

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.4358 of 2015

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ORDER:

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This civil revision petition under Article 227 of the Constitution of India by the unsuccessful petitioner/plaintiff is directed against the orders dated 16.09.2015 of the learned Principal Senior Civil Judge at Mancherial passed in IA.no.75 of 2010 in OS.no.61 of 2008 filed under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 ('the Code', for brevity) requesting to appoint an advocate commissioner to measure the plots of the defendants and also the plots in possession of one Md.Afzal, auto owner and Md.Afzal, advocate, which are towards South-East of the plaintiff's house and to submit a report to the Court in the interests of justice.

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

3. The points for determination are— 'whether the plaintiff had made out valid and sufficient grounds for appointment of an advocate commissioner for the purpose desired by him?' And, whether the Court below is not justified in dismissing the said application filed by the plaintiff?'

4. The facts that lead to the filing of the present revision petition, in brief, are as follows:

4.1 The sole plaintiff brought the suit against the defendants for the following reliefs: '1. A decree may be passed for declaration of easementary right of the plaintiff for free passage on the road measuring 12'x84' without any obstruction towards Southern side of the plaintiff connecting the main road leading to Hyderabad to Nagpur situated in Islampura in Block no.12 of City Municipality Mancherial; (2) That the defendants/their agents/relatives

may kindly be permanently restrained from making any construction on the said road and not to obstruct the passage of the plaintiff as shown in the schedule annexed to the plaint; (3) that the 12' foundation constructed by the defendant may kindly be dismantled and the road may kindly be cleared by issuing directions to the defendants; and (4) that the costs of the suit and any other relief, to which the plaintiff is entitled and this Hon'ble Court deems fit may also be awarded to the plaintiff' (reproduced verbatim). The defendants are resisting the suit.

4.2 After full fledged trial and when the suit is at the stage of arguments, the plaintiff's aforementioned application for appointment of a Commissioner came up for consideration. Nevertheless the case of the plaintiff is follows: 'In the suit filed by the plaintiff, the defendants filed the written statement claiming that they had purchased the suit plot which is towards Southern side of the plaintiff's house *vide* registered sale deed from one Murali Manohara Rao in the year 1991 and also an area of 337 Square Yards. Out of the said plot, the defendants had sold a plot to one Md.Afzul and he had occupied more than the extent of plot that was purchased by the defendants. The defendants are trying to block the road. Hence the suit is filed for the above reliefs. The said road admeasuring 12'x84' is towards South of the plaintiff's house. There is no other alternative way to the plaintiff to go to his house as on all the sides around the house of the plaintiff, constructions have been made. Hence, the road being claimed by the plaintiff in the suit is the only road to the plaintiff's house; and except that road, there is no other way to the plaintiff's house. Md.Afzal had occupied 9'x40' of land belonging to the defendants. The defendants, without taking any action against the said encroachment, are trying to occupy the present road admeasuring 12'x84' towards Southern side of the plaintiff's house. Hence it has become necessary for the plaintiff to file the petition for appointment of a Commissioner.'

4.3 The defence of the defendants in the counter is as follows:

The allegations that defendants are trying to block the road (12'x84' road) which is towards South of the plaintiff's house and that there is

no other alternative way for the plaintiff except the said road are false and baseless. The further allegation that Md.Afzul had occupied 9'x40' of land belonging to the defendants and that these defendants without taking action for removal of the said encroachment had in turn are trying to occupy the subject road is false. The plaintiff has nothing to do with the land owned and possessed by the defendants. The said facts are evident from the documents including the registered sale deeds of the parties. There is no mention in the sale deed of the plaintiff or any other document regarding the usage of 12'x84' passage by the plaintiff. The said claim is, hence, denied. The plaintiff is trying to collect evidence by getting a Commissioner appointed and such collection of evidence is impermissible in law.

4.4 The trial Court having regard to the pleadings of the parties and the fact that the suit is at the stage of arguments and having observed that it cannot give a helping hand to the plaintiff to collect the evidence as sought for by him and that it is the bounden duty of the plaintiff to bring on record necessary evidence to enlighten the Court and that the plaintiff could not produce any convincing material in support of his request for appointment of Commissioner had dismissed the petition. Therefore, the aggrieved plaintiff is before this Court.

