



**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**  
**DATED THIS THE 9<sup>TH</sup> DAY OF JUNE, 2026**  
**BEFORE**  
**THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL**  
**WRIT PETITION NO.20/2021 (GM-CPC)**

**BETWEEN:**

SRI. BHAVANNA  
S/O DODDA MALLAPPA  
AGED ABOUT 65 YEARS  
R/AT DVG ROAD  
BAGEPALLI TOWN  
BAGEPALLI TALUK 561207  
CHICKBALLAPUR DISTRICT.

...PETITIONER

(BY SRI. MANOJ M. NAIK, ADV., FOR  
SRI. NAGARAJAPPA A, ADV.,)

**AND:**

G.M. RAMAKRISHNAPPA  
S/O LATE DODDA MALLAPPA  
AGED ABOUT 60 YEARS  
R/AT SBM ROAD  
BAGEPALLI TOWN  
BAGEPALLI TALUK 561207  
CHICKBALLAPUR DISTRICT.

...RESPONDENT

(BY SRI. B. RAMESH, ADV.,)

THIS W.P. IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE ORDER DATED 8.12.2020 ON AN APPLICATION FILED UNDER ORDER 26 RULE 9 OF CPC MARKED AT ANNEXURE-E FILED IN O.S.NO.46/2014 ON THE FILE OF THE CIVIL JUDGE AND JMFC AT BAGEPALLI AND ALLOW THE APPLICATION FILED UNDER ORDER 26 RULE 9 OF CPC FILED BY THE PETITIONER HEREIN & 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 08.12.2020 passed in OS.No.46/2014 by the Civil Judge and JMFC, Bagepalli (for short 'the trial Court').

2. Sri.Manoj M. Naik, learned counsel appearing on behalf of Sri.A.Nagarajappa, learned counsel for the petitioner submits that the petitioner has filed a suit seeking the reliefs of declaration, permanent injunction and mandatory injunction against the respondent. In the said suit, the respondent filed a detailed written statement and contested the proceedings. After conclusion of the trial, the petitioner filed an application seeking appointment of a Court Commissioner, which came to be rejected by the trial Court without assigning any reasons. It is submitted that the petitioner/plaintiff has made a specific assertion in the plaint that the



respondent/defendant has encroached the suit schedule property to an extent of east to west 11 feet and north to south 1½ feet and has erected a bunk shop and the said factual aspect is required to be proved by the expert's evidence. Hence, the application is required to be allowed. It is further submitted that by allowing such application, no prejudice would be caused to the other side. However, the trial Court has rejected the application only on the ground that the application was filed at the fag end of the proceedings. In support of his contention, he placed reliance on the decision of this Court in the case of **N. Swamygowda v. Ramegowda and Others**<sup>1</sup>. Accordingly, he seeks to allow the petition.

3. Per contra, Sri.B.Ramesh, learned counsel appearing for the respondent supports the order of the trial Court and submits that it is an admitted fact that a property to the extent of 11x18 feet had been allotted to the respondent and thereafter, the authorities have

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<sup>1</sup> ILR 2010 Karnataka 897



acquired the property of the respondent to the extent of 11x13 feet for widening of the road and he was left with a property measuring 11x5 feet, which can be noticed from the sketch produced as Ex.P10 in the present proceedings. It is submitted that the sufficient material has been placed before the trial Court to record its finding with regard to the alleged encroachment. Hence, filing of the application by the plaintiff is an abuse of the process of law and to drag the proceedings without any justifiable reasons. Hence, he seeks to dismiss the petition.

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

5. The petitioner has filed OS.No.46/2014 which is pending on the file of Civil Judge and JMFC, Bagepalli, seeking the relief of declaration, permanent injunction and mandatory injunction. The respondent entered appearance and filed a detailed written statement denying the



assertions made in the plaint. The parties to the proceedings have adduced the evidence and on conclusion of the evidence, the petitioner/plaintiff filed an application under Order XXVI Rule 9 r/w Section 151 of the Code of Civil Procedure, 1908 (for short 'CPC') seeking appointment of a Court Commissioner for inspection of the suit schedule property and submit a report with regard to the assertion of the petitioner that the respondent had encroached the suit schedule property to an extent of east to west 11 feet and north to south 1½ feet and had erected a bunk shop. The said application came to be rejected by the trial Court, which is assailed in this petition.

6. It is to be noticed that the petitioner/plaintiff has been making specific assertion in the plaint as well as in the application that the respondent/defendant has encroached the suit schedule property of the plaintiff to an extent of east to west 11 feet and north to south 1½ feet and has erected a bunk shop, and the said aspect has also



been reiterated in the evidence of PW1. Although the respondent has denied the said assertion by contending that he was allotted an extent of 11x18 feet, and out of the said extent, 11x13 feet was acquired by the State authorities for road widening, leaving him in possession of only 11x5 feet, which cannot be termed as encroachment, such contention does not, by itself, conclusively resolve the dispute. In my considered view, the factual aspect of actual encroachment as asserted by the petitioner in the plaint as well as the application is required to be asserted by physical inspection only and it cannot be asserted based on the oral evidence of the parties, as the respondent/defendant denied about the encroachment.

7. The learned counsel for the respondent placed reliance on the sketch marked as Ex.P10 and contended that he has left with only 11x5 feet of the land and based on such sketch, the Court can record the finding. In my considered view, Ex.P10 and oral evidence may not be sufficient to come to conclusion with regard to the alleged



assertion of encroachment made by the plaintiff in the plaint as well as in the application for appointment of Court Commissioner. The appointment of a Court Commissioner would aid the trial Court in recording the finding with regard to the prayer sought in the plaint and come to conclusion as to whether there is any encroachment or not. Mere conducting of an inspection by the surveyor and submitting a report to the Court would not cause any prejudice to the respondent. Ultimately, the respondent has every right to question the said report and also cross-examine the Court Commissioner in accordance with law.

8. This Court in the case of ***N. Swamygowda*** referred *supra* as well as in the case of ***Sri. Shadaksharappa v. Kumari Vijayalaxmi and Others***<sup>2</sup> has held that the appointment of a Court Commissioner would aid the trial Court in deciding the *lis* between the parties, when one party makes assertion of facts and

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<sup>2</sup> ILR 2023 Kar 3983



another party denies the same. Considering the enunciation of law laid down by these decisions referred *supra*, I am of the view that the trial Court has committed a grave error in rejecting the application solely on the ground that the application was filed after closure of the evidence. Such rejection could have been justified only if the Trial Court had recorded a finding that the evidence already available on record is sufficient to determine the issue relating to the alleged encroachment. In the absence of any such reasoning in the impugned order, I am of the view that the impugned order is required to be interfered with. For the aforementioned reasons, I proceed to pass the following:

**ORDER**

- i. The writ Petition is ***allowed***.
- ii. The impugned order 08.12.2020 passed in OS.No.46/2014 by the Civil Judge and JMFC, Bagepalli is hereby set aside. Consequently, the



application filed by the petitioner under Order XXVI Rule 9 of the CPC is allowed.

- iii. The trial Court shall appoint the Taluka Surveyor of the Town Municipality, Bagepalli, if not available, then Taluka Surveyor of Bagepalli as a Court Commissioner.
- iv. The said surveyor shall conduct and complete the survey as sought in the application.

**Sd/-**  
**(VIJAYKUMAR A. PATIL)**  
**JUDGE**

ABK  
List No.: 1 Sl No.: 25