

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3135 of 2016

ORDER:

This civil revision petition under Article 227 of the Constitution of India by the unsuccessful petitioners-defendants is directed against the order dated 02.05.2016 of the learned Junior Civil Judge, Kodangal, passed in IA.No.111 of 2016 in OS.No.20 of 2016 filed under Order XXVI Rule 9 read with Section 75 of the Code of Civil Procedure, 1908, ('the Code', for brevity) requesting to appoint an advocate commissioner for local investigation of the suit plots in Sy.No.73/ AA9 situate in Bomraspet village and Mandal and note down the physical features of the same.

2. I have heard the submissions of Sri S. Ashok Anand Kumar, learned counsel for the revision petitioners-defendants ('the defendants', for brevity). Though the respondents-plaintiffs are served with notices, none appears. I have perused the material record.

3. The facts that lead to the filing of this revision may be stated, in brief, as follows:

The plaintiffs brought the suit for a perpetual injunction in respect of two plots of 50 Square yards and 60 Square yards in two items in Sy.No.73/ AA9 of Bomraspet village and Mandal of Mahabubnagar District, *inter alia*, claiming that they are the absolute owners and possessors of the said plots and that the 1st plaintiff acquired the first plot of 50 Square yards by virtue of a registered gift settlement deed dated 17.04.2013 and that the 2nd plaintiff acquired the second plot of 60 Square yards by virtue of a registered sale deed dated 17.04.2013, both duly registered in the Office of Sub-Registrar, Kodangal, and that the defendants attempted to commit acts of invasion and disturb their peaceful possession and enjoyment.

The defendants filed written statement denying the claims of the plaintiffs and *inter alia* contending that they are the owners and possessors of house no.4-41 situate at Bomraspet village in a total extent admeasuring 351 Square yards and that there is an open court yard in front of the said house and that the plaintiffs having obtained a registered gift deed are trying to occupy the said open place with a dishonest intention and that on a complaint filed by the defendants a crime was registered and the plaintiffs were enlarged on bail and that the boundaries of the suit plots as mentioned by the plaintiffs in the plaint schedule are imaginary and false and that wrong boundaries are shown in the plaint schedule. Further, in the written statement, the defendants furnished boundaries of the properties and denied the boundaries of the plots mentioned in the schedule of the plaint and pleaded that they constructed basement around the open place in front of their house in the year 1997 and that neither the plaintiffs nor their vendors were and are in actual physical possession of the suit plots.

Reiterating the said contentions pleaded in the written statement, the defendants filed the subject application for appointment of an advocate commissioner for local investigation of the suit plots in Sy.No.73/ AA9 situate in Bomraspet village and Mandal and to note down the physical features of the same. The plaintiffs resisted the said application reiterating their pleaded case.

The trial Court, by the order impugned in this revision, dismissed the application filed by the defendants, *inter alia*, observing that the suit is one for perpetual injunction and that the issue that falls for consideration is in regard to the possession and enjoyment of the suit property and that the legal burden is on the plaintiffs to establish their case by adducing necessary oral and documentary evidence and it is not for the defendants to disprove the case of

the plaintiffs and that when the issues involved can be adjudicated on the basis of oral and documentary evidence, it is not necessary to appoint an advocate commissioner for the purpose desired by the defendants.

Aggrieved of the said order, the defendants filed this revision.

4. Learned counsel for the defendants while reiterating their pleaded case and while stating that the findings of the trial Court are erroneous would submit as under: “It is absolutely essential to appoint an advocate commissioner for noting down the physical features and boundaries of the plaint schedule property when there is a serious dispute in regard to identity of the property with reference to boundaries and when one of the contentions of the defendants is that the plaintiffs furnished wrong boundaries on failure of their attempts to occupy the defendants’ property and when the defendants further pleaded that there is a construction upto basement level in open plot in front of the house no.4-41. The trial Court failed to note the vital principle of law that when once the both parties adduce evidence, the principle of onus of proof pales into insignificance and that the Court has to adjudicate the issues based on the evidence available on record and that therefore it is also the duty of the defendants to place before the Court the best possible evidence which would help the Court in effectively adjudicating the *lis*.”

Having so contended, learned counsel for the defendants placed reliance on a decision of this Court in *Donadulu Uma Devi v. Girika Katamaiah @ Basaiah and others*¹ and submitted that in the oral evidence both parties would assert their respective pleaded cases and also state that the boundaries respectively stated by them are only correct and hence, after adduction of such oral evidence there will be contrary statements made on oath against oath before the Court and, therefore, if a commissioner is appointed and he inspects

¹ 2013(1) ALT 548

the property and files his report, that report will be of immense aid to the Court. He would also state that the defendants are not seeking either demarcation or measurement of the property in dispute and hence, a Commissioner can be appointed for the purpose desired by them.

5. I have bestowed my attention to the facts and the submissions. There is no hard and fast rule or a settled position of law that an advocate commissioner cannot at all be appointed for any purpose in a suit for perpetual injunction. And, it cannot be laid down as a rule of thumb that in no suit for perpetual injunction, an advocate Commissioner can be appointed; however, 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 suit property as it is the function of the Court to decide the issue as to who amongst the parties is in possession of the suit property and the said judicial function cannot be delegated to an advocate commissioner. 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.

6. Reverting to the facts of the case, the plaintiffs are claiming that they are in possession of the suit plots whereas the defendants are claiming that the plaintiffs are not in possession and that they are in possession of the house property and the vacant court yard in front of the house and that after obtaining the gift deed the plaintiffs tried to occupy that open site and that a criminal case is also registered and that the plaintiffs furnished wrong boundaries in the plaint and that in fact the defendants raised construction upto basement level in the open site. Be that as it may. The defendants are seeking appointment of a Commissioner specifically to make local inspection and note down the physical features viz., boundaries and also the existence of

construction upto basement level in the property being claimed by them and to place before the Court an assured piece of evidence in the form of a Commissioner's report to show that the boundaries given by the plaintiffs are incorrect and that the plaintiffs are making incorrect claim by showing incorrect boundaries in respect of the plaint schedule plots. The plaintiffs are asserting that the plaint schedule plots are correctly described. As rightly contended if both the parties and their witnesses assert the pleaded boundaries of the properties in the respective depositions, such oral evidence may not be sufficient to conclusively determine the correctness or otherwise of the contentions of either of the parties. Orders in the nature of appointment of an advocate Commissioner to note down the physical features and boundaries of the disputed properties are incidental and complimentary in nature and assist the Court in arriving at a just decision in the *lis* unlike supplementary orders. The request for appointment of Commissioner for the purpose stated by the defendants, in the considered view of this Court, by no stretch of imagination, can be called an attempt to gather evidence. Further, the pleadings of the parties in the interlocutory application would also show that the plaintiffs also filed a sketch map in respect of the suit plots. If the Commissioner is appointed, he can also verify and submit to the Court about the correctness or otherwise of the sketch map said to have been filed by the plaintiffs. Therefore, the appointment of a Commissioner, in the facts and circumstances of the instant case, would be helpful to the Court below in conclusively and effectively adjudicating the *lis*.

7. On the above analysis, this Court finds that the order impugned brooks interference.

8. In the result, the Civil Revision Petition is allowed without costs. As a sequel, IA.No.111 of 2016 in OS.No.20 of 2016 on the file of the learned Junior Civil Judge, Kodangal, 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 defendants and direct the Commissioner to file a report with plan 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.

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

Date: 27.10.2016
Vjl



M. SEETHARAMA MURTI, J