



**IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH**

DATED THIS THE 24th DAY OF JANUARY, 2023

BEFORE

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

W.P.NO.201274/2022 (GM-CPC)

BETWEEN:

Sri Shadaksharappa S/o Veranna
.....

.... Petitioner

(By Sri Mahantesh Patil, Advocate)

AND:

1. Kumari Vijayalaxmi D/o Pampanna,
.....

2. Chandrashekar
.....

3. The Commissioner,
City Municipal Council,
Sindhanur – 584 101.

... Respondents

(By Sri Sanjay Kulkarni, Advocate for R1;

R2 served; Petition as against respondent No.3 is dismissed vide order dated 11.01.2023)

This writ petition is filed under Article 227 of the Constitution of India praying to set aside the order dated 06.04.2022 passed by the learned II Addl. Civil Judge and JMFC Sindhanur in O.S.No.90/2010 vide Annexure-G and consequently allow I.A.No.27 filed by the petitioner in the interest of justice and equity.

This petition coming on for hearing, this day, the court made the following:-

ORDER

In a suit for mandatory injunction for removal of the alleged encroachment on the suit road, to prove the encroachment, the plaintiff filed an application for appointment of the Commissioner for local inspection. Accepting the objection by the first defendant, the Trial Court rejected the application, on the ground that the application filed before the completion of the trial is premature.

The liberty is granted to file a fresh application, after the completion of the trial, provided there is any ambiguity in the evidence.

2. Learned counsel Sri Mahantesh Patil, appearing for the petitioner would submit that, the plaintiff is complaining about the encroachment on a portion of the suit road, and the defendant has denied the allegation of encroachment, both in the written statement as well as in the cross-examination of the plaintiff. The plaintiff with a view to produce best possible evidence moved an application for local inspection. This being the position, the order rejecting the application for appointment of a Court Commissioner for local inspection is unsustainable.

3. Learned counsel Sri Sanjay Kulkarni, appearing for the first respondent opposed the petition contending that;

- (a) The application for appointment of a Commissioner for local inspection in a suit for a permanent injunction is impermissible.
- (b) If the Commissioner is appointed and the report is secured, the same amounts to collection of evidence which is also impermissible.

- (c) The application for local inspection before completion of the trial is not contemplated in the scheme of Order XXVI of the Code.

4. Though the application is filed under Order XXVI Rule 10-B, of the Code, the contentions raised, have to be necessarily examined in the backdrop of the provisions applicable for local inspection, i.e., Order XXVI Rules 9 and 10 of the Code. In the backdrop of the contentions raised, the court has to answer three questions.

- (a) Whether the appointment of a Commissioner for local inspection amounts to collection of evidence?
- (b) Whether the application for appointment of a Commissioner for local inspection can lie before the commencement of the trial.
- (c) Whether the Commissioner for local inspection can be appointed in a suit for an injunction?

5. Order XXVI Rule 9 and 10-B of the Civil Procedure Code, 1908 (Code, for Short) reads as under:

Rule 9 of Order XXVI of Code of Civil Procedure - Commissions to make local investigations. - *In any suit in which the Court deems a local investigation to be requisite or proper for elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:*

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

(3) Commissioner may be examined in person.- *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."*

Rule 10B Order XXVI of Code of Civil Procedure 1908 Commission for the performance of a ministerial act.

(1) Where any question arising in a suit involves the performance of any ministerial act which

cannot, in the opinion of the Court, be conveniently performed before the Court, the Court may, if, for reasons to be recorded, it is of opinion that it is necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to perform that ministerial act and report thereon to the Court.

(2) The provisions of rule 10 of this Order shall apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

6. Under Order XXVI Rule 9 of the Code, the Court can appoint the Commissioner for local inspection;

- a) If the court deems that local investigation is necessary for elucidating any matter in dispute;
- b) For ascertaining the market value of any property, or any mesne profits or damages or annual net profits.

7. The expression '*Court deems a local investigation to be requisite*' appearing in the provision makes it apparent that the discretion lies with the Court

whether to appoint a Court Commissioner or not. However, discretion is not unbridled. To understand the scope of Order XXVI Rule 9 of the Code, the provision has to be read along with Order XXVI Rule 10 of the Code.

8. Order XXVI Rule 10 of the Code of Civil Procedure reads as under:-

"Rule 10 Order XXVI of Code of Civil Procedure - Procedure of Commissioner.-*(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*

(2) Report and depositions to be evidence in the suit.-*The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or*

as to the manner in which he has made the investigation.

