

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.6536 of 2012
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ORDER:

This revision under Article 227 of the Constitution of India by the unsuccessful petitioners/defendants is directed against the orders dated 22.08.2012 of the learned Principal Junior Civil Judge, Karimnagar passed in IA.no.1110 of 2012 in OS.no.441 of 2005 filed by the defendants under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 requesting to appoint an advocate Commissioner to note down the physical features of the plaint schedule property including the existence of structures, if any, over the suit land.

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. To begin with, the facts, which are to be stated as a preface to this order, in brief, are as follows:

The plaintiff brought the suit against the defendants for a perpetual injunction in respect of Ac.0.07 guntas of land at Nagunur village of Karimnagar Mandal and District, morefully described in the schedule annexed to the plaint. The defendants are resisting the suit. During the pendency of the suit, the defendants had earlier filed an application (IA.no.243 of 2006) before the trial Court for the self same relief *inter alia* contending that the plaintiff is stating that the suit land is a vacant land and there are no structures in the said land, whereas, the defendants are stating that the suit land is not a vacant land and that they had purchased the suit land from the plaintiff under unregistered

sale deeds and that later they had obtained permission and raised constructions up to the first floor level but could not proceed with further constructions due to financial problems; and that if a Commissioner is appointed the true facts would be revealed. That application was resisted by the plaintiff. However, the trial Court had allowed the application and directed appointment of an advocate Commissioner for the purpose desired by the defendants. However, for non payment of process for issuance of warrant to the Commissioner as per procedure, the said IA stood dismissed. Later when the suit is at the stage of conclusion of trial, the defendants again filed the present IA for the self same relief on the basis of the same contentions. That application was resisted by the plaintiff stating that the suit schedule land is a vacant land and that the present petition is filed at a belated stage, that is, after expiry of seven years after the filing of the suit and that an earlier application of the defendants for the self same relief was dismissed and that therefore, the second petition is not maintainable and that the defendants ought to have taken steps for restoration of the earlier petition instead of filing an application a second time for appointment of Commissioner. The trial Court on merits and by the order impugned had dismissed the petition only on the grounds of delay and laches on the part of the defendants and also for the reason that they failed to take steps for restoration of the earlier petition. Aggrieved of the said orders, the defendants filed this revision petition.

4. The learned counsel for the defendants while reiterating the sequence of events and the case of the defendants, which are stated supra, would contend that merely on the ground of laches an application for appointment of a Commissioner cannot be dismissed and that the trial Court having once come to a conclusion that appointment of Commissioner is necessary in the interests of justice ought to have allowed the present application filed by the defendants for appointment of

a Commissioner and that filing a second application for the same relief when the application was dismissed for default is no bar under facts and in law.

4.1 The learned counsel for the defendants called in aid a decision of this Court dated 01.04.2011 in **CRP.no.3266 of 2007**.

5. I have bestowed my attention to the facts and the submissions. It is undeniable that the trial Court is also of the view that a Commissioner is to be appointed and that appointment of a Commissioner is necessary in the facts and circumstances of the case and, therefore, appointed a Commissioner earlier as desired by the defendants. However, since that application was dismissed for default for non payment of process, the instant application was filed for the same relief. In the well considered view of this Court, when the appointment of an advocate commissioner is necessary and the report that may be submitted by the advocate Commissioner after a visit to the property is likely to bring before the trial Court one more assured piece of evidence for adjudicating the *lis* in a comprehensive manner, the trial Court ought to have allowed the petition instead of dismissing the petition merely on the ground of laches.

6. Viewed thus, this Court finds that the order impugned brooks interference.

7. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.1110 of 2012 in OS.no.441 of 2005 is allowed. The trial Court is now directed to appoint an advocate Commissioner from the panel of advocates being maintained by it for the purpose desired by the defendants. It is made clear that to offset the hardship that may be caused to the plaintiff on account of appointment of a Commissioner at this distance of time, the defendants shall bear the costs of the Commission including the fee of the Commissioner irrespective of the result of the suit.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

24th June 2016
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