Judge and JMFC, Mangalore (hereinafter referred to as the 'Trial Court' for short).

2. Sri Anandarama K., learned counsel for the petitioner submits that the petitioner has filed a suit against the respondents seeking for permanent prohibitory injunction. The said suit came to be decreed, and the said decree has attained finality. In violation of the mandate of



the decree, the respondents/defendants encroached upon the suit schedule property. Hence, the petitioner filed an execution petition seeking to enforce the judgment and decree, alleging that the respondents have encroached a portion of the suit schedule property and sought restoration of the same. The said execution proceeding was opposed by the respondents by filing objections. Thereafter, the petitioner filed an application seeking the appointment of a Court Commissioner to find out the actual portion of encroachment by the respondents. The said application was also opposed by the respondents. The Trial Court, under the impugned order, came to the conclusion that the executing Court cannot go beyond the decree, and rejected the application seeking appointment of a Court Commissioner.

3. It is submitted that the decree is for permanent prohibitory injunction against the respondents, and any violation of such decree, the executing Court is bound to enforce the decree, including the removal of encroachment



which is made after the decree. To substantiate his contention, he placed reliance on the decision of the Hon'ble Supreme Court in the case of **JAI DAYAL AND OTHERS VS. KRISHAN LAL GARG AND ANOTHER¹**. It is further submitted that the petitioner is making a specific assertion that the respondents, in violation of the decree, have encroached upon the suit schedule property, and that such assertion needs to be ascertained by the executing Court. Learned counsel further submits that the issue with regard to the appointment of a Court Commissioner is well settled by this Court in the case of **SHADAKSHARAPPA vs. KUMARI VIJAYALAXMI AND OTHERS²**. Hence, he seeks to allow the petition.

4. The notice has been served, learned counsel appeared on behalf of the respondents. Thereafter, he filed a memo of retirement, which was accepted. Since

¹ (1996) 11 SCC 588

² (2023) SCC Online Kar 53



then, there has been no representation on behalf of the respondents.

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

6. The petitioner has filed O.S.No.802/2008 seeking the relief of permanent prohibitory injunction against the defendants/respondents herein. The said suit came to be decreed vide judgment dated 18.02.2013. The operative portion of the judgment and decree reads as under:

"Suit of the plaintiff is hereby decreed with cost. Hereby permanently restrained the defendants, their men, servants, agents, person or persons claiming through or under them from unlawfully trespassing into the schedule property in its eastern side and constructing the compound wall in the schedule property and thereby interfering with the peaceful possession and enjoyment of the schedule property by the plaintiff."

7. The petitioner has filed Ex.Case.No.59/2014 contending that, in violation of the judgment and decree passed in O.S.No.802/2008, the respondents/defendants have encroached a portion of the suit schedule property



and put up a construction thereon. Accordingly, the petitioner sought the following relief:

"a) To enforce decree of permanent prohibitory injunction against the respondents under Order XXI Rule 32 read with Section 151 of CPC by way of order of attachment of the property of the respondents and also committing them to civil prison for the deliberate violation of the decree of permanent prohibitory injunction and in enforcement of the decree for permanent prohibitory injunction to restore the encroached portion of the petition/plaint schedule property to its original position by removing the encroachment made by the respondents, under the guise of constructing the compound wall of their properties in violation of decree for permanent prohibitory injunction.

b) Cost of the suit Rs.76 in O.S.802/2008.

c) Cost of the execution petition.

d) And grant such other and further relief in the interest and justice of equity."

8. The respondents filed their counter to the execution proceedings contending that the judgment and decree dated 18.02.2013 is not an executable decree. Hence, the petitioner cannot invoke Order XXI Rule 32 of the CPC, and sought dismissal of the execution petition on that ground.

9. The petitioner filed an application under Order XXVI Rule 9 of the CPC seeking to appoint a Court



Commissioner to note and report the encroachment of a portion of the schedule property made by the respondents and to prepare a sketch of the suit schedule property showing the encroachment thereof by the respondents. The said application is accompanied with an affidavit, which specifically indicates that the respondents have encroached a portion of the suit schedule property to the extent of approximately one cent or more, towards the eastern side of the suit schedule property, in violation of the judgment and decree of permanent prohibitory injunction.

10. Again, the said application was opposed by the respondents by taking a similar stand. The Trial Court, under the impugned order, rejected the application seeking for appointment of a Court Commissioner by recording the reason that the executing Court cannot go beyond the decree. It further held that, if at all there is any such encroachment upon the suit schedule property, as alleged by the decree holder, then the decree holder



will have every right to take necessary legal recourse, and the same cannot be adjudicated in the present execution proceedings. The executing Court is of the view that the decree holder has to file a separate suit to establish the encroachment and seek relief against the judgment debtor for possession.

11. In my considered view, the aforesaid view is contrary to the powers conferred on the executing Court under Order XXI Rule 32 of the CPC. The Hon'ble Supreme Court, in the case of **JAL DAYAL (referred to supra)**, while referring to the facts of the case in paragraph Nos.2, 3, 4 and 6 to 8 has held as under:

"2. The admitted facts are that the appellant had filed Suit No. 1023 of 1961 against the respondent for perpetual injunction and also for mandatory injunction restraining him from blocking passage of 5 ft. between the house of the appellant and that of the respondents and for removal of the obstruction. It was decreed by the trial court on 30-3-1964 which was confirmed by the appellate court on 10-12-1964. Thus, the decree of mandatory injunction to remove the obstruction and perpetual injunction restraining the respondent from blocking the passage of the appellants through the



"QOADEMLP area" of the land shown in the decree of the trial court. When the appellants had filed an application for execution under Order 21 Rule 32 CPC in Execution Case No. 2903 of 1965, the respondent had removed the obstruction and consequently, the execution case was struck out on 25-2-1966 on the finding that the passage had been cleared and obstruction was removed. That was also upheld by the appellate court by dismissing CA No. 65 of 1966 on 6-3-1967.