(3) Commissioner may be examined in person.- *Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."*

(Emphasis supplied)

9. The following aspects can be noticed in Order XXVI Rule 10 of the Code.

- (a) The report of the Commissioner has to be in writing.
- (b) Commissioner, if he deems it necessary may take evidence in writing.
- (c) The Commissioner should return such evidence together with his report in writing signed by him to the Court.
- (d) The report of the Court Commissioner and the evidence taken by him shall be the evidence in a suit and shall form part of the record.

The meaningful reading of the above-referred provisions would lead to the inevitable conclusion that the

Commissioner's report can be secured to elucidate the matter in dispute and the report of the Commissioner and the evidence taken by the Commissioner shall be the evidence. Thus, the very purpose of Order XXVI of the Code is to secure evidence. Thus, the contention that the Commissioner cannot be appointed for local inspection and such a recourse amounts to collection of evidence overlooks the provision, namely the Order XXVI Rule 10 of the Code.

10. The above-referred view can also be justified from another perspective. Under Order XXVI Rule 10, as noticed above, the report of the Commissioner and the evidence taken by him is a piece of evidence. The word *evidence* is not defined either under the Code or under the Indian Evidence Act. However, the Indian Evidence Act, among others, deals with oral and documentary evidence. The report of the court Commissioner would be documentary evidence under the Indian Evidence Act. The party to the suit is entitled to produce the documentary

evidence in support of his case, subject of course, to the relevancy of the document. In that view of the matter also, the contention that the appointment of a Commissioner for local inspection, or scientific/forensic investigation, amounts to collection of evidence and for this reason the application is maintainable is not a valid, not contention. On the other hand, the party to a suit in an appropriate proceeding is enabled under the law to prove his case through the report of the Commissioner. Thus, in a given case that calls for the appointment of a Commissioner, if the application is rejected, the same amounts to a denial of permission to lead evidence.

11. The appointment of a Commissioner for local inspection, or scientific/forensic investigation/expert's opinion is indeed to secure the evidence and the same is not only permissible but also desirable in certain cases. The report, given the intrinsic complexities of matter in a case, may go a long way in arriving at a just decision or assisting the court to appreciate the other evidence on

record or fact situation in a proper perspective. If the report of the Commissioner is nothing to do with the subject matter in dispute, then there cannot be an order appointing the Commissioner. Order appointing a Commissioner can be made only if the Commissioner's report becomes a relevant *piece of evidence*. That being the position, the contention that the appointment of court Commissioner amounts to collection of evidence has no merit.

12. Under the provisions applicable for local inspection what is impermissible is the delegation of adjudicating power. To cite an example, if both parties claim to be in possession of the disputed property, the local inspection by the Commissioner cannot be ordered to ascertain the possession. The question of possession is to be decided by the court. However, if one party alleges encroachment by another and another party denies such allegation, the Commissioner can be appointed to ascertain whether there is encroachment or not. In such a situation

the Commissioner is appointed to find out the nature of possession. The report based on local inspection will be a handy tool to decide the case relating to encroachment. In the case on hand, the petitioner to prove his assertion of encroachment, instead of leading oral evidence of witnesses has applied for local inspection, and the same is not only permissible but also desirable.

13. The next question is, at what stage of the proceeding in a suit, the application can lie? As could be easily noticed from the provision, the provision is not 'stage' centric. Thus the provision can be invoked either before the commencement of the trial or after. If the application is filed before the commencement of the trial, the court having regard to the pleadings and records may allow such application before the commencement of the trial. For example, in a given case, if the report is necessary for consideration of an application seeking some interim measure, before the commencement of the trial, the Commissioner can be appointed, if the case is made

out for a such appointment. On the other hand, again, having due regard to the pleadings and records, if the court finds that there is every likelihood that after recording the evidence of the parties, the need to appoint the court Commissioner may not arise or that the court is of the view that it can take a call on the application, only after recording the evidence, then it may defer the order on the application till such time. Thus the decision as to when the report of the Commissioner is to be secured must be taken having due regard to the facts and circumstances.

