

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1808 of 2016

ORDER:

The unsuccessful claim petitioner in E.A.No.201 of 2014 in E.P.No.60 of 2012 in O.S.No.57 of 2012 on the file of the Court of the learned Principal Junior Civil Judge, at Avanigadda of Krishna District filed this revision petition under Section 115 of the Code of Civil Procedure, 1908, having been aggrieved of the order dated 10.03.2016 passed in E.A.No.59 of 2016 filed for reopening the claim petition for the purpose of considering the application for appointment of an Advocate Commissioner.

2. I have heard the submissions of *Sri P.Prabhakara Rao*, learned counsel for the revision petitioner/ claim petitioner (hereinafter, 'claim petitioner') and Sri V.V.L.N.Sarma, learned counsel for the respondents 1 and 2, i.e., the Decree Holder and Auction purchaser. Be it noted that though the Decree Holder is the auction purchaser, he was shown twice in the array of parties as the Decree Holder and Auction Purchaser as well. The 3<sup>rd</sup> respondent is the judgment debtor.

3. As per the material borne out by the record and the submissions made before this Court, the case of the claim petitioner, in support of the request to reopen the claim petition for the purpose of considering the application for appointment of an Advocate Commissioner, in brief, is this:

The claim petition is posted for hearing further arguments. Earlier, the claim petition is posted for orders. The claim petitioner filed an application for re-opening the matter. The matter was re-opened to enable the counsel for the claim petitioner to advance further arguments. While so, the claim petitioner filed an application seeking appointment of a Commissioner for noting down the physical features of the claim petition schedule property. However, the said application was not numbered. The counsel while preparing

for arguments in the claim petition had a discussion with the claim petitioner. During the course of the said discussion, the counsel enquired as to whether the claim petition schedule property is a distinct property with distinct boundaries on all its four sides. Then this claim petitioner stated that the boundaries as mentioned in the claim petition schedule are only correct and that the claim petitioner owns Ac.3.00 cents of land adjacent to the claim petition schedule property in an extent of Ac.2.00 cents and that the said two extents of properties constitute one single plot of a total extent of Ac.5.00 cents and that therefore, the claim petition schedule property is not distinct property within distinct boundaries and that at present, it is not possible to identify the claim petition schedule property of an extent of Ac.2.00 cents and therefore, the claim petition schedule property is not identifiable on land. Therefore, it is realized by the judgment debtor that the contentions of the Decree Holder-cum-Auction purchaser are not correct. However, to avoid ambiguity, the claim petitioner was advised to file an application for appointment of an Advocate Commissioner to localize the claim petition schedule property with the assistance of the Mandal Surveyor, Koduru Mandal, and the V.R.O concerned and fix its boundaries to meet the ends of justice. Since the claim petition is re-opened only for the purpose of hearing further arguments, the present application is also filed to reopen the claim petition to consider the application filed for appointment of an Advocate Commissioner.

4. Per contra, the case of the Decree Holder-cum-Auction Purchaser (respondents 1 and 2), in brief, is this:

The material allegations in the affidavit of the claim petitioner are false. Earlier, when the matter is posted for orders, the claim petitioner filed an application to reopen the matter to enable his counsel to advance arguments. The said application was allowed and the claim petition was posted for hearing further arguments. Then the claim petitioner filed the present application for reopening the matter for the purpose of entertaining an

application filed by him for appointment of an Advocate Commissioner. That application filed for appointment of an Advocate Commissioner is not even numbered as it was defective; and, it was returned with objections by the office of the Court. The narrative of the claim petitioner that he owns Ac.3.00 cents of land and that after purchasing the subject property of Ac.2.00 guntas, he merged the same with his own land and that at present, the entire Ac.5.00 cents of land is a single plot, is a developed story and such a story was developed after completion of arguments of both sides in the claim petition. The present application to reopen the matter to entertain an intended application for appointment of an Advocate Commissioner for localizing the claim petition schedule property is based on a concocted story and is in the nature of an abuse of process of law. In deed, the extent and the boundaries of the EP schedule property were considered during execution proceedings and before the property was eventually auctioned in the Court auction sale. The claim petitioner is filing series of applications and the judgment debtor is also filing series of applications to stall the delivery of the schedule property, which was purchased in the Court auction by the Decree Holder with the permission of the Court. The claim petitioner and the judgment debtor are intentionally dragging on the matter. The judgment debtor and the purchasers from him who are claiming through him have no right to interfere with the delivery proceedings. Hence, the petition may be dismissed.

5. On merits, and by the order impugned in the revision, the trial Court dismissed the petition by passing a detailed order. Therefore, the claim petitioner is before this Court.

6. At the time of hearing before this Court, learned counsel reiterated the contentions of the parties, which are extracted supra, and made submissions in line with the pleaded contentions of the parties. The learned counsel for the claim petitioner would submit that the claim petitioner purchased the claim

petition schedule property of an extent of Ac.2.00 cents and that the claim petitioner also owns Ac.3.00 cents of land adjacent to the said claim petition schedule property and that the said two extents of properties constitute one single plot of a total extent of Ac.5.00 cents and that therefore, the claim petition schedule property is not a distinct property within distinct boundaries and that at present, it is not possible to identify the claim petition schedule property of an extent of Ac.2.00 cents on land as it was merged with the adjacent Ac.3.00 cents of land belonging to the claim petitioner and that as of now, the claim petition schedule property and the claim petitioner's other extent constitute a single plot of Ac.5.00 cents. He, therefore, further submits that it is necessary to localize and demarcate the claim petition schedule property on land for the purpose of identification of the claim petition schedule property separately and hence, appointment of Commissioner for the said purpose is necessary and that for that reason the present petition was filed for reopening the matter. He, therefore, submits that the order of the trial Court dismissing the application to reopen the matter is unsustainable.

