

IN THE COURT OF IX ADDL.CITY CIVIL AND
SESSIONS JUDGE AT BANGALORE (C.C.H.5)

Dated: This the 30th day of April 2016

Present: Shri Krishnamurthy B.Sangannanavar,
B.Com.LL.B.,(Special)
IX Addl. C.C & S.J, Bangalore.

O.S. NO.3048/2015

Plaintiff: Bansilal L.Asrani

-Vs-

Defendants: 1) Mrs.Maya Shamsundar
2) Harish S.Asrani
3) Mrs.Pooja H.Asrai
4) Suresh S.Asrani
5) Mrs.Aarti S.Asrani

Orders on I.A. filed by plaintiff dated 4.4.2016
u/o.26 R.9 of C.P.C.

This IA is filed u/o.26 R.9 of C.P.C. to issue a commission warrant to conduct an investigation to ascertain the nature of construction/repairs being carried out by defendants in 1300 square feet of the suit schedule property and to file a report thereon.

2. The plaintiff has sworn in that he has filed suit seeking permanent injunction restraining

defendants from interfering with his peaceful possession and enjoyment of the schedule property by encroaching or attempting to encroach upon the schedule property or otherwise put up construction on the schedule property and for mandatory injunction directing defendants to remove illegal structure put up on the eastern side of the schedule property at their cost, without causing any harm to the schedule property. He preferred MFA aggrieved by the order of this Court on IA No.1 and 2 in MFA No.8606/16 and the High Court vide order dated 2.2.2016 in terms of the submission of the counsel for defendants stating that defendants would not put any new construction on the plaint schedule property disposed of the appeal. However, it has come to his notice that entire property of defendants including 1300 square feet belonging to him has been barricaded in such a way that it has become impossible to ascertain nature of construction/repairs taking place. There is likelihood of defendants putting up an entire new construction on the portion of suit property under the guise of carrying out repairs. If the current stage of construction/repairs is documented, the same

would be of assistance to the Court finally adjudicating the matter and the appointment of commissioner is necessary for a fair and complete consideration of grievances of plaintiff.

3. On the contrary, defendants submitted their objections contending that they have not put up any new construction in the disputed area. The apprehension of the plaintiff is unfounded. The allegation of the plaintiff that the entire property of the defendants, including 1300 square feet belonging to him has been barricaded in such a way that it has become impossible to ascertain the nature of construction/repairs taking place is utterly false and baseless and even on the direction of Lokayukta, BBMP did a spot inspection and found that there is no new construction and there were only repairs to the old building of 50 years. This was also brought to the notice of High Court by defendants. The plaintiff without leading evidence deliberately trying to harass defendants in one or the other way.

4. In view of the rival contentions of the learned counsels for plaintiff and defendants, now

the following points arise for consideration of this court:

(1) Whether plaintiff has made out grounds for appointment of commissioner to conduct an investigation to ascertain the nature of construction/repairs being carried out by the defendants in 1300 square feet of the suit property is absolutely necessary to adjudicate the matter which would be of assistance to Court to decide the facts in issue between parties?

(2) What order?

5. The findings on the above points are recorded as under:

Point No.1 : In the Negative

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

REASONS

6. **Point No.1:** At the very outset, Court to make mention of the fact that suit filed by plaintiff is for grant of permanent injunction restraining defendants from interfering with his peaceful possession and enjoyment of the property by encroaching or attempting to encroach upon the schedule property or otherwise put up construction on the schedule property. Further,

sought for mandatory injunction directing defendants to remove the illegal structure put up on the eastern side of the schedule property at their own cost.

7. The schedule property described under the plaint schedule is as under :-

All that piece and parcel of immovable property originally bearing Site No.2-Bengaluru Plot No.17, presently bearing Corporation No.54, Palace Road, Bangalore 560 001, admeasuring on the East 100", on the West 100", on the North 84" and on the South 68", totally measuring 7600 sq.ft. or 844.44 sq. yards, together with a residential house and bounded on the :

East by:	Plot No.53
West by :	Property of Mr.V.C.Mudaliar
North by :	Plot No.55
South by :	Plot No.52

8. In order to seek such relief, plaintiff has valued suit u/s.26(c) of K.C.F. & S.V.Act, 1958 by paying Rs.50/-. The cause of action to sue defendants could be witnessed from para-10 of the plaint arose on 3.11.2014, when the plaintiff got issued a legal notice to the defendants who

attempted to disturb the possession of the plaintiff and attempt to put up illegal construction on the schedule property and on 10.11.2014 when the defendants got issued a frivolous reply on every day while threat continues within the jurisdiction of this Court.