3. *It is now an admitted position that subsequently a shop was constructed which is an obstruction to the passage in question and it had completely blocked the passage. The appellant, therefore, filed again an execution application under Order 21 Rule 32 in EC No. 42 of 1967. The executing court had directed, overruling the objections of the respondents, to remove the obstruction completely and issued injunction not to disobey the mandatory injunction. It was issued by way of attachment of the property and detention of the respondents in civil prison if only the obstruction is not removed. On appeal, the Additional District Judge by his judgment dated 10-3-1969 confirmed the same. In the execution second appeal, the learned Single Judge reversed the decree and remitted the matter on the finding that under Section 22 of the Easements Act, 1882, it is required to be seen whether the obstruction has caused enjoyment of easementary right. Since that was not done, the courts below have committed error of law in directing removal of the obstruction and also the*



attachment of the properties and direction to keep the respondents in civil prison.

4. The question is whether the view taken by the High Court is correct in law. One of the defences taken by the respondent was that he had sold the property to third parties who had constructed the shop and thus it is not he who caused obstruction. That evidence was not accepted and it was found that the respondent had constructed the shop in the disputed area. Thereafter, it is recorded as a fact as under:

"The next question for decision in this appeal is whether the disputed construction has blocked the passage. In support of his contention on this point the decree-holder has examined himself and has stated on oath that by disputed construction the passage at QOADEMLP shown in the decree has been completely blocked. The statement of the decree-holder is corroborated by the report of the commission dated 13-5-1967. The report and map of the commission filed in the execution case show that the said passage has been completely blocked by the disputed construction and the place of dirty water of plaintiff's house has been stopped. The judgment-debtor Babu Lal Garg has also admitted in cross-examination that by the disputed construction the said passage has been completely blocked."

5. The appellate court, thereafter, found that though the decree on the earlier occasion was satisfied, since by his conduct he had constructed shop obstructing the free flow



of passage, an application for execution under Order 21 Rule 32 CPC could be laid to enforce the injunction granted in the suit in respect of the aforesaid area.

6. *It is contended that the High Court has proceeded on the premise that the rights of parties are required to be adjudicated under Section 22 of the Easements Act. The view of the High Court is clearly in error. It is seen that once the decree of perpetual injunction and mandatory injunction has become final, the judgment-debtor is required to obey the decree. In whatever form he obstructs, it is liable to removal for violation and the natural consequence is the execution proceedings under Order 21 Rule 32 CPC which reads as under:*

"32. (3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance, if any, to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease."



7. In this case, since the attachment was made for enforcement of the perpetual injunction and mandatory injunction, the decree is required to be complied with. In case he did not obey the injunction under clause (1) of Order 32, the judgment-debtor is liable to detention in the civil prison and also to proceed against the property under attachment.

8. The question of Section 22 of Easements Act would arise only if the question arises for the first time. However having allowed the perpetual injunction and mandatory injunction granted by the trial court to become final, it would be no defence for the respondent to plead that he has not obstructed the passage etc. or that, as found by the High Court, a part of the property in which the present shop was constructed was not part of the property in the original suit. In other words, if a judgment-debtor has suffered the decree, no attempt to circumvent the perpetual injunction and mandatory injunction can be permitted. If the decree-holder makes any construction clubbing the other adjacent property, property which is a part of the subject-matter in the earlier suit, a party cannot and should not, by his action, be permitted to drive the decree for another round of adjudication of the rights in the second suit to be settled afresh. In other words, giving such a liberty will amount to encouraging persons to take the law into their own hands and drive the decree-holder to another suit. It can never be facilitated to circumvent the law and relegate the party for tardy process of the civil action. What is



needed is an opportunity to obey the injunction. Non-compliance is a continuing disobedience entailing penal consequences. A separate fresh suit is barred under Section 49 of the CPC. Under these circumstances, the view of the High Court is clearly in error and appeal is accordingly allowed. The judgment and order of the High Court stand set aside and that of the trial court and the appellate court stand restored. No costs."

12. Keeping in mind the enunciation of law laid down by the Hon'ble Supreme Court, I am of the considered view that the petitioner has made a specific assertion in the execution petition that the judgment debtor are in violation of the judgment and decree of permanent prohibitory injunction which is in force, have encroached a portion of the suit schedule property and sought to remove the said encroachment by restoring the possession in favour of the petitioner.

13. The said exercise is required to be carried out by the executing Court, and such power is very much available under Order XXI Rule 32 of the CPC. It is also required to be noticed that the assertion made by the petitioner with regard to the alleged encroachment is



required to be ascertained by the executing Court by appointing a Court Commissioner, who is required to measure the properties by considering the schedule mentioned in the decree and submit a report along with a sketch indicating as to whether there is any encroachment and to what extent by the judgment debtors, as alleged in the application and submit the report. Thereafter, the executing Court shall proceed further in the matter in accordance with law.

14. For the aforementioned reasons, I proceed to pass the following:

ORDER

- i) The writ petition is ***allowed***.
- ii) The impugned order dated 01.02.2020 passed on the application filed under Order XXVI Rule 9 of the CPC in Ex.Case No.59/2014 by the III Additional Civil Judge and JMFC, Mangalore is hereby set aside.



- iii) Consequently, the application filed by the petitioner under Order XXVI Rule 9 of the CPC stands allowed.
- iv) The executing Court shall appoint a Court Commissioner, as sought for in the application, and proceed further in accordance with law.
- v) No order as to costs.

Sd/-
(VIJAYKUMAR A. PATIL)
JUDGE

SHS
List No.: 1 Sl No.: 21