THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CIVIL REVISION PETITION No.101 of 2015

ORDER:

This Civil Revision Petition is filed challenging the order dt.31-12-2014 in I.A.No.987 of 2014 in I.A.No.1868 of 2005 in O.S.No.1501 of 2005 of the Principal Junior Civil Judge, Tirupati.

2. The petitioner herein is defendant in the suit. The respondents/plaintiffs filed the above suit against the petitioner for a perpetual injunction restraining the petitioner from in any way interfering with their alleged possession and enjoyment of the plaint-A to F schedule properties.

3. Written statement was filed by petitioner opposing the suit claim.

4. The respondents filed I.A.No.1868 of 2005 seeking appointment of an Advocate-Commissioner to note down the physical features of the plaint schedule properties. The said application was allowed and one Sri S.P. Balaji Kumar, Advocate, Tirupati was appointed as Advocate-

Commissioner to note down the physical features of the plaint schedule properties. He visited the plaint schedule properties and submitted his report dt.02-05-2006.

5. Thereafter on 17-12-2014, the respondents/plaintiffs filed I.A.No.987 of 2014 to redirect the same Advocate-Commissioner, who had submitted his report in I.A.No.1868 of 2005 to re-inspect the petition schedule properties and to note down its physical features particularly certain developmental activities/structures, which according to respondents are illegally being made by petitioner.

6. In the affidavit filed in support of the said application, it is contended that petitioner had nothing to do with the plaint schedule properties and she is a resident of Bangalore and she was never in possession and enjoyment of the plaint schedule properties. It was alleged that she, along with her followers, criminally trespassed into the plaint schedule properties along with 100 unsocial elements and removed the demarcating stones, because of which the suit was filed; that no Presiding Officer was posted in the trial Court for considerable time and taking advantage of it, the petitioner is changing the physical features of the plaint schedule properties by engaging hired gundas. It was

further contended that the petitioner deployed machinery like J.C.B., tractors etc. and changing the physical features every minute; the said application was returned initially and the petitioner kept quiet for a few days; that she again engaged more than 100 men and machinery and was trying to make temporary structures; the respondents at that time filed I.A.No.650 of 2011 seeking reappointment of the Advocate-Commissioner and direct him to revisit the plaint schedule properties at once and note down the physical features of the plaint schedule properties; when that application was coming up for hearing, the petitioner again kept quiet and represented that she is ready for trial; and so the Court below closed the petition on 08-03-2013 by passing a docket order to the effect that “since trial is commenced in the suit and the counsels for both the parties reported no objection to close without prejudice to their rights”. It was further contended that the petitioner had entered into a contract with a third party for construction of residential apartments and is proceeding ahead by digging pits, by raising pillars etc., and also by keeping floodlights for execution of work at nights. The respondents, therefore, contended that there is grave urgency to note down the physical features since the physical features as on the date of filing of I.A. i.e. 17-12-2014 may not be there if they are changed.

They therefore prayed that Sri S.P. Balaji Kumar, Advocate, who earlier inspected the property, should be directed to re-inspect the suit schedule property and to note down the physical features and ongoing developmental activities therein which are being illegally made by petitioner.

7. Counter affidavit was filed by petitioner to the said application. The petitioner contended that she is the absolute owner of the plaint schedule property; that respondents either by mistaken identification or with malafide intention to knock away the petitioner's property, attempted to construct temporary structures in the property, which was subject matter of O.S.No.1086 of 2005 filed by her; that she alone is in possession and enjoyment of the property of extent Ac.3.00 in Sy.No.3/2C/2/2E2; that the Advocate-Commissioner appointed in I.A.No.1868 of 2005 had acted beyond the scope of the warrant entrusted to him and had not considered the memo filed on behalf of the petitioner; therefore the said Advocate-Commissioner had not acted in a *bona fide* manner and the same Commissioner cannot be redirected to again visit the plaint schedule property as it would cause injustice to her. She further pleaded that there is no question of redirecting the Court

Commissioner to visit the plaint schedule property at all; that possession of the property alone is relevant in a suit for perpetual injunction; and that respondents had not approached the Court with clean hands. The petitioner in the counter affidavit specifically denied that she was doing any activity in the plaint schedule properties such as deploying machinery or changing the physical features.

8. By order dt.31-12-2014, the Court below allowed I.A.No.987 of 2014 but instead of earlier Advocate-Commissioner Sri S.P.Balaji Kumar, it appointed one Sri S.Harichandra Prasad, as Advocate-Commissioner to note down by the physical features of the suit schedule property with the assistance of the Mandal Surveyor. In the said order, the Court below observed that respondents have asserted that petitioner is changing the physical features by digging pits and raising pillars to construct a building etc; but the petitioner had contended that there was no such construction and learned counsel for petitioner had reported that construction was going on in the property of petitioner, but not in the suit schedule property. It further held that if construction is made in the suit schedule property, the very purpose of filing the suit on the premise that it is vacant site would be frustrated; respondents have to amend the plaint by seeking the

relief of delivery of possession of property and for removal of structures by seeking relief of mandatory injunction; and therefore it is necessary to verify whether the plaint schedule property is a vacant site as contended by respondents or whether there were any structures being raised therein. It held that appointing an Advocate-Commissioner would enable the Court to find out whether the plaint schedule property is a vacant site or not or whether there was any construction made therein and it would assist the Court in disposal of the suit. It held that since the petitioner had doubted the integrity of Sri S.P. Balaji Kumar, the earlier Advocate-Commissioner, a different Advocate-Commissioner is being appointed to submit his report. It held that it had ample power to appoint an Advocate-Commissioner to note down the physical features and no prejudice would be caused to either party if an Advocate-Commissioner is appointed and the report would help both parties as well as the Court to come to a just decision.

