

25-06-2019

Order on I.A.No.10

ORDERS ON I.A. No. X.

The instant I.A. is filed U/Order XXVI Rule 13 r/w 151 of CPC by the applicants/petitioners through their learned counsel with a prayer appoint Court Commissioner to divide the properties and propose scheme of partition as per Preliminary decree for the reasons mentioned in the accompanying affidavit. A memo also filed to reject the commission report already submitted on 29.11.2016.

3. On the other hand, the learned counsel for the opponent/respondent No.1, has filed detailed statement of objections contending that, contents of I.A. and affidavit are false, frivolous, vexatious and not maintainable either in law or on facts. It is contended that unless previous commission report is rejected this IA is not maintainable. These among other grounds, it is prayed for rejection of the IA.

4. Heard and perused.

5 The points that arise for my consideration are:

- 1) *Whether the instant I.A.No.10 filed by applicants/petitioners U/Order XXVI Rule 13 r/w Sec.151 of CPC deserves to be allowed?*
- 2) *What order?*

6. My findings on the above points are as under.

Point No.1: In Affirmative.

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

REASONS

7. **Point No.1:** Admittedly, this FDP is out come of Preliminary decree passed in OS 185/2006 by this court on 6.3.2009, Plaintiffs are declared together entitled for 1/6 share in the suit-A schedule properties which are residential houses. It was challenged by the respondents by filing RA No. 62/2009, it came to dismissed and Judgment of trial court came to be confirmed. Since the respondents did not effect partition and separate possession, the petitioners were constrained to file this petition.

8. Respondents No. 2 to 4 have remained absent placed exparte. Respondent No.1 has contested this matter. Already this court appointed City Surveyor, Hubballi as court Commissioner, who submitted report with sketch maps. It is objected by respondent No.1. Enquiry has been conducted. Court Commissioner as CW-1, has deposed as regards his commissioner work, 4 documents came to be marked as Ex.C.1 to C.4. But in his Cross examination it is forthcoming that he did not obtain valuation certificate of suit properties from the office of Sub-Registrar, there is no mention as regards area of the suit properties in the Preliminary decree.

He could not give measurement of the sub-division of each property. He is also Cross examined as regards his experience in measuring the suit properties and telemarketing shares.

9. As per instant IA and memo it is forthcoming that the court commissioner has not shown pathway in the suit properties for ingress and egress.

10. So at this juncture, it is necessary to reject the commission report dtd. 28.11.2016 and appoint marked C-1 to C-4 and appoint fresh commission for fair and complete adjudication of the **lis**. No harm will cause to the respondents. In the interest of the justice and equity, it is necessary to appoint commission as prayed. Hence, I answer Point No.1 in the “**Affirmative**”.

11. **Point No.2:** In view of answer to the Point No.1, I proceed to pass the following:

ORDER

I.A.No.X filed by the applicants by /petitioners, U/Order XXVI Rule 13 r/w Sec.151 of CPC is hereby allowed.

Commission report on record marked as Ex.C-1 to C-4 is rejected.

The City Surveyor, Hubballi is appointed as Court Commissioner to divide the suit properties by metes and bounds as per Preliminary decree and propose scheme of partition along with sketch maps in accordance with law within two weeks.

Commission fee is fixed at ₹1,000/-

Issue Commission warrant.

Await CR.

Call on : 12.07.2019.

**I Addl. Senior Civil Judge,
Hubballi.**