7. *Per contra*, learned counsel for the Decree Holder-cum-auction purchaser would submit as follows: "The narrative of the claim petitioner that the claim petition schedule property is merged with the adjacent extent of Ac.3.00 cents of property is a story developed as an after thought. The said story was developed after the claim petition was once posted for orders. The claim petitioner who claims to have purchased the claim petition schedule property from the judgment debtor is a person claiming rights through and from the judgment debtor and, hence neither the claim petitioner and nor the judgment debtor has any right to stall the delivery proceedings. The judgment debtor and the claim petitioner are colluding together and are filing petitions after petitions to delay and defeat the just claim of the Decree Holder and to stall the delivery proceedings inspite of the fact that the sale certificate was already issued and a petition for delivery of the sale certificate property is

pending since a long time before the executing Court. He, accordingly supported the orders of the trial Court and prayed for dismissal of the revision.

8. I have given detailed and thoughtful consideration to the facts and the submissions.

9. Since the facts and the contentions are already stated in detail supra, there is no need to dilate on the said aspects. Be it noted that the Decree Holder having filed the execution petition pursuant to a decree, which has become final, brought the EP schedule property to sale. After the property was put to sale in a Court auction, the Decree Holder purchased the decree schedule property with the permission of the Court and a sale certificate has already been issued by the executing Court in respect of the said property in his favour. Now, the proceedings for delivery are pending before the executing Court. While so, the claim petitioner filed the claim petition. In that claim petition, enquiry was concluded and arguments were once heard and the claim petition was posted for orders. At that stage the claim petitioner filed a petition to reopen the matter to enable his counsel to advance further arguments. After the claim petition was reopened for the said purpose, the subject application for reopening of the matter was again filed on the ground that the claim petitioner intends to seek appointment of a Commissioner for localization of the claim petition schedule property with the help of a Mandal Surveyor and the VRO concerned. However, the said application filed for appointment of a Commissioner was not numbered since defective and it was returned by the executing Court with office objections. The only contention of the claim petitioner is that his property of Ac.3.00 cents is merged with the claim petition schedule property of an extent of Ac.2.00 cents and that therefore, the entire Ac.5.00 cents is a single plot as of now and that the claim petition schedule property is not a distinct property within distinct boundaries and it is not possible to identify it on the land. In a claim petition, as per the

amended provisions of the Code of Civil Procedure, 1908, the issue of title to the claim petition schedule property will be determined. The statute confers a right of appeal against the orders passed in the claim petition. To put it in other words, the claim petition is in the nature of a title suit for all purposes. Therefore, not only the initial onus of proof but also the legal burden is upon the claim petitioner to establish his title to the claim petition schedule property in order to succeed in the claim petition. It is also settled law that in such an application, the claim petitioner succeeds on his own strength but not on the weakness of the respondents in the said application. If the claim petitioner's title is established, the claim petition would stand allowed and therefore, there would be no necessity to localize or demarcate or segregate the claim petition schedule property even assuming for a moment that at present it is not distinctly identifiable on land. On the other hand, if the claim petition stands dismissed, on merits, then the Decree Holder-cum-Auction Purchaser would be entitled to obtain delivery of the EP schedule property, which he purchased with the permission of the Court in the Court auction. In which case, as per the general practice and procedure contemplated under law, a Field Assistant would be entrusted with a delivery warrant and he will be called upon to deliver the property to the decree holder-cum auction purchaser after due identification of the same at the time of actual delivery. Further, if the Field Assistant notices at the time of delivery that the property to be delivered is not distinct and is not identifiable on land and that effecting delivery is not possible without identification of the said property, then he is supposed to report back to the trial Court that the EP schedule property, which is to be delivered is not identifiable. In such circumstances only, the necessity of identifying the property to be delivered would arise for consideration, but not at this stage of hearing arguments in the claim petition. Thus, the necessity for appointment of an Advocate Commissioner for localizing and segregating and identifying the property to be delivered would not arise unless

the Field Assistant, at a future point of time, i.e., at the time of delivery of the property to the decree holder-cum-auction purchaser finds that the property is not identifiable on land. Hence, it is clear that the present request of the claim petitioner is not *bona fide*. *Ex facie*, it appears that this petition and also the application filed for appointment of an Advocate Commissioner, which is not even registered by the trial Court, are intended to drag on the proceedings, as rightly contended by the Decree Holder.

10. Viewed thus, this Court finds that the contentions of the claim petitioner that at this stage, the appointment of Commissioner is necessary to identify the claim petition schedule property and that therefore the matter, which is at the stage of hearing further arguments, requires to be re-opened are wholly misconceived and do not merit consideration.

11. On the above analysis, this Court finds that there is no merit in the revision and that the trial Court is justified in passing the orders impugned in the revision and that therefore, the revision petition is liable to be dismissed.

12. In the result, the Civil Revision Petition is dismissed with costs.

Pending miscellaneous petitions, if any, shall stand closed.

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M. SEETHARAMA MURTI, J

19<sup>th</sup> December 2016  
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