9. Questioning the same, this Revision is filed by petitioner.

10. Sri E.Madan Mohan Rao, learned counsel for petitioner contended that the Court below ought not to have appointed another Advocate-Commissioner to

inspect the suit schedule property and submit a report when there was already a report of the earlier Advocate-Commissioner Sri S.P.Balaji Kumar in I.A.No.1868 of 2005 and since the suit was for perpetual injunction, directing the Advocate-Commissioner to again inspect the property to note down the physical features will not assist the Court in any manner in deciding the suit. The learned counsel for petitioner also contended that respondents themselves have admitted that they filed I.A.No.650 of 2011 but did not press it on 08-03-2013 and it was closed on that day and therefore, there was no warrant for the Court below to again pass the impugned order, and therefore, the impugned order be set aside.

11. The learned counsel for respondents, on the other hand, contended that the order of the Court below is correct and did not warrant any interference by this Court under Article 227 of the Constitution of India. He contended that between the time when the earlier Advocate-Commissioner visited the suit schedule property and the date when I.A.No.987 of 2014 was filed, there is change in the physical features of the property carried out by the petitioner, and therefore, the Court below was justified, in the interest of justice, to appoint an Advocate-Commissioner to again visit the plaint schedule property

and to note down the physical features therein.

12. I have noted the submissions of both sides.

13. The suit filed by respondents is no doubt for a perpetual injunction restraining the petitioner from interfering with their alleged peaceful possession and enjoyment of the plaint schedule property which was described as a vacant site. Admittedly, in I.A.No.1868 of 2005, at the instance of respondents, an Advocate-Commissioner was appointed and the said Advocate-Commissioner has filed his report on 02-05-2006. An application for temporary injunction in I.A.No.1867 of 2005 was also filed by respondents in the suit and urgent notice was ordered thereon. It appears that the disposal of the suit got delayed because of absence of the Presiding Officer in the Court of Principal Junior Civil Judge, Tirupati for some time.

14. Be that as it may, I.A.No.650 of 2011 was filed by respondents for reappointment of Sri S.P. Balaji Kumar, Advocate, Tirupati, who had earlier inspected the properties and filed his report, seeking a direction to re-inspect the suit schedule property again and note down the physical features therein. According to the respondents, after that application was filed, the petitioner

kept quiet and therefore the trial was commenced and the application was closed without prejudice to the rights of both parties.

15. According to the respondents, again before filing of I.A.No.987 of 2014, the respondent started making construction of residential apartment in the plaint schedule properties by digging pits and by raising pillars using floodlights also at nights and the physical features were being changed everyday. This allegation is not admitted by petitioner. According to petitioner, no constructions were being undertaken in the plaint schedule property, but constructions were being done in the property of petitioner, which is not the plaint schedule property.

16. In view of the fact that respondents asserted that the petitioner is making construction in the plaint schedule property and petitioner is disputing the same, and since according to respondents the constructions were being carried on at or about the time when they filed I.A.No.987 of 2014 i.e. on 17-12-2014, the dismissal of I.A.No.650 of 2011 on 08-03-2015 by the docket order would not bar the respondents from filing I.A.No.987 of 2014 because admittedly I.A.No.650 of 2011 was closed without prejudice to the rights of either parties. The commencement of constructions allegedly by petitioner

just prior to filing of IA 987/2014 is a fresh cause of action entitling the respondents to file a fresh application.

17. Also, if it is found from the Advocate Commissioner's report that constructions were being carried on in the plaint schedule property, as observed by the trial Court, it would necessitate the respondents to make application for amendment of plaint seeking the relief of recovery of possession of the plaint schedule property and also for removal of the structures constructed therein by way of mandatory injunction.

18. Therefore, I complete agree with the view expressed by the Court below that by appointment of the Advocate-Commissioner in the facts and circumstances of the case again to inspect the plaint schedule properties and note down their physical features with the assistance of Mandal Surveyor would assist the Court in deciding the issue in the suit.

19. That apart, the petitioner having filed a counter affidavit in I.A.No.987 of 2014 denying making of any alterations in the physical features of the plaint schedule property, cannot shy away from enquiry by the Court below as to whether such a statement made in the counter-affidavit by her is a false statement or not. If an

Advocate-Commissioner is appointed to visit the plaint schedule property and note down the physical features, it would assist the Court in coming to conclusion whether the stand taken in the counter affidavit in I.A.No.987 of 2014 by petitioner is true or false. If the Court below comes to the conclusion on the basis of the report of an Advocate-Commissioner and other material evidence that the petitioner had filed a false affidavit, it would render the petitioner liable for further action for perjury and for proceedings to be initiated against her under Contempt of Courts Act, 1971 for such false statement.

20. In **Haryana Waqf Board Vs. Shanti Sarup and others**[1] the Supreme Court has held that whether in a suit for injunction there is a necessity for demarcation of the disputed land, it would be proper for the Court to direct the investigation by appointing a local Advocate-Commissioner under Order XXVI Rule 9 CPC.

21. In the present case also, there is dispute as to whether the plaint schedule property and the land claimed by petitioner are one and the same. Therefore, appointing an Advocate-Commissioner to note down the physical features with the assistance of the Mandal Surveyor is appropriate and was rightly ordered by the Court below.

22. I therefore, do not find any merit in the Revision and it is accordingly dismissed. No costs.

23. As a sequel, miscellaneous petitions pending, if any, shall stand disposed of.

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JUSTICE M.S. RAMACHANDRA RAO

Date: 25-06-2015
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[1] (2008) 8 SCC 671