

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.212 of 2015

ORDER:

The unsuccessful petitioner/defendant had filed this revision under Article 227 of the Constitution of India assailing the orders dated 08.12.2014 of the learned Principal Senior Civil Judge, Tirupathi of Chittoor District passed in I.A.no.661 of 2013 in O.S.no. 623 of 2012 filed under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 requesting to appoint an advocate-commissioner to inspect the plaint "A" and "B" schedule properties, measure them with the assistance of a Mandal Surveyor of Tirupati Rural Mandal from the Northern internal road of Plot no.133 to the South of the Plot no.140, fix the boundaries of the plots nos.133 and 140 on ground as per the approved layout plan and FMB of survey nos.555 and 558 of Peruru village, note the physical features of the said schedule properties and submit a report with a plan to the Court.

2. I have heard the submissions of the learned counsel for the petitioner/defendant ('the defendant', for brevity) and the learned counsel for the respondent/plaintiff ('the Plaintiff', for brevity). I have perused the material record.

3. The facts of the case, which lead to filing of the present revision petition by the petitioner/defendant, in brief, are as follows:

3.1 The plaintiff brought the suit against the defendant to declare that she is the absolute owner of the plaint 'B' Schedule property and to direct the defendant to surrender the vacant possession of the said 'B' Schedule property; and, in default of the defendant to do so permit her to obtain possession of the same through the process of law and grant a consequential perpetual injunction against the defendant and his men etcetera from interfering with the plaintiff's possession and enjoyment of the said 'B' Schedule property and for costs. The defendant is resisting the suit.

3.2 In the said suit the defendant had filed the aforementioned interlocutory application and had sought appoint of a commissioner for the above said purpose *inter alia* contending as follows:

Survey no.558 of Peruru village and the other lands in the other survey numbers were allotted to Gazetted Officers Cooperative House Building Society, Tirupati and the entire extent was laid out into house plots; and the main roads and internal roads were also laid. The width of the main roads is 40 feet each and that of the internal roads is 30 feet each. Boundary stones were fixed. Plot no.140 in the said approved lay out plan was allotted to the defendant vide a registered allotment deed dated 12.08.1975. All the plots are uniform. The possession of the said plot was delivered to the defendant by the Society. One Janardhan Reddy was allotted plot no.133, which is situate to the North of the plot no.140. Plot no.133 is a corner plot. There is a main road to the East of plot nos.133 no. 140 . Plaintiff is claiming right in plot no.133. "B" schedule of the plaint is in plot no.140. The plaintiff has given correct boundaries for the plaint "A" schedule, which is plot no.133. But, the measurements of the plaint "A" schedule from North to South are not correctly given. The measurement was shown by the plaintiff from North to South as 57 feet instead of showing 75 feet. The plaintiff suppressed real facts and measurements and gave less measurements from North to South for plaint "A" schedule. Plaint "B" schedule is not in plot no.133 and it is not part and parcel of the said plot. "B" schedule property on ground is plot no.140 and it is a part and parcel of Plot no.140, which is the plot of the defendant. Thus, the plaintiff by giving wrong measurements of plaint "A" schedule from North to South had shown this defendant's site in the plaint "B" schedule and had claimed falsely the "B" schedule property as if it is plot no.133. Therefore, the demarcation of the boundaries of the two said plots is necessary to ascertain, in detail, and elucidate the matter in controversy. The plaintiff is trying to change the physical features by removing boundary stones. Under the above said circumstances, the petition is filed seeking appointment of a Commissioner.

3.3 The plaintiff reported no counter.

4. On merits and by the orders impugned, the trial Court had dismissed the petition of the defendant having observed that appointing a commissioner for the purpose desired would amount to permitting to collect evidence and that appoint of a commissioner for collection of evidence is impermissible and that the burden is on the parties to examine the revenue authorities and file survey records and produce lay out copies and that therefore, appointing a commissioner for the purpose desired by the defendant is not just and proper. Aggrieved of the said orders, the defendant had preferred this revision.

5. The learned counsel for the defendant while reiterating the pleaded case of the defendant would contend as follows: The suit is filed claiming that the plaintiff is the absolute owner of the plaint "B" schedule property. The "B" schedule property is the site of the defendant and it is plot no.140. The plaintiff is claiming title to plot no.133. While furnishing the boundaries correctly of the plaint "A" schedule property, the plaintiff had intentionally given wrong measurements of plaint "A" schedule property from North to South and had intentionally shown lesser measurement and is thus falsely claiming the "B" schedule property of the defendant though plaint "B" schedule property is not plot no.133 and it is not a part and parcel of plot no.133. In fact, it is in plot no.140 on ground and it is a part and parcel of plot no.140 of this defendant. Though the plaintiff reported no counter, the trial Court had erroneously dismissed the petition. The order is unsustainable in law, in the facts and circumstances of the case. If a Commissioner is not appointed and is not directed to file a report after measuring the two plots and other neighbouring properties as per requirement, it is not possible to resolve the controversy effectively and set at rest the dispute once and for all.