5. The learned counsel for the plaintiff while reiterating the case of the plaintiff, stated supra, had contended that the plaintiff is contending that the pathway in question in the suit is the only way to his house and that there is no other alternative way and that on the other hand, the defendants are contending that there is no such way and that the contention of the plaintiff that there is no other way is false and that, therefore, if a Commissioner is appointed to note down the physical features, if not for the measurement of the plots of the parties and the neighbours, the ends of justice would be met. He would also submit that the dismissal of the petition on the ground that the application is filed at the stage of arguments is incorrect and unfair as the application was filed long time back, but the application was adjourned several times for counter and that ultimately the counter was filed on 02.12.2009, but, the court below did not pass any orders for a period of more

than six years from the date of the filing of the application on 26.10.2009 and had eventually erroneously dismissed the petition having taken up for disposal at the stage of arguments. He would also submit that the appointment of a Commissioner to make a local investigation and to measure the properties and to file a report after measuring the properties and noting the physical features does not amount to collection of evidence, more particularly, when the suit is filed for declaration of an easementary right in regard to a way; and that if a Commissioner is appointed for the desired purpose and that if such a Commissioner files his report after local inspection of the property, the said report would be of considerable assistance to the Court in effectively adjudicating the *lis*.

6. On the other hand, the learned counsel for the defendants while supporting the order of the Court below would contend that in a suit in regard to an easementary right, the legal burden is on the plaintiff to prove the easementary right, the entitlement to the right of way and also the absence of any other alternative way and that by seeking the appointment of an advocate commissioner, the plaintiff now wants the Commissioner to measure not only the properties/plots of the parties to the *lis* but also that of the adjacent owners and that if that is so, the said adjacent plot owners are necessary parties to the suit and that by seeking appointment of a Commissioner for measurements of plots not only of the parties to the suit but also of the neighbours, the plaintiff is intending to enlarge the scope of the *lis* and that as rightly held by the Court below the plaintiff is intending to collect evidence by filing the instant application and that the Court below is justified in dismissing the petition and that there is no error much less jurisdictional error calling for interference in this revision.

7. I have bestowed my attention to the facts and the submissions. I have perused the plan filed along with the material papers showing the road in dispute, the properties of the parties and others and the topographical details of the locality. A perusal of the said plan shows that except the road in question admeasuring 12'x80' there is no other way to the plaintiffs to reach the 20' road on further South of the plots of the defendants and others. A

further perusal of the plan would also show that the 20' road runs from East to West and connects to PWD road from Hyderabad to Nagpur on the East. Since the plaintiff is *inter alia* contending that the disputed way is the only way and there is no other way and as the suit is filed for declaration of an easementary right in regard to that right of way and as the defendants are contending that the contention of the plaintiff that except the way in question there is no other way is false, in the well considered view of this Court it would be just and fair to appoint an advocate commissioner to make a local inspection and note down the physical features of the properties shown in the plaint plan and file a detailed report with a rough sketch showing the topographical details of the property of the plaintiff, the disputed road in question, if any, and the neighbouring properties. In the case on hand, the plaintiff cannot be blamed for the delay in disposal of the application as the application had remained pending without disposal till the trial had concluded. Nonetheless, merely on the ground of delay an application for appointment of Commissioner need not be dismissed as there is no settled legal position as to the stage at which the application for appointment of Commissioner can be entertained and considered. In the well considered view of this Court, an application for appointment of a commissioner can be considered at any stage of the suit subject, however, to the facts of a case, if any peculiar. A commissioner generally would be appointed to perform such ministerial functions, which if performed, would reduce the volume of oral evidence to be adduced and obviate the necessity of examining a number of witnesses by the parties and would help in saving the precious time of the Court and the time and money of the parties. In the case on hand, if the Commissioner is directed to file his report after noting down the physical features of the properties and also the boundaries existing on land of the properties of the parties and the boundaries with reference to the registered documents, if any, of the parties the same may in all probability be helpful in arriving at the truth and in conclusively and effectively adjudicating the *lis* by the Court below.

8. Viewed thus, this Court finds that though no case is made out for giving

direction to the advocate Commissioner for measuring the properties of the parties to the *lis* and that of the neighbours, sufficient case, in the facts and circumstances of the case, is made out for appointment of a Commissioner for a limited purpose of noting down the physical features of the properties of the parties and that of the others in the locality and also the boundaries as existing on land and with reference to the registered documents, if any, of the properties of all the parties to the *lis* and those of the immediate neighbours. Such a function, which the commissioner may be called upon to discharge, cannot be equated to collection of impermissible and inadmissible evidence; and, delegating of such function to the commissioner does not amount to delegating a judicial function, which the trial Court has to perform. For the reasons stated, this Court finds the order impugned is not justified and calls for interference. Points are accordingly answered.

9. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.75 of 2010 in OS.no.61 of 2008 stands allowed in part. The trial Court is now directed to appoint an advocate Commissioner, from the panel of advocates being maintained by it, for the aforementioned purposes and direct him to file a report with a rough sketch of the properties of the suit locality. It is needless to mention that while entrusting the warrant to the Advocate Commissioner, the trial Court shall be at liberty to give any further/additional directions, which it may deem fit and proper, having regard to the facts and circumstances of the case and the observations in this order.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

19.04.2016

Vjl