



CNR: KAHC010390702021

NC: 2026:KHC:38331
W.P. No.18999/2021

IN THE HIGH COURT OF KARNATAKA AT BENGALURU
DATED THIS THE 24TH DAY OF JULY, 2026
BEFORE
THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL
WRIT PETITION NO.18999/2021 (GM-CPC)

BETWEEN:

SUDARSHAN SHERIGAR
S/O SAVITHRAMMA
AGED ABOUT 32 YEARS
R/AT SRI RAMA COMPOUND
KIGGA HOBLI, BEGARA VILLAGE
SHRINGERI TALUK
CHIKKAMAGALURU DISTRICT-577120.

...PETITIONER

(BY SRI. S.S. PARIKSHIT, ADV.,)

AND:

SUBRAMANYA M.S.
S/O LATE SHESHE GOWDA
@ SHESHAPPA GOWDA
AGED ABOUT 40 YEARS
R/AT MAJARE, KAMBALI
KOPPA, KIGGA HOBLI
BEGARU VILLAGE
SHRINGERI TALUK
CHIKKAMAGALURU DISTRICT-577120.

...RESPONDENT

(BY SMT. BHANUPRIYA SHETTY, ADV., FOR
SRI. PRASANNA D.P. ADV.,)

THIS W.P. IS FILED UNDER ARTICLE 227 OF THE
CONSTITUTION OF INDIA, PRAYING TO SET ASIDE THE
ORDERS PASSED BY THE LEARNED PRL. CIVIL JUDGE AND

Digitally signed
by RUPA V
Location: HIGH
COURT OF
KARNATAKA



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JMFC THIRTHAHALLI IN O.S.NO.175/2018 DTD.29.9.2021 ON
IA NO.6 VIDE ANNEXURE-E AND ALLOW THIS W.P. & 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 petition is filed challenging the order dated
29.09.2021 passed on IA.No.6 in OS.No.175/2018 by the
Principal Civil Judge and JMFC, Thirthahalli (for short 'the
trial Court').

2. Heard Sri.S.S.Parikshit, learned counsel
appearing for the petitioner, Smt.Bhanupriya Shetty,
learned counsel appearing on behalf of Sri.Prasanna D.P.,
learned counsel for the respondent and meticulously
perused the material available on record.

3. The petitioner filed OS.No.175/2018 seeking
relief of declaration that he, his family members,
predecessors, his servants, have acquired a right of way



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over the suit road, i.e. Scheduled 'C' Property, having width of about 20 feet, running over a portion of the plaintiff 'B' schedule property from Bidaragodu, Kigga Main Road to the plaintiff 'A' schedule properties of the plaintiff and also sought a consequential relief of perpetual injunction against the defendant from blocking the right of way over the suit road. The respondent/defendant filed a detailed written statement denying the plaintiff averments, specifically contending that there is no road that exists as claimed by the plaintiff. The plaintiff filed an application under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (for short 'CPC') seeking the appointment of a Court Commissioner i.e., a practicing Advocate at Thirthahalli Bar, to hold a local investigation of the suit schedule properties to find out whether the road exists as stated in the suit schedule property or not. The respondent/defendant opposed the application. The trial Court, under the impugned order dismissed the application mainly on the ground that the suit is one for



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declaration and permanent injunction, and that the party, who has approached the Court, must lead the evidence and prove his case, and a Court Commissioner cannot be appointed to collect the evidence on behalf of a party.

4. It is required to be noticed that the relief sought by the plaintiff in the aforesaid suit is a declaration that the plaintiff's family members and predecessors are in use of road described in the plaint 'C' schedule property and also sought perpetual injunction. The defendant has categorically denied these assertions, by specifically contending that the plaintiff, only with an intention to prove his imaginary right to approach access to his alleged property situated in government land, which he is not having any absolute right or the title, has been making an attempt to seek appointment of a Court Commissioner. The defendant has specifically denied the right of way and existence of the alleged road.



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5. This Court in the case of **Sri.Shadaksharappa v. Kumari Vijayalaxmi and Others¹** at paragraph Nos.20 and 21 held 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.

- 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 Code of Civil Procedure 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 WP.No.201274/2022 disposed of on 24.01.2023



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- 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 20 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,*



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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.*
- 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.*



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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 stream, pond, drainage, watercourse, road, pathway, pollution, or nuisance."*

6. Keeping in mind the enunciation of law laid down by this Court in the aforesaid decision, I am of the considered view that the dispute is relating to a right of way between the parties and its existence. One party is making assertion that from ages they are using the road and other party is denying, and the said factual matrix is



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required to be ascertained by the Court to do the complete justice.

7. The trial Court, while rejecting the application has observed that the Court Commissioner cannot be appointed for the purpose of collecting evidence. In my considered view, the said observation runs contrary to the finding recorded by this Court in the aforesaid decision. This Court has observed that denying an opportunity to appoint a Court Commissioner is denying a party to adduce evidence.

8. It is further required to be noticed that the mere appointment of a Court Commissioner or submission of the Commissioner's report would not amount to decreeing the suit as claimed. If the report is factually incorrect according to the defendant, an opportunity is available to the defendant to oppose the Court Commissioner's report by filing objections and even the said Court Commissioner can be cross-examined during



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the trial. With the aforesaid observations, I proceed to pass the following:

ORDER

- i. The writ petition is ***allowed***.
 - ii. The impugned Order dated 29.09.2021 passed on IA.No.6 in OS.No.175/2018 by the Principal Civil Judge and JMFC, Thirthahalli is hereby set aside. Consequently, IA.No.6 filed by the plaintiff under Order XXVI Rule 9 of the CPC is allowed.
 - iii. The trial Court shall appoint a Court Commissioner as sought in the application or as fit appropriate and fix the timeline to submit the report.
- No order as to costs.

Sd/-
(VIJAYKUMAR A. PATIL)
JUDGE