

IN THE COURT OF PRL. CIVIL JUDGE AND JMFC.,
SOMWARPET

Present:

Sri K Gopala Krishna, B.A.L., L.L.B.,

Prl. Civil Judge & JMFC., Somwarpet.

Dated: 8th Day of July, 2022

O.S.NO.31/2020

Plaintiff : Sri. D.R. Vijaya

V/s

Defendant's : Sri. K.H. Vittala & Another

ORDERS ON IA NO.IV FILED BY THE PLAINTIFF
UNDER ORDER XXVI RULE 10A R/W Sec. 151 OF
CPC.

The plaintiff has filed this application under order XXVI rule 10A R/W Sec. 151 of CPC, for appointment of court commissioner (Qualified Civil Engineer) preferably the assistant executive Engineer PWD, Somwarpet as a Court commissioner to conduct survey for the purpose of examination and report about the existence of the houses

and constructions situated upon the suit A and B schedule properties and to submit a detailed report over the same.

2. The plaintiff in his affidavit has stated that he has filed the present suit against the defendants for the relief of Mandatory Injunction and also a permanent prohibitory Injunction in respect of the suit property. And the plaintiff also filed an interim application on IA No. 2 seeking an order of interim injunction restraining the defendant No.1 from carrying out further construction works of his house over the suit B schedule property and he submit that defendant No.1 has completely violated the terms and conditions of the license granted to him for construction of the house in the manner set out. Due to illegal construction of the house. And 1st defendant has completely blocked the flow air and light to plaintiff house and contradictory

statement taken by the 1st defendant and it is just a necessary to appoint a qualified engineer as court commissioner to visit the houses belonging to plaintiff on the 1st defendant in ordered to find out as to weather the 1st defendant as constructed the house in accordance with the terms of conditions of the construction license obtained by him from the 2nd defendant. It is also necessary to find out the in convenience caused to the plaintiff due to illegal construction done by the 1st defendant. Hence appointment of commissioner is necessary at the stage of the case in ordered to consider IA No. 2 on it is merits, since the 1st defendant as completely denied the contentions taken by the plaintiff. Hence the report of the commissioner is very necessary in this case. Hence the local investigation of the suit property is very necessary, hence the plaintiff prays to allow this application. In case this application may

allowed no hardship to other side. Hence, it is very much necessary to appoint the court commissioner and to file the report as prayed for. Hence, prayed to allow the application.

3. On the other hand the defendant No.1 filed objection denied the entire contention taken by the plaintiff in the IA. The defendant submitted that the suit filed by the plaintiff for the relief of Mandatory Injunction along with Permanent Injunction in respect of the suit property. In order to prove the plaintiff possession the survey commissioner is not necessary. This application filed by the plaintiff for appointment of commissioner for the purpose of examination and report about the existence of the houses and construction situated upon the suit A and B schedule properties and to submit a detailed expert report over the same is highly premature and not maintainable at the stage of the suit

and the suit filed by the plaintiff for the relief of Mandatory Injunction along with Permanent Injunction in respect of the suit property. Hence the commissioner visit the spot and give report is not maintainable. The commissioner can't be appointed to collect evidence on behalf of the plaintiff. The defendant No.1 has already stated in the written statement that the construction was started in 2015 and and plaintiff has not taken any action for 5 years and he has now come out with the suit only to harass the defendant No.1. and defendant No.1 as not violated any of the condition of the license. On the other hand the plaintiff as violated the conditions of license will constructing his house in the suit A schedule property. Hence, this application not maintainable under law. The plaintiff has not made out a prima facie case for allowing the present IA. Hence he prays to dismiss the above IA and heavy costs.

4. Heard arguments both sides.

5. In light of the above contentions, the infra points that would arise for my consideration.

1. Whether the plaintiff has made out a case to appoint as court commissioner?

2. What order?

6. My findings on the above points are as under:

Point No.1: In the *Negative*

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

::REASONS::

7. **Point No.1::** This is a suit for Mandatory Injunction along with Permanent Injunction in respect of the suit property. The plaintiff submitted that he was absolute owner and in possession and enjoyment of the

suit property. Bearing Sy. No. 294/1 measuring 0.03 acres, situated in mahadeshwara block, somwarpet town. The suit A schedule property originally belongs to one Smt. D.Lakshamma, who is the grand mother of the plaintiff, the B Schedule property was originally it is Sy. No. 294 in the town revenue record and measuring 0.10 acres in extent it was a vacant site by a registered will dt: 28-08-1986 the said Smt. D. Lakshamma bequeathed the said property in favor her only daughter Smt. D. Balamani who is the mother of plaintiff. The subsequently the said lakshamma died on dt: 02-09-1986 after the death the said property bearing municipal Sy. No. 294 devolved upon Smt. D. Balamani the mother of the plaintiff. After acquiring the said property the mother of the plaintiff partitioned and allotted the suit A schedule property in favor of the plaintiff, whereas out of the balance area in original 294 measuring 0.03 acres

was allotted to the share of one D.R. Yogesha the brother of the plaintiff and the balance area of 0.04 acre was allotted to the share of D.R. Kumara another brother of the plaintiff. After the such a reason the khata in respect of the suit A schedule property was transferred to the name of plaintiff by sub dividing the original number as 294/1 in the local authority records. The khata in respect of the suit A schedule property transferred to the name of plaintiff and the plaintiff is in possession and enjoyment of the suit A schedule property till today and the plaintiff he had left sufficient said back and also left 3 vacant space on the sides of the house in accordance with building rules of the town panchayat and during the year of 2013 the plaintiff as build a first floor with accommodation for two houses upon the existence residential house by obtaining approval for the plan and estimates and also by obtaining necessary license from

the town panchayat somwarpet.