9. Further to be take notice of the pleading in para-5, plaintiff has pleaded, **he has noticed that the defendants have surreptitiously put up construction on the eastern side of the schedule property, encroaching upon the plaintiff's property, to an extent of about 1300 square feet of the schedule property, in the guise of developing their property.** Thus, from this plea, plaintiff is definite that his property to an extent of 1300 square feet is surreptitiously encroached by defendants by putting up construction on the eastern side of the schedule property. The entire property is measuring 7600 square feet which could be seen from schedule property. On the contrary, defendants categorically denied such pleas in their written statement. They are contending that plaintiff has never been in occupation, possession and

enjoyment of the extent of property shown in the plaint schedule and submits that towards the west of the dwelling house, there was open space and out-houses and garages. Towards the east of the dwelling house, there is open space till the Palace road. On the North and South of the dwelling house, there is a set back space of approximately 5 feet wide. In the dwelling house, there is a ground floor and 1st floor. The family of Mr.Shamsundar used to reside in the ground floor and the family of the plaintiff used to reside in the first floor of the dwelling house, having separate mess for quite sometime earlier, about 20 years back. During 1996, plaintiff mooted the idea that he be given a portion which is to the west of the dwelling house, on which a separate house could be built as in the house in which he was living was a very old construction and he wants to live in a new built house suiting his professional standard. Mr.Shamsundar Asrani acceded to the same and accordingly on that basis, oral partition took place in 1996. Further contended that a portion to the western side of the dwelling house (setting aside a space of 5 feet East West, running from southern edge to northern edge, in between the dwelling

house and western portion, as a lung space for the home of Mr.Shamsundar Asrani was given to the plaintiff. Mr.Shamsundar also provided substantial money to the plaintiff to build a house on the said western portion out of filial affection. The plaintiff built a house there, moved out of the first floor of the old/original dwelling house to the new house in 2000 and started living there with his family in the new building constructed on the western portion. The plaintiff also left lung space of about 10 feet and constructed a compound wall, bifurcating the properties, which is visible in the photographs.

10. Thus, defendants so contended specifically in para-14 and in para-19 contended that they have not added a single wall to the old house, in which they are dwelling, since more than 40 years and contended, claim of plaintiff that defendants surreptitiously encroached upon 1300 square feet of the plaintiff's property is utterly false. Thus, from these contentions, disputed issue to be adjudicated by the court would be whether 1300 square feet of the property of plaintiff, was surreptitiously encroached by defendants?

That is why this Court, on completion of pleadings of parties to the suit, formulated the following issues for the purpose of trial:-

- (1) Whether plaintiff proves his lawful possession over the schedule property?
- (2) Does he prove the encroachment of his property to an extent of 1300 sq.ft. situate on the eastern side of his property?
- (3) Does he prove that defendants have put up illegal structure on the encroached property?
- (4) Does he entitle for relief of injunction and mandatory injunction as prayed?
- (5) Whether court fee paid and the valuation made by the plaintiff is correct and proper?
- (6) Whether suit in the present form is maintainable?
- (7) What order and decree?

11. Thus, from the above issues, 2nd issue would be proof of encroachment of property to an extent of 1300 square feet situate on the eastern side of the property of the plaintiff, issue No.3

would be proof of putting up illegal structure on the encroached property by defendants. Issue No.5 is regarding correctness of the valuation of the suit property and payment of court fee thereon. Now, the matter is set for recording evidence of plaintiff as such, plaintiff to begin evidence to prove these issues and to convince as to how valuation made on the plaint is correct and to show as to how the court fee paid u/s.26(c) of K.C.F. & S.V.Act at Rs.50/- is correct and proper.

12. In the above such circumstances and in such stage of the suit proceedings, instant application came to be filed to conduct an investigation to ascertain the nature of construction/repairs being carried out by defendants in 1300 square feet of suit schedule property. In order to seek relief as prayed by the plaintiff in respect of the disputed property namely the encroachment said to have been made on the suit property as pleaded plaintiff still to prove and the issue to that effect is already framed. Thus, from pleadings and issues framed by the court, dispute between plaintiff and defendants, defendants carrying repairs in the alleged

encroachment would not affect his rights, since they are bound to carry out repairs of old construction to make property in tact. It is to be observed here in case of proof of plaintiff about the alleged encroachment of defendants, subject to other legal implications, he would be entitled to recover same from them or such construction would be removed through process of court, by issue of mandatory injunction.

13. It is to be noted here that plaintiff although prayed for grant of mandatory injunction against the defendants has not sought for relief of declaration and recovery of possession, as such considering the issues framed by this court has to hear the same as preliminary issue before any other I.A's could be heard and disposed off.

