

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition Nos.3790 of 2015 & 3801 of 2015

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COMMON ORDER:

These two revision petitions under Article 227 of the Constitution of India are directed by the petitioner/defendant against the order dated 08.07.2015 of the learned Senior Civil Judge, Razole of East Godavari District passed in I.A.no.189 of 2015 and 188 of 2015 in O.S.no.95 of 2014 respectively filed for appointment of a Commissioner to be present at the time of plastering the Western side wall of the building of the petitioner/defendant and to permit the petitioner/defendant to plaster the Western building wall of his house in the presence of the Advocate Commissioner.

2. I have heard the submissions of the learned counsel for the petitioner/defendant and the learned counsel for the respondents/ plaintiffs. I have perused the material record.

3. The facts, which are necessary to be stated as a prelude to this common order, in brief, are as follows:

The plaintiffs/respondents herein ('the plaintiffs', for brevity) brought the suit against the defendant/petitioner ('the defendant', for brevity) for declaration of title of the plaintiffs over 'A' marked portion in the plaint plan, that is, the plaint schedule property and for ejecting the defendant there from by directing the defendant to remove all constructions and projections thereon. The defendant is resisting the suit. In the said suit, the defendant had filed the above mentioned two applications for the above mentioned reliefs. The plaintiffs resisted the said applications by filing counters. By the orders impugned in these revisions, the trial Court had dismissed both the applications of the defendant. Hence, the defendant had filed these two revisions.

4. The case of the defendant, in support of his requests in the instant

applications, in brief, is this:

The defendant is the absolute owner of Ac.0.20 cents in R.S.no.221/1 of Tatipaka village having purchased the same along with two shops for a valuable consideration from his vendor under registered sale deed dated 20.06.2001. The two shops being not sufficient for the business of the defendant and as he is keeping his material in go-down, he had intended to develop his business and had accordingly, started construction of new building by taking approval of Tatipaka Gram Panchayat on 21.11.2013. The respondents have no concern or right over the property of the defendant. The construction of a building by the defendant has become an eyesore for the plaintiffs and they had tried to stop the construction by raising petty quarrels. Therefore, the defendant had lodged caveat petitions. He had raised a three storied building; and the entire construction work except the plastering work was completed. At that stage, the plaintiffs had filed the suit. The defendant had left four inches site on the Western side of his property. He has yet to plaster the Western side building wall. He had completed plastering work of the remaining walls. Unless the Western side building wall is also plastered, the building will be damaged. Therefore, the defendant is intending to have the Western side building wall plastered in the presence of a Court Commissioner to avoid further disputes with the plaintiffs. The defendant is prepared to bear the expenses of the Court Commissioner. Hence, these two petitions are filed.

5. *Per contra*, the case of the plaintiffs, in brief, is this:

The material allegations in the affidavits of the defendant filed in support of the two petitions are false. The defendant had constructed the wall by occupying the site of the plaintiffs. The plaintiffs had objected for the same. When the land was measured through a Mandal Surveyor, it was found in that survey that the defendant had encroached into an extent of Ac.0.02.17 cents of the property of the plaintiffs. Even after the survey work also, the defendant did not stop his construction; and he had projected the eaves and beams of his construction into the site of the plaintiffs, which is shown as 'A' marked portion in the plaint plan. The defendant had also

trespassed into the said property of the plaintiffs and made constructions. Now, under the guise of these petitions, he intends to further encroach into the site of the plaintiffs. He is not entitled to do so. Under the guise of the orders of the Court, the petitioner/defendant wants to enter into 'A1' marked portion of the plaint plan, which is not the subject matter of the suit. Even according to the case of the defendant, the men of the defendant cannot plaster the wall without entering into the land of the plaintiff. The defendant is seeking permission for unauthorized entry into the land of the plaintiffs for laying poles in the land of the plaintiffs for plastering the wall. The defendant cannot seek permission for doing such unauthorized acts. He is a lawless person. He had already projected the structures inspite of the objections of the plaintiffs and the measurement of land by the Mandal Surveyor. If the plastering is not done to the alleged construction on the Western side of the building, there will not be any harm to either the structure or the business of the defendant. The attempt is only to strengthen his unauthorized construction in 'A' marked portion with the aid of the Court. Hence, the petitions may be dismissed.

