

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.4746 OF 2015

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India by the 2nd defendant - Municipality is directed against the orders dated 27.07.2015 of the learned Additional Junior Civil Judge, Vizianagaram passed in I.A.no.31 of 2014 in O.S.no.414 of 2006 filed under Section 151 of the Code of Civil Procedure, 1908 requesting to appoint an advocate commissioner to note down the physical features of the plaint schedule property with reference to the plaint plan and plaint schedule and to record the statements of the inhabitants, who are in possession and enjoyment of the houses situated in the plaint schedule property i.e., T.S.No.380 of Maharajupeta North Ward, Vizianagaram.

2. I have heard the submissions of the learned counsel for the revision petitioner/2nd defendant ('the 2nd defendant', for brevity) and the learned counsel for the respondents/plaintiffs ('the plaintiffs', for brevity) and I have perused the material record.

3. The case of the 2nd defendant – Municipality in support of its request aforementioned, in brief, is as follows:

The suit is coming up for adducing further evidence on the side of the defendants. The plaintiffs had filed a rough plan along with the plaint. The plaint plan shows that there are some vacant plots; and, the details of the same are given in the plaint schedule. However, on the ground there is no vacant site at all in the plaint schedule property and the entire plaint schedule property was occupied by the inhabitants of the locality. The Government had issued possession certificates to the persons in occupation of the respective portions of

the vacant site, after recognising long possession and enjoyment of such persons over the respective portions of the site. Basing on the possession certificates, they had constructed houses with the financial aid given by the Housing Corporation. Suppressing all these material facts, the nature of the subject property was wrongly shown by the plaintiffs as vacant in the plaint plan and also in the schedule annexed to the plaint. They have also shown wrong measurements and boundaries in order to grab the property. To bring the above facts to the notice of this Court it is necessary to appoint an advocate commissioner to note down the physical features of the subject property with reference to the plaint plan and the plaint schedule and to record the statements of the inhabitants. The appointment of an advocate commissioner is also necessary for the effective adjudication of the *lis*.

4. The case of the plaintiffs, in brief, is this:

The 2nd defendant is seeking appointment of an advocate commissioner in a suit for perpetual injunction, alleging that there is no vacant site at all in the plaint schedule property and that the entire plaint schedule property was occupied by the inhabitants of the locality and that recognising such possession of the respective inhabitants, the Government had issued possession certificates and that basing on such possession certificates, the alleged occupants had constructed houses with the financial aid of the Housing Corporation. The 2nd defendant is also requesting the Court to direct the commissioner to record the statements of inhabitants. Such a course is impermissible under law. The suit is part-heard and is coming up for adducing further evidence on the side of the defendants. The material allegations in the affidavit are all false. By taking advantage of the absence of the plaintiffs from Vizianagaram, some 3rd parties have occupied some portions of the land; and, the present suit is filed excluding the occupied portions from the schedule and plan and confining the claim

to the vacant portions, which are clearly earmarked in the plaint plan. If, at this belated stage, a commissioner is appointed, the illegal occupants of the portions of the site, who had already occupied the portions shown as occupied in the plaint plan and which are not subject matter of the suit, may tend to occupy the other vacant spaces also, that is the vacant sites shown in the plaint plan, only to create an impression at the time of visit of the commissioner that there are no vacant spaces as shown in the plaint plan. There is no dispute about the identity of the property. The only contention of the 2nd defendant is that the plaintiffs are claiming that there are vacant sites as shown in the plaint plan, but on land there are no vacant sites.

5. Be it noted that the trial Court had dismissed the application of the 2nd defendant *inter alia* observing that there is no dispute about the identity, boundaries and physical features of the property and that in suit for perpetual injunction a party cannot be permitted to gather evidence under the guise of seeking commission for noting down physical features. Therefore, the aggrieved 2nd defendant had preferred this revision.

6. Both the learned counsel advanced arguments in line with respective pleaded case of the parties. The learned counsel for the 2nd defendant mainly contended that since the 2nd defendant-Municipality is contending that the vacant sites shown in the plaint plan are in fact not vacant sites and that the entire site in the locality is occupied by the inhabitants of the locality and that there are no unoccupied vacant sites as shown in the plaint plan, it is highly essential for appointing a commissioner to note the nature of the plaint plan property if not for recording the statement of the inhabitants. Per contra, the learned counsel for the plaintiffs had contended that the suit claim is confined to the unoccupied vacant sites shown distinctly in the plaint plan and that if a commissioner is appointed to verify whether such sites are

vacant or not, the illegal occupants of the occupied site with support of the Municipality will create a scene at the time of the visit, if any, of the Commissioner, if any, appointed by the Court and that there will be scramble for possession and that the plaintiffs, who are law abiding may not be in a position to resist such acts of the illegal occupants and the Municipal Authority and protect their possession of the remaining vacant sites also, which are shown in the plaint plan and which are only the subject of the suit and that in the facts and circumstances of the case a commissioner cannot be appointed for the purpose being sought to be achieved by the

2nd defendant - Municipality and that the 2nd defendant - Municipality is seeking the appointment of a commissioner with a *mala fide* intention and with an oblique motive.

