

IN THE COURT OF PRL. CIVIL JUDGE & J.M.F.C
AT CHALLAKERE

O.S.No.210/2012

:PRESENT:

NAGARAJ S ANKASADODDI, (BA., LL.B(spl))
PRL. CIVIL JUDGE & J.M.F.C.,
CHALLAKERE.

THIS THE 1ST DAY OF OCTOBER 2015

PLAINTIFF :- C. Dasareddy

V/S

DEFENDANT :- Smt. Honnamma

PARTIES TO I.A. No. VI

APPLICANT :- Smt. Honnamma

V/S

OPPONENT :- C. Dasareddy

ORDER ON I.A. No. 6 FILED BY THE DEFENDANT
U/O 26 RULE 9 OF C.P.C.

This I.A.No.6 is filed by the Defendant U/o 26 Rule 9 of CPC to appoint Assistant Executive Engineer, PWD, Challakere as court commissioner to inspect the spot and to report existing true state of affairs with respect to the encroachment of 1½ feet open space as contended in Written Statement of the Defendant.

2. It is stated in the affidavit annexed to the application that the present suit is filed by the plaintiff seeking relief of permanent injunction and it is contended that, the Defendant has purchased counter claim schedule property on 29.11.1976. That from the purchase of the same the Defendant has been in possession and enjoyment of the same. It is further stated that, the Defendant fixed the stone towards eastern side of her property by leaving 1 ½ feet space of the counter claim schedule property. After stone slab there is a open space belongs to the Defendant. It is further stated that, the Plaintiff without leaving any space towards western side of the suit schedule property has illegally constructed the ground floor and upstairs which affect free light and air of property of the Defendant. It is further stated that, the Plaintiff is disputing the property of the Defendant. Hence, this application is filed to ascertain the real facts existing in the suit property. Hence, prayed to allow the application.

3. Opposing the said application the Plaintiff has filed objections stating that, the present application is filed only to harass the Plaintiff and is liable to be dismissed. It is contended that, the Defendant having no right over the counter claim schedule property, the Plaintiff and Defendant have enjoyed the plaint suit schedule property jointly by constructing stone compound since several years and Defendant is residing in the adjacent property on the western side of the Plaintiff property which measures 1.5 feet stone slab compound wall. So, the Defendant has no

right, title, interest towards western side of Plaintiff wall. It is further contended that, the Defendant is now trying to put up some construction in the open place of the Plaintiff schedule property to create such right over that common passage to the Plaintiff western side wall by way of putting additional structures, stones, slabs etc. attempting to encroach portion of the common passage of the Plaintiff of western side portion. It is further contended that, the Defendant is unnecessarily dragging the proceedings on one or the other reasons and this application filed harass the Plaintiff. Hence, sought for dismissal of the application.

4. Heard learned counsel for the plaintiff and defendants and perused the materials placed before the court.

5. Now, the points that would arise for my consideration are;

1. Whether the appointment of commissioner is necessary for complete adjudication of the controversy involved?

2. What order?

6. My finding on the aforesaid points for consideration is:

POINT NO.1 : In the affirmative

POINT NO.2 : As per final order for the following:

REASONS

7. POINT NO.1: The suit is one for permanent injunction against the Defendant from interfering with the enjoyment of the western side wall of the Plaintiff's house i.e. by plastering, painting, cleaning and etc. the Defendant also filed counter claim seeking the relief of permanent injunction restrain the Plaintiff from causing interference of the peaceful possession and enjoyment of the suit property by the Defendant and also seeking mandatory injunction for demolition of 1½ feet space encroached by the Plaintiff.

8. In the present case, the Defendant claims that, the Plaintiff has encroached 1½ feet space belongs to him. It is contended that, the Defendant has purchased the counter claim schedule property on 29.11.1976 and from the date of purchase she has been in peaceful possession and enjoyment of the same. It is further contended that, the Defendant being aged about 75 years, by taking undue advantage of her old age in the month of September 2012 the Plaintiff encroached 1½ feet space belongs to the Defendant and also the Plaintiff made hectic efforts to put up the construction in the counter claim schedule property and hence, to ascertain the existing state of affairs, the appointment of commissioner is necessary.

9. Contrary to this, the Plaintiff contended that, the appointment of commissioner would result in collection of evidence and the Defendant is at liberty to substantiate her

claim by leading evidence and as such, the application is not maintainable.

10. On hearing the rival submissions made by the parties and on perusal of the materials placed before the court, it is apparent that there is a serious dispute as to the alleged encroachment of 1½ feet space of the counter claim schedule property and the present suit is filed for permanent injunction and also filed counter claim by the Defendant for seeking mandatory injunction against the Plaintiff for demolition of 1 ½ feet space alleged to have been encroached by the Plaintiff and in such a situation, the appointment of commissioner cannot be considered to be collection of evidence. But, it is to elucidate the matter which are local in character and which can be done by only local inspection at the spot.

11. Order 26 Rule 9 CPC contemplate that whenever the court is unsure about the factual aspect of the matter and is of the opinion that the local inspection is required to be done for the purpose of elucidating any matter in dispute, it may appoint a commissioner. Thus, in the instant case, since the alleged encroachment of 1½ feet is in dispute, it is just and necessary that a local inspection has to be conducted and the commissioner has to report the existing state of affairs of the counter claim schedule property and in such a situation, appointment of commissioner should not be mistaken for collection of evidence. Thus, in view of the reasons assigned so far, it is opined that appointment of

commissioner is just and proper and accordingly the above said point for consideration is answered in the affirmative.

12. POINT NO.2:- In view of my findings on Point No.1, I proceed to pass the following :-

O R D E R

**The I.A.No.6 filed by the Defendant
U/o 26 Rule 9 R/w Sec. 151 of CPC is
hereby allowed.**

No order as to costs.

**Both parties to file their memo of
instructions.**

**Commissioner fee is fixed at
Rs.1,500/-.**

**Assistant Executive Engineer, PWD,
Challakere is appointed as Court
Commissioner and the commissioner is
directed to conduct local inspection and
report the true existing state of affairs
with respect to the suit schedule property
to the court.**

(Dictated to typist and typed by him, corrected and then pronounced by me in the open court on this the 1st day of October 2015)

(Nagaraj S Ankasadoddi)
Prl. Civil Judge & JMFC,
Challakere.