6. Per contra, the learned counsel for the respondent/plaintiff while supporting the orders of the Court below would contend that it is for the plaintiff to establish her case as rightly observed by the trial Court and that in the facts and circumstances of the case, there is no need to appoint a Commissioner for the purpose desired by the defendant.

7. I have bestowed my attention to the facts and submissions and I have given earnest consideration to the submissions.

8. In view of the facts peculiar to the case and the specific contentions of the defendant, which are extracted supra, and the further fact that the plaintiff had reported no counter in the application filed by the defendant for appointment of a Commissioner for the purpose stated in the petition, this revision need not detain this Court for long. The suit is filed for declaration of ownership in respect of plaint "B" schedule property and for recovery of vacant possession of the same. As noted, the plaintiff is claiming right in respect of plot no.133; whereas the defendant is claiming right in plot no.140. The plaintiff furnished two schedules "A" and "B". The defendant is not disputing the boundaries of the plaint "A" schedule as furnished by the plaintiff, but is disputing its measurements, particularly, the measurements from North to South and is *inter alia* contending that the plaintiff suppressed real facts and furnished wrong measurements in respect of plaint "A" schedule property and is showing that plaint "B" schedule is part and parcel of plot no.133 though it is part and parcel of plot no.140 of the defendant. It is the specific contention of the defendant that by giving wrong measurements to the plaint "A" schedule property, the plaintiff had shown the defendant's site in plaint "B" schedule property and is claiming it falsely as if it is a part of plot no.133 though it is part and parcel of plot no.140. Therefore, the defendant is seeking appointment of a Commissioner to ascertain the ground situation of the properties for effectively resolving the controversy.

9. Be it noted that in the decision in **Jajula Koteswar Rao v. Ravulapalli Masthan Rao** ^[1], the facts disclose that the suit is filed for declaration of right in the plaint schedule property and a consequential mandatory injunction for removal of a disputed wall on the allegation of encroachment/occupation of the site belonging to the respondent and his family in their absence from the village; however, when an application for appointment of a Commissioner was filed, it was contended by the petitioner that appointment of an Advocate Commissioner would result in collection of evidence, which is impermissible.

Having regard to the said facts, particularly, the allegation of encroachment of the land of the respondent by the petitioner, this Court had held that mere oral evidence will not aid either party and had accordingly rejected the contention that the appointment of an Advocate Commissioner would amount to collection of evidence in the facts and circumstances of the case. The law is well settled that a Commissioner cannot be appointed to find out as to who amongst the parties is in possession of the property as it is the function of the Court to decide the issue as to who amongst the parties is in possession of the property and the said judicial function cannot be delegated to an advocate commissioner. The request for appointment of a commissioner to note down the physical features of the properties and measure the properties as per records/documents with the help of a competent Surveyor and fix the boundaries of the plots of the parties on ground and find out whether plaint "B" schedule is in plot no.133 or in plot no.140 and file a report with a sketch with measurements, by no stretch of imagination can be called as an attempt to gather evidence, in the well considered view of this Court. In the circumstances of the case when the controversy is as to identification of the "B" schedule property on land and its location and the question to be resolved is as to whether the plaint "B" schedule is a part of plot no.133 or plot no.140, local investigation should be done. When oral evidence brought on record may not be of any aid and may not be enough to arrive at a proper and correct conclusion and when such oral evidence alone may be insufficient for the effective adjudication of the real dispute involved in the *lis*, it is just and fair to appoint an Advocate Commissioner. Therefore, appointing an Advocate Commissioner for the purpose desired by the defendant is just and necessary in the facts and circumstances of the case for the effective adjudication of the real dispute involved in the suit. Under law, in any suit in which the Court deems local investigation is requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to an advocate or any competent person and direct to make such investigation and to report to the Court. Having regard to the reasons and the legal position obtaining, this court is satisfied that the order of the Court below, which is passed without considering the facts correctly and the legal

position in proper perspective, is not justified and therefore, warrants for interference.

10. In the result, the Civil Revision Petition is allowed without costs and the order impugned is set aside. As a sequel, I.A.no.661 of 2013 in O.S.no.623 of 2012 on the file of the trial Court is allowed. The trial Court is accordingly directed to appoint an Advocate Commissioner, from the panel of advocates being maintained by it, for the purpose mentioned in the application of the defendant and direct the Commissioner to file a report with a plan with measurements as expeditiously as possible, and preferably within a month's time from the date of entrustment of the warrant to the Commissioner, pursuant to these orders. It is needless to state that the trial court shall consider the probative value of the Commissioner's report at the appropriate stage, having regard to the facts and the circumstances of the case, however, after giving an opportunity to both the parties to file objections, if any, to the said report.

No costs.

Miscellaneous petitions pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

05th July, 2016
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