



IN THE HIGH COURT OF KARNATAKA AT BENGALURU
DATED THIS THE 9TH DAY OF OCTOBER, 2023
BEFORE
THE HON'BLE MR. JUSTICE VIJAYKUMAR A. PATIL
WRIT PETITION NO.17853 OF 2023 (GM-CPC)

BETWEEN:

1. SRI. MANJUNATHA S.C.
S/O LATE N. CHANNABASAPPA
AGED ABOUT 50 YEARS
PERMANENT R/O SANEHALLI VILLAGE
HOSADURGA TALUK, CHITRADRUGA DIST
NOW RESIDING AT NO.652/K
1ST FLOOR, NEAR NAVARANG CIRCLE
DR. RAJKUMAR ROAD, RAJAJINAGAR
BANGALORE-560010.

...PETITIONER

(BY SRI. RAJASHEKHARA SEERI, ADV.,)

AND:

1. SMT. GANGAMMA
W/O SHIVAMURTHY @ RAGI MURTHY
AGED ABOUT 55 YEARS
R/O NO.17, SIDDRAMANAGARA
HOSADURGA TOWN
CHITRADURGA DIST.

...RESPONDENT

(RESPONDENT SERVED AND UNREPRESENTED)

THIS W.P. IS FILED UNDER ARTICLE 227 OF THE CONSTITUTION OF INDIA, PRAYING TO SET ASIDE THE ORDER DATED 04/08/2023 PASSED BY LEARNED PRINCIPAL CIVIL JUDGE AND JMFC, HOSADURGE, CHITRADURGA ON I.A. NO. XIX FILED BY THE PETITIONER IN O.S. NO.373/2016, VIDE ANNEXURE-D.

THIS PETITION COMING ON FOR PRELIMINARY HEARING IN 'B' GROUP, THIS DAY, THE COURT MADE THE FOLLOWING:



**ORDER**

This writ petition is filed by the petitioner-plaintiff assailing the order dated 04.08.2023 passed on I.A.No.XIX in O.S.No.373/2016 on the file of Principal Civil Judge and JMFC, Hosadurga, Chitradurga (for short, '**the trial Court**'), whereby an application filed under Order XXVI Rule 9 of Code of Civil Procedure, 1908, seeking for appointment of Court Commissioner was rejected.

2. Brief facts leading to filing of this petition are that the petitioner-plaintiff has filed the suit seeking to grant permanent injunction restraining the respondent-defendant from putting up any construction without leaving proper set-back towards the western side of the suit schedule property, declare that the encroachment of the defendant over the suit schedule property to an extent of east to west 1 1/2 feet and north to south 60 feet towards the western side of the suit schedule property is illegal and further prayer to grant mandatory injunction directing the defendant to demolish the illegal construction over the petitioner-plaintiff's suit schedule property. The respondent has opposed the suit by



filing the written statement. In the said proceedings the present application was filed and the same came to be rejected.

3. Sri.Rajashekhara Seeri, learned counsel for the petitioner-plaintiff submits that the trial Court has committed grave error in rejecting the application filed by the petitioner seeking for appointment of Court Commissioner despite the fact that the respondent-defendant has expressed no objection to the said application. It is submitted that the impugned order dated 04.08.2023 is contrary to the settled position of law and material available on record. The petitioner-plaintiff has specifically pleaded in the application that the respondent-defendant has encroached 1 1/2 feet X 60' feet of schedule 'A' property by constructing building in site No.17 and the said encroachment is shown in the schedule 'B' property and to ascertain the correctness of the encroachment it is just and necessary to measure the schedule 'A' property as well as the property of the respondent-defendant. However, the trial Court, without appreciating the averments made in



the application and the material available on record, has erroneously rejected the application. It is further submitted that the petitioner-plaintiff has specifically sought prayer of mandatory injunction against the respondent-defendant and unless the correct portion of encroachment is found out, it would be difficult for the trial Court to grant the said relief. Hence, he seeks to set aside the impugned order dated 04.08.2023 by allowing the writ petition.

4. Though the notice issued to the respondent-defendant is served, she remained absent.

5. Having heard the learned counsel for the petitioner-plaintiff and perusing the material on record, it is not in dispute that the petitioner-plaintiff and the respondent-defendant are neighbours and the petitioner-plaintiff has filed suit in O.S.No.373/2016 seeking prayer to grant permanent injunction restraining the respondent-defendant from putting up any construction over the suit schedule property without leaving proper set back, further prayer to declare that the encroachment of the respondent-



defendant over the suit schedule property to an extent of east to west 1 1/2 feet and north to south 60 feet towards the western side of the suit schedule property is illegal and also prayer for mandatory injunction to demolish the illegal construction over the suit schedule property. The petitioner-plaintiff has specifically made an assertion in the plaint as well as in the application seeking appointment of Court Commissioner that the respondent-defendant has encroached 1 1/2 feet X 60 feet over the suit schedule property by putting up illegal construction in her property i.e., site No.17, and the details of the encroachment are shown in schedule 'B' property. It is specifically pleaded by the petitioner-plaintiff that to ascertain the correct portion of encroachment by the respondent-defendant, it is just and necessary to appoint an independent authority to measure the properties in question to enable the trial Court to address the issue in the suit. This Court is of the considered view that the reasoning assigned by the trial Court that the suit is one for declaration of title and ownership over the suit schedule property and it is the



petitioner-plaintiff who is required to establish his case and the filing of application is at the initial stage is contrary to the settled principles of law. This Court is of the view that when the petitioner-plaintiff is specifically making assertion that the respondent-defendant has encroached schedule 'A' property to an extent of 1 1/2 feet X 60 feet which has been specifically shown as schedule 'B' property and respondent-defendant has expressed no objection, hence no prejudice or harm would be caused to the other side if an independent expert inspect the properties and measure the same. The report of the Court Commissioner would enable the trial court to record the finding on the assertion of the petitioner-plaintiff in the pleading on alleged encroachment.

6. Therefore, this Court is of the considered view that merely appointing of Court Commissioner to measure the alleged encroachment by the respondent-defendant would not amount to decreeing the suit in favour of the petitioner-plaintiff and not amounts to collection of evidence in favour of the party to the suit. However, it would definitely aid the trial Court to decide the controversy



between the parties. It is always open for the respondent-defendant to challenge the report of the Court Commissioner in the pending suit by filing objection and by cross-examining the Court Commissioner. In view of the same, keeping in mind the peculiar facts and circumstances of the case, this Court is of the considered view that the trial Court has committed error in rejecting the application filed by the petitioner-plaintiff. Hence, for the aforementioned reasons, this Court pass the following:

ORDER

The impugned order dated 04.08.2023 passed on I.A.No.XIX in O.S.No.373/2016 on the file of Principal Civil Judge and JMFC, Hosadurga, Chitradurga is set-aside and the I.A.No.XIX filed by the petitioner-plaintiff is allowed and the trial Court is directed to appoint the Court Commissioner as sought in the application on the next date of hearing.

Accordingly, the writ petition is ***disposed of***.

**Sd/-
JUDGE**

BSR