14. The discretion, though lies with the court, as to appoint the Commissioner before the trial or after the trial, the decision must be taken with due regard to the possibility of reducing or eliminating the need to record the oral evidence of witnesses to prove an issue which could be effectively decided with the aid of the report. More often than not, in disputes relating to the existence of pathway, stream, pond, well, or disputes relating to the

boundary between adjoining holders, encroachment, easement of air and light, construction of building in violation of setback rules, or relating to the authenticity of a document, signature/thumb impression to name a few by way of illustration, a report secured before the trial may cut short the trial in as much as the party relying upon the report may not examine multiple witnesses to prove the matters covered by the report. The party may simply rest his case based on his evidence and the report. In a given case, the appointment of the Commissioner before the commencement of the trial may facilitate a focused trial. In the case of ***Bhimappa Rayappa Chougala v. Shrikant***, 2014 SCC OnLine Kar 12277 : (2014) 2 KCCR 1652 at page 1653, the Co-Ordinate Bench of this court has held as under :

"4. xxx *Only if the plaintiffs can show that the defendants have encroached upon their property, they would be entitled to the relief. Any amount of oral evidence is not a substitute or sufficient to prove the encroachment. To cut short the litigation to reduce recording evidence, the trial Court in its*

wisdom, thought it fit to appoint a Commissioner even before the commencement of the trial. That is how the duration of the litigation could be curtailed and speedy disposal of the civil matter could be achieved."

15. For the reasons stated above, this court is of the view that the dispute between the parties is one relating to alleged encroachment, the trial court could not have rejected the application on the premise that the trial is not complete. Considering the nature of the case, this court is of the view that an order rejecting the application, with the liberty to file an application for local inspection after the trial is nothing but placing the cart before the horse.

16. The next question is whether the court Commissioner for local inspection can be appointed in a suit for an injunction.

17. The answer to the question referred to above, lies in the reframing question and the question would be whether the power of the court to appoint the

Commissioner is controlled by the form of the suit. The answer is a big no. The language of the provision is clear. It does not impose any such restrictions based on the form of the suit. The guiding factor is '*whether the report is necessary for elucidating matters in dispute*'. It can be any kind of suit. Be it suit for injunction, mandatory injunction, declaration and injunction, possession, partition, specific performance, or any suit for that matter. The form of a suit is never the guiding or deciding factor while considering the application for the appointment of a Commissioner. In the judgment of ***M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit v. Modi Transport Service referred supra***, the Apex court has held that the court has wide discretion under Order XXVI Rule 9 of the Code to appoint the Commissioner. The relevant portion of paragraph 35 of the said judgment is extracted here.

"35. xxx *Order XXVI Rule 9 of the Code gives wide powers to the court to appoint a Commissioner to make local investigations which may be requisite or proper for elucidating any matter*

in dispute, ascertaining the market value of any property, an account of mesne profit or damages or annual net profits. xxx" (emphasis supplied)

This being the position, the application for appointment of Commissioner cannot be rejected on the premise it amounts to collection of evidence or on the premise that it is not permissible looking into the form of the suit. If the Court deems it fit that the report is necessary to elucidate the matter in dispute then the application for local inspection has to be allowed.

18. For the reasons discussed above, the contention taken by defendant/respondent No.1 that the appointment of a Court Commissioner, in this case, amounts to collection of evidence does not merit consideration at all. The burden of proving the alleged encroachment is on the plaintiff. Instead of voluminous oral evidence, if the petitioner seeks to prove his contention relating to encroachment through the report of the Commissioner, the prayer for local inspection should

be willingly granted unless there are justifiable reasons for the court to take a view that the local inspection is a futile exercise. For this reason, this Court is of the view that the Trial Court committed a grave error in not appointing a surveyor for local inspection.

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 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.
- 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.
- 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. 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.

22. The examples given above are not exhaustive but merely illustrative. The guidelines in this order should not be construed as having exhaustively listed the cases in which the Commissioner can be appointed. Nor the observations should be construed as having diluted or expanded the discretion vested with the trial court in such matters.

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;-

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

Before ending, to put it in nutshell, the report under Order XXVI of the Code, in an appropriate case, is an effective tool available to the court and the party to the proceeding. The party to the proceeding, may use this tool for proving his/her case and the court to unravel the mystery surrounding the case.

Hence the following:

ORDER

The writ petition is *allowed*.

- i) The impugned order dated 06.04.2022 at Annexure-G passed by the II Additional Civil Judge, Sindhanur is quashed.
- ii) I.A.No.XXVII filed under Order XXVI Rule 10-B of Code of Civil Procedure before the II Additional Civil Judge, Sindhanur in O.S.No.90/2010 is allowed.
- iii) The Trial court shall appoint the jurisdictional surveyor to measure the suit property and to secure the report.
- iv) The guidelines indicated above to be followed as far as practicable.
- v) In view of disposal of petition, IA No.1/2023 does not survive for consideration. Accordingly, it is dismissed.

**Sd/-
JUDGE**

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