

ORDER ON I.A. NO.X AND XI.

These are the I.A.No.X and XI filed by the learned counsel for the applicant/defendant under Section 151 of C.P.C. and Order 26 Rule 10(2) read with Section 151 of C.P.C. respectively, seeking to re-open the case from the stage of arguments to the stage of evidence and permit the defendant to examine the Court Commissioner.

2. In the I.A.No.X and XI it is stated that for the reasons mentioned in the accompanying memorandum of affidavit that, the case has been filed by the plaintiff for the relief of declaration and mandatory injunction in respect of plaint schedule property. Now the above case is posted for arguments. In the above case this court has appointed the Surveyor as Court Commissioner and he has inspected the spot and filed a detailed report to the Court. The Court Commissioner has submitted his report and same has been objected by the defendant by filing objection. Further stated that, the Court Commissioner has not followed the memo of instructions filed by him. Further, the Court Commissioner has submitted report in favour of plaintiffs and same has been objected by her. Hence, the Court Commissioner has to be examined in respect of report submitted by him. Now he has to be examined. If the above applications are allowed no hardship will be caused to the plaintiffs, on the other

hand if not allowed he will be put to untold hardship and inconvenience. Accordingly, prayed to allow the I.A.No.X and XI.

3. On the other hand, the learned counsel for the opponents/plaintiffs have objected the above application by filing objection to the said application. The plaintiff has contented that, the applications filed by the defendants is not maintainable. Further contented that, the plaintiff has filed the application under order 26 Rule 9 of C.P.C for appointment of Taluk Surveyor as Court Commissioner. Thereafter, the Taluk Surveyor has filed report in accordance with law. Further contented that, the Court Commissioner clearly mentioned that, the defendant No.1 has encroached $\frac{1}{2}$ guntas of land of plaintiff. Further contented that, the Court Commissioner report is throwing light on issue and also the contentions raised in the written statement and also evidence adduced by the parties. Hence, the question of examine the Court Commissioner is not warranted. The defendant has filed the present application in order to drag on the proceedings. Hence, prays to reject the application.

4. Heard and perused the materials available on record.

5. In this case, I have completely gone through the entire suit file. This is the suit filed by the plaintiff for the relief of declaration, permission and mandatory injunction. In this case, already the evidence of both plaintiff and defendants side has been completed and posted for arguments. When the case has been posted for arguments, applicant/defendant No.1 has come up with these I.A.No.X and XI with a prayer to re-open the case and seeking permission to examine the Court Commissioner.

6. After careful perusal of the entire case file and also after hearing the both sides on these I.As., I have also perused the specific provision of Rule 17 of Order XVIII of C.P.C. which states that, "*the Court may at any stage of the suit recall any witness who has been examined*". As per the above provision, the Court may permit the party to re-call his witness for further examination at any stage of the suit that includes even at the stage of argument. However, it is the discretionary power of the Court. The applicant/defendant intends to examine the Court Commissioner.

7. After going through the contents of affidavit of I.A.No.X and XI, I have also gone through the provision of **Order 26, Rule 10(2) of C.P.C.**, which reads as under:-

“10(2):- Report and depositions to be evidence in suit – the report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or has to his report, or has to the manner in which he has made the investigation.”

8. On careful scrutiny of the above provision of law it is crystal clear that, the Court or with the permission of the Court any of the parties to the suit may examine the Commissioner personally in the open Court. Therefore, in the instant case the suit filed by the plaintiff for the relief of declaration and mandatory injunction it is also the burden of the defendants to disprove the case of the plaintiff. Moreover, the statutes itself has given right to the parties to examine the Commissioner personally in open Court with respect to his report and investigation. Therefore, the sufficient opportunists are to be given to him. Therefore, in my opinion if these I.A's. are allowed no hardship is caused to the opponent/plaintiff and it will not allowed it will be greater hardship is caused to the applicant/defendant. Therefore, it is necessary in the

interest of justice and equity to allow the I.A.No.X and XI. Accordingly, the applicant has made out sufficient grounds to allow the above I.A's. In these circumstances this Court has no other option except allowing the I.A.No.X and XI. Hence, I proceed to pass the following:-

:: O R D E R ::

The I.A.No.X and XI filed by the learned counsel for the applicant/defendant No.1 under Section 151 of C.P.C. and under Order 26 Rule 10(2) of C.P.C. respectively, are hereby **allowed.**

The applicant/defendant No.1 is hereby permitted to cross examine the Court Commissioner.

Issue witness summons to the Court Commissioner by name B.M.Manohar, Taluk Surveyor, T.Narasipura, to present before the Court and adduce evidence with respect to the Commissioner report dated:10.03.2023.

The applicant/defendant No.1 has directed to deposit the witness batta of **Rs.500/-**.

For further evidence of defendant.

Call on:16.12.2024.

**Addl. Civil Judge & J.M.F.C.,
T.Narasipura.****