The B Schedule property was a vacant house site the brother of the plaintiff D.R Yogesh did not venture to put up any construction over vacant house site, hence right from the beginning the plaintiff is getting light and air to his houses from it is southern side without any obstruction or interruption from any angle. The said yogesha as sold his share of the vacant house site to the defendant No.1 by registered sale dt: 20-06-2015 and the defendant No.1 started to construction within his property he was obtained permission and license from the second defendant on dt: 27-06-2016 and the first defendant started constructing a building by the 1st defendant consists of 4 floors and he has encroached a portion of the plaintiff to in suit A schedule property. And the defendant No.1 violating the license and construct the building and it is illegal acts and

construction done by the 1st defendant and also avoid the air and light is blocked hence the plaintiff is filed this suit for the relief of Mandatory Injunction along with Permanent Injunction in respect of the suit property.

8. It is pertinent to note here that the present application is filed before commencement of trial. the plaintiff also filed an interim application on IA No. 2 seeking and order of interim injunction restraining the defendant No.1 from caring out further construction works of his house over the suit B schedule property and he submit that defendant No.1 has completely violated the terms and conditions of the license granted to him for construction of the house in the manner set out. Due to illegal construction of the house. And 1st defendant has completely blocked the flow air and light to plaintiff house and contradictory statement taken by the 1st defendant and it is just a necessary to appoint a qualified

engineer as court commissioner to visit the houses belonging to plaintiff on the 1st defendant in ordered to find out as to weather the 1st defendant as constructed the house in accordance with the terms of conditions of the construction license obtained by him from the 2nd defendant. It is also necessary to find out the in convenience caused to the plaintiff due to illegal construction done by the 1st defendant. Hence appointment of commissioner is necessary at the stage of the case in ordered to consider IA No. 2 on it is merits, since the 1st defendant as completely denied the contentions taken by the plaintiff hence the report of the commissioner is very necessary in this case. Hence the local investigation of the suit property is very necessary hence the plaintiff prays to allow this application. In case this application may allowed no hard ship to other side. Hence, it is very much necessary to appoint the

court commissioner and to file the report as prayed for.

Hence, prayed to allow the application.

9. It is burden of prove to plaintiff to establish his case. After the completion of evidence on both the sides, if it is found that there is any ambiguity in the evidence adduced by the parties, then the court commissioner may be appointed for the purpose of clarification of such ambiguity. In the present suit the plaintiff is required to prove his title and rights over the suit schedule property and alleged interference by the defendants. This can be determined only after full fledged trial. Without proving the basic elements, it is premature to consider the present application.

10. Advocate for defendant No.1 argued the plaintiff filed false application and premature application, the plaintiff intending to collecting the evidence it is not

maintainable every permanent injunction suit the plaintiff must proved the possession and violation of the defendants hence he prays to dismiss the IA on cost and one decision produced. Peruse the decision produced by the 1st defendant.

1981(2) KLJ 432

Jaganath.B Vs N.C.Narayanappa & Another

in this decision Hon'ble High Court of Karnataka where in it is held that U/o 26 rule 9 of CPC power is confirmed on the court for appointment commissioner for local inspection in order to better appropriate the evidence which is already on record.

2019 STPL 2635

M.P. Anuradh Jaiswal Vs Collector Khanadwa & Others

where in it is held that

(A) Civil procedure code U/O 26 rule 9 and

constitution of india 1950 article 226 appointment of commissioner disputed question of fact, question of encourachment and identity of the land is in dispute, necessary circumstances are very much they are invoking U/O 26 rule 9 of CPC in view of those statement it is clear that for the purpose of determine the indentivity of land excise of the power U/O 26 rule 9 of CPC is permissible. Can't be held that impugned order of the court below amounts to permitting the plaintiff to collect the evidence – found no basis to interfere in this case – interference article 227 of constitution can be made if order suffers from any manifest procedure impropriety, palpable pervicity or jurisdiction error – another view is possible is not a grounds are interference – in absence any such ingredient interference is declined petition dismissed.

10. In AIR 2007 KAR 133, Miss Renuka V/s Thammanna and others, the Hon'ble High Court of Karnataka has held that commissioner cannot be appointed before conclusion of evidence. The ration laid down in the above referred decision is squarely applicable to the present fact of the case. In the instant case also the plaintiff alleged encouragement by the defendants . In the instant case the evidence is not yet commenced and therefore question of ambiguity in the evidence will not arise at this stage. In view of the above decision by the Hon'ble High Court of Karnataka, this court is having no other option but to reject the application. Hence point No.1 in **Negative**.

11. Point No.2:: For the above discussed reasons, this court proceeds to pass the following:

::ORDER::

The application filed by the
plaintiff under order XXVI Rule
10A of C.P.C. is hereby dismissed.

No order to cost.

[Dictated to the stenographer directly on computer and then corrected by me and
thereafter pronounced in the open court on this the 8th day of July , 2022]

Sd/-
[K. Gopala Krishna]
Prl. Civil Judge and JMFC,
Somwarpet.