6. At the time of hearing of these applications before the trial Court, no oral and documentary evidence was adduced. As already noted, the trial Court had dismissed both the petitions of the defendant and therefore, the defendant is before this Court.

7. The learned counsel for the defendant while reiterating the case of the defendant, which is extracted supra, would submit as follows:

The trial Court ignored the fundamental principles and had erroneously dismissed the petitions of the defendant. The application for appointment of a Commissioner was dismissed by recording a finding that the application filed for permission to plaster the Western side building wall of the defendant is dismissed. No reasons are assigned for dismissing the application filed seeking appointment of a Commissioner. Since there are already disputes between the parties, the defendant intends to have the Western side building wall plastered in the presence of a Commissioner to avoid any further dispute. The Court below ought to have seen that the Commissioner can be

appointed for the purpose desired and the law does not prohibit appointment of a Commissioner for the desired purpose. The Court below ought to have seen that the defendant is contending that he made constructions in his property and that he had left four inches site beyond his building on the Western side. The contentions of the plaintiff in the suit have to be decided after full-fledged trial. The construction of a three storied building was completed. After the entire construction except the plastering work was completed, the suit was brought with an eye sore. The plaintiff had got plastered all the walls except the Western side building wall. Unless the defendant is permitted to have the Western side building wall plastered, the building gets damaged. The defendant is prepared to have the Western side building wall plastered through his men in the presence of an Advocate Commissioner by meeting necessary expenses of the Commissioner irrespective of the result of the suit. Plastering of the Western side building wall with cement is highly essential to protect the valuable building constructed by the defendant. The Court below did not assign any reasons as to how the plaintiffs' rights will be prejudiced if permission for plastering the Western side building wall is granted. Moreover, the property of the plaintiffs is a vacant land with trees and bushes; therefore, if the men of the defendant enter the plaintiffs' property temporarily and construct temporary scaffoldings and do plastering work of the Western side building Wall of the building of the defendant, no prejudice would be caused to the plaintiffs, more particularly, when such work is being intended to be done under the supervision of a Court Commissioner. The Court below ought to have observed equities and ought to have allowed the request of the defendant to prevent any damage to the building of the defendant during the pendency of the suit. The disposal of the suit and the further appeals that may be filed by any one of the parties may take a long time; and, if in the meanwhile, the Western side building wall of the defendant's building gets exposed to rain and inclement weathers, the entire building that was constructed by spending substantial amount would be spoiled. The loss that may be caused under such circumstances cannot be compensated. The Court below was in error

in holding that the defendant is not entitled to seek permission without assigning any valid reasons. The law permits the owner of a building to enter the neighbour's property with permission and make repairs to the building on the neighbour's side. The Court below ignored the settled legal position and had failed to grant reliefs to which the defendant is entitled to under facts and law and therefore, failed to exercise the jurisdiction vested in it.

8. *Per contra*, the learned counsel for the plaintiffs while reiterating the case of the plaintiffs, which is extracted supra, had contended as follows:

The defendant had already made an encroachment to an extent of Ac.0.02.17 cents into the property of the plaintiffs and made unauthorized constructions inspite of the objections and a survey, which has revealed the encroachment made by the defendant. The defendant made construction high handedly and projected the eaves and beams of his construction into the site of the plaintiffs, which is shown as 'A' marked portion in the plaint plan. Now, he wants to strengthen the unauthorized construction under the guise of the present petitions. He wants his men to enter into the 'A1' marked portion, which is not the subject matter of the suit, and wants to erect poles in the property of the plaintiffs and have his wall plastered through his men. He is not entitled to seek permission to plaster with cement, the wall that was illegally constructed in the property of the plaintiffs. The defendant is a highhanded and lawless person. In spite of objections and a survey that was done; he had not vacated the encroached portion of the property of the plaintiffs and made constructions illegally and high handedly. If the Western side wall of the building of the defendant is not plastered, no harm either to the construction or to his business would be caused. The trial Court had correctly appreciated the facts and law. The suit is of the year 2014. It is likely to be disposed of within a reasonable time. The revision petitions are devoid of merit and are liable to be dismissed.

