

ORDER ON I.A.NO.XII

The counsel for defendant No.1 has filed I.A.No.XII under Order XXVI Rule 9 R/w Sec.151 of CPC praying to issuance of commission for the purpose of holding local inspection of the suit properties and to call for a report as mentioned in the application.

In the annexed affidavit, the defendant No.1 states that, plaintiff has filed the suit against him and another seeking relief of mandatory as well as prohibitory injunction on the ground urged in the plaint, which grounds are controverted by him in his written statement in detail and defendant No.1 has also sought for counter claim as against the plaintiff seeking relief of permanent prohibitory injunction. It is his specific case that, the plaintiff got constructed the compound wall to her property and while doing so she had illegally enclosed the site of 5' width reserved roadway passing on the northern side of her property as also the 20' width road way passing on western side of the property allotted to the share of the plaintiff by enclosing the sites of said reserved roadways leaving only 20' width of road way lying to the west of the plot of land allotted to the share of the 2nd defendant and the 5' width of roadway to the south of the property of 2nd defendant. In order to have first hand information and to enable the court to appreciate the real matter in controversy, it is absolutely essential to appoint an advocate commissioner and call for a report as prayed for, which report will definitely help the court in arriving at just conclusion in the suit. No prejudice will be caused to the other side, if the application is allowed. Infact the plaintiff's counsel himself has suggested for appointment of a commission while he had cross examined defendant No.1. Hence, prayed to allow the application.

On the other hand, the counsel for the plaintiff has filed objection to the present application and contended that the application filed by the defendant is belated and not maintainable. However, on 26.08.2015 as per Ex.P.7, the property was measured by the Taluk Surveyor. This particular survey took place at the instance of Police Station Bajpe, it was again measured on 20.10.2015. The defendant\DW1 agreed before the Police Station for measurement by surveyor. The points raised by defendant cannot establish encroachment by

defendant. Therefore, it is submitted that plaintiff also should be given opportunity to file her work memo, so as to come to exact conclusion of encroachment as explained in the plaint. Further mentioned the points for consideration/ work memo on behalf of the plaintiff.

Heard and Perused the materials available on record.

The suit is one for mandatory injunction directing the defendants to vacate the 'C' schedule property and deliver to plaintiff and remove the encroachment made by them and for permanent mandatory injunction restraining the defendant from further encroaching into the 'A' schedule property in any other manner.

On the other hand the defendant has contended that, the plaintiff has illegally built the compound wall on the northern side of her property by enclosing the reserve 5' width of reserved road way and sought for counter claim for the relief of permanent mandatory injunction directing the plaintiff to clear the blockage caused by her to the reserved common road way lying on the northern side of th property bearing S.No.35/6 of Kondamoola village of Mangalore Tq, got allotted to the share of plaintiff in the Partition deed dated 11.01.1999, bearing Document No.1238/98-99, by ordering for the removal/shifting of the illegally constructed western and northern compound walls to its further east and south respectively so as to have a clear right of user of common road ways of 20' width on the western side and also the road way of a total 10' width inclusive of the 5' width reserved roadway on the southern side of the property allotted to the share of 2nd defendant as set out in the Partition deed dated 11.01.1999 executed by the plaintiff and 2nd defendant in favour of 1st defendant.

As the plaintiff has alleged encroachment of plaint 'A' schedule property by the defendants and also the defendant No.1 has alleged that the plaintiff

illegally got constructed the compound wall to her property by enclosing the site of 5' width reserved roadway passing on the northern side of her property as also the 20' width road way passing on western side of the property allotted to the share of the plaintiff by enclosing the sites and leaving 20' width of road way lying to the west of the plot of land allotted to the share of 2nd defendant and 5' width of road way lying to the south of the property of 2nd defendant, it is necessary for a commissioner report for proper adjudication of the matter. Now, the evidence of both the parties has been concluded and the defendant has made this present application for appointment of court commissioner. Since there is dispute of encroachment and illegal construction by both the parties, the assistance of commissioner's report would be necessary for proper adjudication of the matter. The plaintiff has already mentioned the points for consideration/ work memo for commission work. Therefore, the I.A. deserves to be allowed. Accordingly, I proceed to pass the following:

ORDER

The I.A.No.XII filed by the defendant No.1 under Order XXVI Rule 9 R/w Sec.151 of CPC is hereby allowed.

The Court Commissioner is appointed for local inspection of the suit properties as mentioned in the application.

To suggest the name of the Court Commissioner.

Call on:27.03.2023

**III Addl. Civil Judge & JMFC.,
Mangaluru, D.K.**