

THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

CRP.No.4002 of 2015

ORDER:

The petitioner in the C.R.P challenges the Order dated 07.09.2015 in I.A.No. 1338 of 2015 in O.S.No.175 of 2013, whereby and whereunder, the learned Principal Senior Civil Judge, Srikakulam allowed the petition filed by the defendant No.3 in the suit for appointment of Commissioner to verify the properties of the plaintiff as well as the defendants covered by old Survey No.434 and new survey No.9211 with the help of Mandal Surveyor.

2) The factual matrix of the case is thus:

- a. The petitioner is the plaintiff in O.S.No.175 of 2013 who filed the suit initially on the file of I Additional Junior Civil Judge, Srikakulam, for perpetual injunction against the defendant Nos. 1 to 4 and later got amended the plaint reliefs for declaration and recovery of possession and as those reliefs exceed pecuniary jurisdiction of the trial Court took return of the suit and filed before Senior Civil Judge, Srikakulam. When the suit was pending before I Additional Junior Civil Judge, Srikakulam, the plaintiff filed I.A.No.92 of 2011 for appointment of Commissioner to note the physical features of the plaint schedule property with the help of Mandal Surveyor and the said petition was allowed and the Commissioner executed the warrant and filed his report. The work memo given by defendant No.3 was rejected by the Commissioner observing that the measurements sought to be made in the work memo i.e., to measure the sites of defendant No.3 and other defendants, was beyond the scope of Commission Warrant. Thereafter, it appears, defendant No.3 filed I.A.No.567 of 2015 seeking re-entrustment of the warrant to the Commissioner to answer his work memo and by an Order dated 16.07.2015, learned Principal Senior Civil Judge, Srikakulam, dismissed the said petition observing that since the prayer of the petitioner was beyond the scope of warrant and as the evidence was going on, the Petition cannot be allowed, but it was open to the petitioner/defendant

No.3 to file a fresh petition to appoint Commissioner with specific prayer showing the necessity to measure the entire land belonging to the plaintiff and defendants. Hence, defendant No.3 filed I.A.No.1338 of 2015 seeking appointment of a Commissioner to verify the properties of the plaintiff as well as the defendants covered by old survey number 434 and new survey number 9211 with the help of Mandal Surveyor. The purpose for appointment of Commissioner, as per defendant No.3 is that the defendant No.3 purchased the property from first defendant long prior to plaintiff purchased the plaint schedule property from the same vendor and therefore, there was no question of defendant No.3 encroaching into the plaint schedule property at that time. Further, the plaintiff while purchasing the property from the first defendant simply obtained Sale Deed without getting the physical measurements of the property purchased by her. Therefore, to determine whether the defendant No.3 encroached into the property of plaintiff or not, it is apposite to measure the entire property got by the first defendant, who is the original owner and who in turn sold to defendant Nos. 2 to 4 and plaintiff in parts. Added to it, subsequent to the purchase of the property by the defendant No.3, there was a re-survey and thereby the old survey number of the property of first defendant was changed and the new survey number was assigned and thereby there was a possibility of change in the physical features of the property purchased by each party and unless the entire property is measured, the issue cannot be decided and the Court cannot come to a just conclusion. The Plaintiff opposed the said petition. However, learned Principal Senior Civil Judge, Srikakulam, opined that unless the entire property was got measured with the help of sale deeds belonging to both parties, no useful purpose would be served and hence a Commissioner need to be appointed and by this count, no prejudice would be caused to the plaintiff and accordingly, allowed the petition.

Hence, the instant C.R.P at the instance of the petitioner/plaintiff.

3) Heard both sides.

4) The main contention of the learned counsel for petitioner against the appointment of a Commissioner is that such appointment of a second Commissioner would amount to fishing out evidence for the defendant, which the law does not permit, and the first Commissioner appointed by the Court has given a vivid report, which will be suffice to determine the issues involved in the case. In this context, he relied upon the following decisions:

1) **A. Gopal Reddy v. R. Subramanyam Reddy and another.**

2) **Batchu Narayana Rao v. Batchu Venkata Narasimha Rao.**

5) In the light of the above rival contentions, the point for determination is:

“whether there are merits in the CRP to allow ?”

6) **POINT:** On perusal of record and after hearing both sides, it must be said the Order dated 7.09.2015 in I.A.No.1338 of 2015 is factually and legally sustainable. It should be noted that initially the plaintiff filed the suit for injunction simpliciter, wherein he got appointed a Commissioner for localization of the plaint schedule property and for noting the physical features and to measure the same with the help of Mandal Surveyor and revenue records and the Commissioner did the same. At that time, when defendant No.3 sought for answering his work memo to measure not only the plaintiff's site but also the properties of defendants, the Commissioner refused as it was beyond the scope of the Commission Warrant. Be that it may, subsequently the plaintiff got amended the plaint and converted the suit into one for declaration and recovery of possession and thereby the suit was transferred to Principal Senior Civil Judge, Srikakulam. Needless to say, it is a comprehensive suit. At this juncture, since the subsequent prayers are comprehensive ones, the plaintiff has to establish his title in respect of the plaint schedule property and also to establish that the defendant encroached into a part of it. The contention of the defendant No.3 is worth noting at this juncture. His submission is that plaint schedule property and his property were all originally belonged to first

defendant and long prior to the plaintiff, he purchased a part of the said property and subsequently, the plaintiff purchased the remaining extent but without actually getting the property physically measured and further, there was a re-survey on account of which, old survey numbers of the properties in the vicinity including the suit survey number were changed and their extents were also reduced and in this backdrop, to decide whether defendant No.3 made any encroachment into the plaintiff's property or not, there is every need to measure not only the plaintiff's property as did by the Commissioner when the suit was only for injunction simpliciter, but also the properties of the first defendant and defendant Nos. 2 to 4 to have a better comprehension. His submission was found favour with trial Court. I find every legal justification in the contention of defendant No.3. Unless a comprehensive localization and measurement of all the parties concerned are made, the Court cannot arrive at a just decision. In this backdrop of the facts, there is no other way the Court can determine the issue of alleged encroachment. Therefore, in my considered view, the appointment of Commissioner though a second one in the very suit, does not amount to fishing out evidence for any party but rather exhuming the truth, which is a vital component for a just decision in the suit. I have gone through the cited decisions. It must be said that they do not apply to the present facts in the case. Hence, they will not enure to the benefit of the revision petitioner.

7) In the result, the C.R.P is dismissed, but without costs.

As a sequel, miscellaneous petitions, pending if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 05.10.2015

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Dt. 05.10.2015

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