

(2015) 07 KAR CK 0136
In the Karnataka High Court

Case No : Writ Petition Nos. 56289 and 56290-291 of 2013 (GM-CPC)

B.G. Bhagavan and Others

APPELLANT

Vs

The Commissioner, Bangalore Development Authority and
Others

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, Order 26 Rule 9, 151
Constitution of India, 1950 — Article 227

Citation : (2015) 07 KAR CK 0136

Hon'ble Judges : A.V. Chandrashekara, J

Bench : Single Bench

Advocate : R.L. Patil, Senior Advocate for R.L. Patil Associates, for the Appellant;
Ashwin S. Halady, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.V. Chandrashekara, J—Heard the learned counsel appearing for the parties and perused the records. With their consent the matter is taken for final hearing.

2. Petitioner is the sole plaintiff in an original suit bearing O.S. No. 2238/2002 pending on the file of City Civil Judge, Bangalore. It is a suit filed for declaration, title and separate possession of a site situated in Rajajmagar 2nd stage, Bangalore - 10. An application had been filed under Order 26 Rule 9 r/w Section 151 of CPC, by the plaintiff requesting the trial Court to appoint the Joint Director of Land Records, City Survey Bangalore to survey the property and submit a report regarding locality identification of the property in question. That application has been dismissed after contest. Another application under Order 18 Rule 17 r/w Section 151 of CPC has been filed requesting the Court to permit the plaintiff to cross-examine DW. 2 and the said application has also been dismissed. Both these applications have been dismissed by a common order passed on 26.11.2013. It is this common order which is called in question by attracting the provisions of Article 227 of the Constitution of India.

3. The documents placed on record would go to show that the plaintiff had filed a simple suit for permanent injunction against respondent No. 3 - Parmeshwarappa in O.S. No. 3413/1984 before Additional First Munsiff, City Civil Court, Bangalore. The said suit was dismissed after contest. Later on, regular appeal in RFA No. 750/1989 had been filed before this Court and that was also dismissed on 24.11.1998. While dismissing the said appeal, this Court has come to the conclusion that the plaintiff has not been able to make out a clear identity of the property and is liable to possession as asserted by the plaintiff as on the date of filing the suit appears to be doubtful. Ultimately, this Court has observed as follows:-

"It is however, open to the plaintiff to establish her title to the property after taking steps in respect of the allotment and cancellation and then apply for whatever remedy open to her in law."

4. Consequent upon the observation made by this Court, a comprehensive suit has been filed by the plaintiff before the trial Court seeking declaration of title consequently, relief of possession. The grievance of the petitioner is that the trial Court could not have dismissed the application mainly on the ground of delay without looking to the role of the court in adjudicating the matter effectively. Reliance has been placed on the decision of N. Swamygowda Vs. Ramegowda, (2010) ILR (Kar) 897 : (2009) 4 KCCR 3003 . The scope of provisions of Order 26 Rule 9 of CPC relating to the appointment of a commissioner to make local investigation has been well dealt at length in paragraph 9 of the above decision at page 901, which is as follows:

"9. It is also profitable to refer to this Court's judgment in the case of JANAB NIZAR AHMED SHERIFF Vs. A. KANNAN", wherein it is held that if the identity of the property is in dispute, the Court can unilaterally appoint the Court Commissioner, it can even compel the parties to agree to the appointment of the Court Commissioner. The Apex Court in the case of SHREEPAT Vs. RAJENDRA PRASAD & ORS.", has held that 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."

5. Since the very identification of the property is in question any amount of oral evidence would be insufficient to address the issue effectively. The delay in filing such application could have met with by imposing suitable cost. When the plaintiff wants to cross-examine DW. 2 on certain vital points, an opportunity should have been given to the plaintiff to cross-examine DW. 2 by imposing cost. In the light of this and having come to the conclusion that appointment of a commissioner is required to effectively determine the lis regarding identity commissioner is to be appointed. Allowing the plaintiff to further cross-examine DW. 2 would be just and proper. In this view of the matter, the approach adopted by the Trial court needs to be corrected in terms of supervisory jurisdiction vested under Article 227 of the constitution of India.

6. Hence the following:

The petitions are allowed and impugned order is set aside. The learned judge is directed to appoint Joint Director of Land Records, City Survey and to get report at the earliest and DW. 2 to be tendered for cross-examination after receipt of report from the commissioner. Consequently, I.A. Nos. 20, 21 and 22 are allowed on payment of cost of Rs. 5,000/- to be paid to defendant Nos. 3 to 6. Payment of cost is a condition precedent.

Since the matter is of the year 2002, learned judge to make all efforts to dispose of the suit as early as possible preferable within a time frame of 09 months from the next date of hearing. Parties and learned counsel to cooperate with the court in disposal of the matter at the earliest. It need not be reiterated by virtue of this order, the matter should get reopened in the trial Court.