

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.1917 of 2015

ORDER:

This civil revision petition under Article 227 of the Constitution of India by the defendants/respondents in CMA.no.1 of 2013 on the file of the Court of the learned II Additional District Judge, Kurnool at Adoni is directed against the order dated 24.04.2015 of the said learned Judge passed in the aforementioned CMA.

2. I have heard the submissions of the learned counsel for the revision petitioners/defendants ('the defendants', for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The facts necessary for consideration, in brief, are as follows:

The plaintiff brought a suit against the defendants for a perpetual injunction. The said suit is being resisted by the defendants. Along with the suit, the plaintiff had filed an interlocutory application in IA.no.796 of 2012 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure for grant of a temporary injunction pending final disposal of the suit. That application was also resisted by the defendants. At the hearing before the trial Court, no oral evidence was adduced by either side; but, exhibits P1 to P21, R1 to R13 and C1 and C2 were marked. On merits, the trial Court had dismissed the said IA without costs. The aggrieved plaintiff filed the aforementioned CMA before the Court below. When the said CMA came up for hearing before the Court below, the Court below having heard the submissions of the learned counsel for both the sides, without disposing the CMA on merits, had passed the intermediary order, which is now impugned in this CRP by the defendants. The relevant portion of

the said intermediary order reads as under: **‘....I feel that surveying the land in the presence of the Advocate Commissioner with the help of the Mandal Surveyor will certainly be helpful for proper adjudication of the lis. Hence, the same advocate i.e., Sri B. Adiseshappa is appointed as Commissioner to measure the land which is in possession and enjoyment of the petitioner with distinct and identifiable boundaries with the help of the Mandal Surveyor. His fee is fixed at Rs.2000/- directly payable by the petitioner. Till the Commissioner’s report is received, the respondents are restrained from interfering with the petitioner’s peaceful possession and enjoyment over the petition schedule property.’ [Reproduced verbatim]**. Thus, in the pending CMA without the application of the parties, the Court below had *suo motu* directed the Commissioner, who was already appointed by the trial Court and who had already filed his report, to further survey the land with the help of Mandal Surveyor and measure the land, which is in possession and enjoyment of the plaintiff within distinct and identifiable boundaries with the help of the said surveyor, and further restrained the defendants from interfering with the plaintiff’s peaceful possession and enjoyment over the plaint schedule property till the Commissioner executes the warrant. Finally the Court below directed the CMA to be listed after filing of the Commissioner’s report.

4. The learned counsel for the defendants would submit that the Court below had directed the Commissioner to measure the property in possession of the petitioner with the help of a Mandal Surveyor and that the very direction would indicate that the Commissioner was re-appointed or re-entrusted with the work of survey to ascertain the possession of the plaintiff and that such a course is impermissible, as the law is well settled that in a suit for perpetual injunction no Commissioner can be appointed to ascertain as to who among the

parties is in possession of the property and that the order impugned is an erroneous order and is unsustainable under facts and in law. He would further submit that when the Court below is unsure and is not able to decide the issue involved in the CMA without the assistance of an Advocate Commissioner's report, the further order, without deciding the CMA on merits, restraining the defendants from interfering with the plaintiff's possession is also unsustainable.

5. The learned counsel for the plaintiff while supporting the orders of the Court below would submit as follows: "The plaintiff's contention is that he is in possession and enjoyment of Ac.7.94 cents. Ac.6.47 cents of land has been purchased by his ancestors. As the Commissioners report already filed is not helpful to resolve the issue involved in the *lis* and as there is a dispute about the identity of the property in the opinion of the Court below, the Court below had thought that verification by survey with the help of a Mandal Surveyor is necessary. Therefore, the directions issued by virtue of the intermediary order to the Commissioner to further execute the warrant and measure the properties with the help of a Mandal Surveyor do not call for any interference. Such a course is necessary to give a quietus to the *lis*. The Court below was correct in protecting the interests of the plaintiff by granting an injunction till the Commissioner's report as directed is filed."

6. Be it noted that the suit is filed for a perpetual injunction. The onus of proof would be on the plaintiff to prove his lawful possession over the plaint schedule property. Though the 'onus of proof', that is, the evidentiary burden shifts from side to side during the course of trial, the 'burden of proof', i.e., the legal burden to prove the material facts, which are required to be proved for obtaining a decree for injunction, is always on the plaintiff and it never shifts. The Court below, based on the analysis of the evidence that may be brought on record, has to come to a safe conclusion in regard to the issue whether or not the plaintiff

established his lawful possession over the suit schedule property as on the date of the suit and at all relevant times. The law is well settled that a Commissioner cannot be appointed to ascertain as to who among the parties is in possession of the plaint schedule property as the said function being a judicial function cannot be delegated. The trial Court had already appointed an advocate Commissioner and he had filed his report. In-fact, as could be seen from the appendix of evidence at the foot of the order of the trial Court, the Commissioner's report and plan are exhibited as exhibits C1 and C2. It is not clear from the material record as to whether or not anyone of the parties had filed any objections to the Commissioner's report. Since the application for temporary injunction filed by the plaintiff was dismissed, he had filed the CMA before the Court below. The Court below instead of deciding the CMA with the evidence made available to it, had *suo motu* directed the already appointed Commissioner to measure the land, which is in possession and enjoyment of the plaintiff within distinct and identified boundaries, with the help of a Mandal Surveyor. In the well considered view of this Court, in the background of facts stated supra and the legal position obtaining, such a direction is impermissible. Further, when the Court below is of the considered view that the controversy involved cannot be resolved and be given a quietus unless a Commissioner is appointed for the purpose stated by it, it ought not to have granted a temporary injunction at an intermediary stage in favour of the plaintiff and against the defendants by prejudging the issue in the CMA, which is yet to be disposed of. Viewed thus, this Court finds that on both counts, the order impugned warrants interference.

7. In the result, the Civil Revision Petition is allowed and the impugned intermediary order is set aside with a direction to the Court below to dispose of the CMA as expeditiously as possible and preferably within a period of one month from the date of the receipt of a copy of this

order. It is made clear that the plaintiff is at liberty to file an application either before the Court below or the trial Court for re-entrustment of the warrant to the Commissioner, if the plaintiff so desires and so chooses.

It is needless to state that if any such application comes to be filed, the appropriate Court shall give an opportunity to the defendants to file counter and dispose of the said application on merits having regard to the settled legal position obtaining. There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this CRP shall stand closed.

M. SEETHARAMA MURTI, J

14.03.2016

Vjl