7. Undeniably, the plaintiffs brought the suit for perpetual injunction against the officials of the defendants, their men, agents, etcetera to restrain them from interfering with the peaceful possession and enjoyment of the plaintiffs in the plaint schedule items shown in Green colour in the rough sketch either by assigning them to 3rd parties or by illegally ousting the plaintiffs and the defendants 4 to 6 there from and to further restrain the 3rd defendant and its officials from granting any type of loans to such 3rd party assignees detrimental to the right, title, interest and lawful possession and enjoyment of the plaintiffs in the vacant sites shown in the plaint plan.

8. A plain perusal of the plaint and the plaint plan would show that the plaintiffs have not made any claim in the suit in respect of the occupied sites with the existing houses, but had confined their suit claim only to the Green marked open spaces in the plaint plan/rough sketch. In **Bongu Ramulu and Anr. v. Gudur Narender Reddy**^[1] this Court held that in a suit for perpetual injunction, the court has to adjudicate as to who is in actual possession of the suit

property as on the date of institution of the suit on the basis of oral and documentary evidence adduced by the parties and the said function cannot be entrusted to an Advocate Commissioner. The law is well settled that in a suit for perpetual injunction, a commissioner cannot be appointed to find out as to who among the two parties is in possession of the property as it is the function of the Court to decide the said issue and the said judicial function cannot be delegated to a commissioner. As per the law, which is also well settled, a commissioner cannot be appointed for recording the statements of the inhabitants, if any, of the plaint schedule locality, as it would amount to directing the Commissioner to collect evidence. Further, statements, if any, of any alleged inhabitants of the locality are necessary to establish the defence of the 2nd defendant – Municipality, it is always open to it to examine any such alleged inhabitants as witnesses on its side in the pending suit, but it cannot seek appointment of a commissioner for recording their statements. A three Judge Bench of the Supreme Court in the decision in **Padam Sen and another v. The State of UP**^[2] has ruled that it is no business of the Court to collect evidence for a party. Further, there is no dispute about the identity of the plant schedule property. The only question or the principal issue, which falls for consideration in the suit, is as to whether the plaintiffs are in possession of the vacant sites, which are distinctly shown in the plaint plan as on the date of the suit and at the relevant times as being claimed by the plaintiffs. Though there is no hard and fast rule or it cannot be laid down as a rule of thumb that in no suit for a perpetual injunction a commissioner can be appointed, this Court is of the considered view, that in the facts and circumstances of the instant case, a commissioner cannot be appointed for the purpose desired by the 2nd defendant – Municipality. As rightly contended by the learned counsel for the plaintiffs/respondents, if a commissioner is appointed at this stage to find out the physical features and nature of the plaint plan

vacant sites, there may be a scramble for possession, more particularly, when already certain portions of the plaint plan were already occupied and houses were constructed and the said occupied portions shown in the plaint plan are excluded from the suit claim while instituting the suit. In suits of this nature, if commissioner is appointed, in the well considered view of this Court, there is every possibility that a powerful party may try to occupy temporarily the vacant site/s, if any, to give an impression at the time of the visit of the commissioner that the disputed site/s is/are not vacant; and, such party may even try to change the nature of the subject property keeping in view the impending visit of the commissioner, who may be appointed by the Court. Therefore, appointing a commissioner in a suit of this nature would lead to mess ups and scrambles and law and order problems, which it is always better to avoid. In the facts and circumstances of the case, appointing a Commissioner for a local investigation is not requisite and the report of the Commissioner even if called for will not be useful for elucidating the matter in dispute. Therefore, having regard to the facts and circumstances of the case, this Court is of the well considered view that the present case on hand is not a fit case to appoint an advocate commissioner for the purpose desired by the 2nd defendant – Municipality and that as rightly contended by the plaintiffs the request is misconceived and is obviously made with an ulterior design and *mal fide* intention.

9. Having gone through the order of the Court below, this Court is satisfied that the Court below is justified in dismissing the petition of the 2nd defendant and that the order of the Court below does not warrant interference. Having regard to the reasons assigned, this Court finds that the order impugned does not brook interference and that the revision is devoid of merit and is liable to be dismissed.

10. Accordingly, the Civil Revision Petition is dismissed with costs.

Miscellaneous petitions, if any, pending in this Civil Revision
Petition shall stand closed.

M. SEETHARAMA MURTI, J

Date:8th July 2016
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[\[1\]](#) 1998 (3) ALD 657

[\[2\]](#) AIR 1961 SC 218