9. I have bestowed my attention to the facts. I have given earnest consideration to the facts and the submissions. I have perused the material record including the photographs filed by the plaintiffs showing the building as well as the Western side un-plastered building wall of the defendant's

building. Admittedly, the suit is filed complaining that the defendant made encroachments into 'A' marked portion of the plaint plan, which is said to be belonging to the plaintiffs; and, in the suit the reliefs of declaration of title in respect of 'A' marked portion and recovery of the same after removal of construction and projections thereon made by the defendant are sought for. The defendant is resisting the suit. Though a Commissioner was earlier appointed in the matter by the trial Court, as per the submissions of both the sides, the said Commission was issued only to note down the physical features but not to measure the properties of the parties and fix, the encroachment, if any. Thus, both the learned counsel for the parties had fairly submitted that as on today, neither of the parties had sought for appointment of an Advocate Commissioner for measurement of the properties and for fixing the encroachment, if any, made by the defendant as being claimed by the plaintiffs in the suit. By now, one of the parties at least should have filed an application for appointment of an Advocate Commissioner to have the properties measured with the assistance of a qualified surveyor and to demarcate the properties of the parties and fix the encroachment, if any, said to have been made by the defendant over the property of the plaintiffs and file a plan along with his report. Had such exercise been completed by now, there would have been some material before the trial Court to examine the existence or otherwise of a *prima facie* case in favour of either of the parties. The plaintiffs complain that the defendant had already made encroachment into 'A' marked portion. The defendant contends that he had left four inches of his own site beyond his Western side building wall and that the constructions are made with the approval of the Gram Panchayat. In a case of this nature, unless the properties are measured by a qualified surveyor as per the title documents of the parties, if any, and enjoyment, it is not possible to resolve the dispute and arrive at a just conclusion. Therefore, in the well-considered view of this Court, it is just and fair to direct the plaintiffs on whom the burden of proof lies, in the facts and circumstances of the case, to file an appropriate application before the trial Court for appointment of an Advocate Commissioner to inspect the suit schedule

property, note down the physical features and measure the properties of both the parties with the help of a qualified surveyor and demarcate the properties and fix the encroachment, if any, made by the defendant over the 'A' marked portion in the plaint plan and file his report along with a plan drawn with the assistance of a Surveyor. If the Commissioner who may thus be appointed files such a report with a plan, the trial Court would certainly be in a better and advantageous position to either consider or reject the requests of the petitioner/defendant in I.A.no.189 of 2015 filed under Section 151 of the code for permission to plaster his Western side building wall in the presence of a Court Commissioner and the application in I.A.no.188 of 2015 filed for appointment of a Commissioner to supervise the said work. Though the Commissioner appointed by the trial Court to note the physical features had already filed a report before the trial Court, the order impugned does not make a reference to any of the observations in the report of the Commissioner in regard to physical features, which are relevant for consideration and also the traces of old wall/structures and boundary stones, if any, etcetera in the disputed portion of the site. Hence, it is apposite to set aside the orders impugned and remand both the instant applications, with necessary directions, to the trial Court for disposal afresh. Accordingly, the plaintiffs are directed to file, within fifteen days from the date of receipt of a copy of this order, an application for appointment of an Advocate Commissioner to inspect the suit schedule property, note down the further physical features and measure the properties of both the parties with the help of a qualified surveyor and demarcate the properties and fix the encroachment, if any, made by the defendant over the 'A' marked portion in the plaint plan and file his report along with a plan drawn with the assistance of a Surveyor. It is needless to state that after the Commissioner thus appointed files his report with plan as directed, the trial Court shall give an opportunity to both the parties to file their objections, if any, to such report and then take up the instant two applications, which are now being remitted to the trial Court, and pass appropriate orders having regard to the facts and the circumstances of the case and the legal position, if any, applicable to the facts. If the plaintiffs, for any reason, fail to file an application for appointment of Commissioner as

directed in these orders, the trial Court shall dispose of the applications of the defendants afresh with the aid of the available material.

10. In the result, both the revision petitions are allowed and the orders impugned in the revisions are set aside and both the interlocutory applications in I.A.no.188 of 2015 and 189 of 2015 are remitted to the trial Court for fresh disposal in strict accordance with the procedure established by law and subject to the directions given in this common order.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in these revisions shall stand closed.

M. SEETHARAMA MURTI, J

29th June, 2016
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