

OS 62/2015 Dt:22-10-2020

ORDERS ON I.A.NO.XII

I.A.No.XII is filed by the plaintiff under Sec. 151 of CPC praying to recall the order dated 19.08.2017 passed on I.A.No.7 and issue commission as prayed in the I.A.No.7 and such other reliefs.

2. In the accompanying affidavit it is alleged that, the plaintiff filed an application under Order 26 Rule 9 of CPC for issuance of commission. The

said I.A. was disposed off by this Court on 19.08.2017 by observing that, the issuance of commission may be considered after recording of evidence. It is also alleged in the affidavit that, the defendants are now trying to sell their property including the encroached property which belonged to the plaintiff. Once it is sold, then it is necessary to implead the subsequent purchaser of the defendants' property. Therefore, in order to avoid all those unnecessary circumstances, it is just and necessary to allow the application filed by the plaintiff under Order 26 Rule 9 of CPC. Therefore, the plaintiff has prayed to allow the present I.A. by recalling the order dated 19.08.2017.

2. On the other hand, the defendants have filed objections stating that, there was a clear observations by this court in the order dated 19.08.2017 that, if there is any ambiguity for identification of properties even though after recording of evidence, the parties are at liberty to reopen the I.A.No.7. In the present case, the evidence has not been completed. There is no ambiguity explained by the plaintiff. Therefore, the defendants have prayed to dismiss the I.A.

3. Heard the arguments. The following points for arise for consideration;

1) Whether it is necessary to recall the order dated 19.08.2017?

2) What order?

4. Findings to the above said points as here under;

Point No.1:- **Affirmative**

Point No.2:- As per final order for the following;

REASONS

5. **Point No.1:-** It is not in disputed that, the plaintiff filed an application for appointment of Court Commissioner along with surveyor to identify the suit property and to locate the encroachment made by defendant in the suit property. On the contrary, defendant no.1(a) to 1(e) filed objection to the said application and submitted that, the commissioner cannot be appointed for collection of evidence. Hence, prays to dismiss the application.

6. After examining the documentary and pleadings, it was held that, the instant suit is filed by the plaintiff against the defendants for mandatory injunction. In the instant case, the plaintiff has to prove her case by giving oral and documentary evidence. If there would be any ambiguity in evidence then the Court would consider the appointment of court commissioner. At

this juncture appointment of commissioner does not arise and if application is allowed, it is nothing but collection of evidence. After considering the one of the Judgment by the Hon'ble High Court of Karnataka, it was also held that, under Order 26 CPC, a Commissioner can be appointed to make local investigation to investigate the facts or other materials which are found in the property and to make a report in regard to that matter to the Court. Hence, the application is kept in abeyance at this juncture and followed order has been passed. The orders is as hereunder;

I.A.No.VII which is filed by applicant/ plaintiff under Order 26 Rule 9 and Section 151 of CPC is hereby kept in abeyance.

It will be considered after completion of evidence of both the parties if there would be any ambiguity in evidence.

7. The plaintiff has specifically stated in the present application that, the defendants are making attempts to sell their property which includes the portion of plaintiff's property which encroached by the defendants. It is also specific case of the defendants that, if the commission is not issued and the defendants are permitted to sell including the encroached portion, then it is difficult for the plaintiff to make other persons who purchase the

defendants' property to make as party in the present case. The counsel for the defendants has fairly submitted that, after measurement of the plaint 'A' schedule property, if it is found that there is no encroachment by the defendants, the plaintiff will file an application for withdrawal of suit. Therefore, considering the submission of the learned counsel for the defendants and in order to avoid multiplicity of proceedings, it is just and necessary to recall the order dated 19.08.2017 and issue commission as prayed in I.A.NO.7. Accordingly, the Point No.1 held in the **Affirmative**.

8. **Point No.2:-** For the above said reason, the following;

ORDER

I.A.No.XII filed by the plaintiff is hereby allowed.

The order dated 19.08.2017 is hereby recalled.

The application filed by the plaintiff under Oder 26 Rule 9 of CPC is allowed.

Call on for suggestion of commissioner's name by 23.10.2020.

sd/-
Civil Judge and JMFC,
Moodbidri