14. As already stated above that issue No.2 is to prove the encroachment of plaintiff's property to an extent of 1300 square feet, situate on the eastern side of his property. It is therefore, plaintiff is still to adduce oral and documentary evidence to establish the same and at this stage, this Court is of the opinion that conducting an investigation to ascertain the nature of construction/repairs being

carried out by defendants in 1300 square feet is of no assistance to Court. In such view of the matter, request now made to conduct an investigation to ascertain the nature of construction/repairs cannot be considered as not necessary. In other words to say it would be considered after completion of evidence of plaintiff and defendants, that too, if it would be necessary, to adjudicate upon the fact in issue.

15. The plaintiff in the plaint has alleged against defendants about encroachment of his 1300 square feet of property and the defendants have denied such allegation, as such, he has to establish when exactly defendants have encroached such an extent of property and the defendants also to meet such evidence to be adduced by him.

16. No doubt, defendants have undertaken not to put up new construction not only before this Court, but also before High Court which could be borne from order in MFA No.8606/15 (CPC) dated 2.2.2016 would become part of record. The suit is filed on 30.3.2015 and the court also disposed of the pending IAs and the plaintiff during pendency

of the suit, that too after disposal of IAs.1 and 2 filed u/o.39 R.1 and 2 of C.P.C., has approached Karnataka Lokayuktha and filed complaint with Hon'ble Upa-Lokayuktha dated 30.11.2015, is nothing but pressurizing the defendants in one or the other way as contended by learned counsel for the defendants has substance. The defendants have produced few documents to show that pursuant to such complaint lodge by plaintiff, Karnataka Lokayuktha, through officers of BBMP visited schedule property, found building aged about 50 years and also found carrying out repairs by the defendants. In their inspection report, we could witness that no new construction is put up but it was only the repair works. The photographs produced by defendants taken on 4.4.2016 along with Deccan Herald Newspaper of that day, evidencing that the allegation of the plaintiff that the entire property has been barricaded could be said unfounded. We could see from these photographs that they were taken on 4.4.2016.

17. In the above such circumstances, the decision reported in **ILR 2001 Kar.5013 in Anil Kamalakar Shirodkar vs. Dudhappa Santu Patil and another** wherein it was held, "*The*

appointment of the Commission for measurement of the property and to demarcate the boundaries and correct extent of the properties as per the claim made by the parties would be fully justified” has no application to the present facts, since commissioner was appointed in the said case only after conclusion of the evidence in the suit.

18. In **ILR 2010 Kar.897 in N.Swamygowda S/o.Nanjegowda vs. Ramegowda, S/o.Channegowda, Secretary, Grama Panchayat, Executive Engineer, Irrigation Department & Executive Engineer, Administrative**, it was held, *“If there is a serious dispute with regard to the area and boundaries of the land in question, the non-appointing of the Court Commissioner results in the serious miscarriage of justice.”* is again has no application, since plaintiff herein is definite that encroachment by defendants is to an extent of 1300 square feet out of schedule property and so far, no oral or documentary evidence adduced by plaintiff.

19. In **AIR 1986 Madras 33 in Pormusamy Pandaram vs. The Salem Vaiyappamalai Jangamar Sangam**, it was held, *“Local*

investigation is best way to find out whether construction put up by defendant within his land or not” has no application to the facts of this case and CRP No.3760/2014 of the High Court of Telangana and the State of Andhra Pradesh wherein it was held, “*No absolute bar of appointment of Commissioner in suit for injunction*” could not be applied to the facts of this case considering nature of present suit and the relief sought by plaintiff against defendants in respect of 1300 square feet of property out of schedule property. Under such circumstances, learned counsel for defendants rightly submitted that ought to resort to Order 26 Rule 9 of C.P.C. to be felt by the Court for the purpose of elucidating certain details which in its opinion can neither be had from the records nor produced by parties by way of oral or documentary evidence. In this regard, to substantiate his contentions has placed reliance in W.P.No. 13493/2013 (GM-CPC) of our own High Court decided on 31.1.2015. It is therefore, this Court felt, appointment of Court Commissioner to conduct an investigation to ascertain the nature of construction/repairs being carried out by the defendants in 1300 square feet of suit property is

not necessary, for a fair and complete consideration of the case of plaintiff. Thus reaching to such conclusion, this court is of the opinion that non-appointing court commissioner would not cause any hardship or legal injury to the plaintiff. In such view of the matter, finding on this point would be record without saying in the Negative.

20. **Point No.2:** In view of the above finding and in the result, this court passes the following:

O R D E R

- (a) I.A. No.3 filed u/o.26 R.9 r/w. S.151 of C.P.C. is hereby dismissed as devoid of merits.
- (b) Cost of this application shall be the cost in the cause.

(Dictated to the Judgment Writer, transcribed by her, corrected and then pronounced by me in the open court, on this the 30th day of April 2016).

(Krishnamurthy B.Sangannanavar)
IX Addl. City Civil & Sessions
Judge, Bangalore.

