

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 1645 of 2017

ORDER:

1) The present Civil Revision Petition is filed by the petitioners/ plaintiffs under Article 227 of the Constitution of India, aggrieved by the order, dated 17.01.2017, passed in I.A.No.872 of 2016 in O.S.No.348 of 2016 on the file of the Additional Senior Civil Judge, Tirupati, wherein and whereunder an application filed under Order XXVI Rule 9 of C.P.C. seeking appointment of an advocate-commissioner to note down the physical features of the schedule property; unlawful constructions made by the defendants in plaint 'A' and 'B' schedule properties and to take measurements of the constructions and file a report along with the sketch, was dismissed.

2) The facts in issue are as under:

The petitioners/ plaintiffs filed O.S.No.348 of 2016 seeking declaration of title and a direction to the defendants to remove the illegal and unlawful constructions made by the defendants in the plaint "A" and "B" schedule properties and if the defendants failed to do so, empower the plaintiffs to remove the same and take possession of the same through

process of the Court. The contents of the affidavit filed in support of the petition would show that about a month prior to filing of the petition, the 1st plaintiff went to Bangalore and was doing plumbing works. Taking advantage of his absence in Tirupati, the defendants colluded with each other and constructed a building in plaint "C" schedule property by encroaching plaint "A" and "B" schedule properties and also erected concrete pillars and beams in their entire plaint "C" schedule property and in part of plaint "A" and "B" schedule properties. As such, the plaintiffs filed an application seeking appointment of an advocate-commissioner to note down the physical features. Respondent No.1 filed counter denying the averments made in the affidavit filed in support of the petition. It is stated that plaint "D" schedule property belonged to Government Poramboke, classified as Mallaiahgunta katta and the same was occupied by one Putturu Yanadi Chellaiah. He sold the said site to the 1st defendant. After purchasing the same, she constructed a thatched house, to which the Municipal Authorities have also assigned a door number. Subsequently, she removed the thatched house and constructed R.C.C.house in its place. Apart from that she filed O.S.No.434 of 1997 on the file of the I Additional District Munsif, Tirupati, against the plaintiffs which was decreed. The judgment in the said suit has

become final as no appeal was filed by the plaintiffs herein. Therefore, it is stated that the petitioners have no right, interest, title and possession of the suit schedule properties and no fresh construction is going on as alleged in the affidavit. The 1st defendant also obtained preliminary decree in O.S.No.128 of 1995 on the file of the I Additional District Munsif, Tirupati, with regard to the property bearing Door No.13-4-430 in the name of P.Ademma. The said Ademma died intestate and her share was succeeded by the 1st defendant and her younger sister P.Kanthamma as legal heirs. Thereafter, the 1st defendant and her younger sister P.Kanthamma, sold their shares to the 2nd defendant for a valid consideration of Rs.40,000/- on 06.12.1998 and delivered possession of the same. Since then he claims to be in exclusive possession and enjoyment of the same. In view of the above, it is stated that the plaintiffs have no right, interest, title or possession and enjoyment whatsoever over the suit schedule properties. It is further stated that only with a view to collect evidence and to protract the matter, the plaintiffs filed the present application seeking appointment of an advocate-commissioner.

3) After considering the rival submissions made, the trial Court dismissed the said petition. Challenging the same, the present Civil Revision Petition is filed.

4) Learned counsel for the plaintiffs would submit that the trial Court failed to appreciate that the defendants involved in building construction activities in the entire plaint 'C' schedule property by encroaching the plaint 'A' and 'B' schedule properties from North to South 6 feet, and East to West 55 feet on northern side of plaint 'A' and 'B' schedule properties and southern side of plaint 'C' schedule property. The defendants raised pillars upto a height of about three feet from the ground level and dumped the construction material ie. Steel, sand and bricks etc. as on 11.08.2016. He further submits that no prejudice would be caused to the respondents if an advocate-commissioner is appointed to note down the physical features.

5) Learned counsel for the respondents would submit that the suit is posted for trial and the present petition is filed only for collection of evidence as there is title dispute and that appointment of an advocate-commissioner is not necessary, more so, when the respondent No.2 is in possession of the schedule property and no fresh construction is going on in the suit schedule property.

6) In *Bandaru Mutyalu and another v. Palli Appalaraju*¹ a learned Single of this Court while dealing with the aspect of

¹ (2013) 6 ALT 26

appointment of an advocate-commissioner before trial held as under:

“Where there is controversy as to identification, location or measurement of the land, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The party against whom the report may have gone may choose to adduce evidence in rebuttal.”

7) In *Haryana Wakf Board v. Shanti Sarup and others*² the Apex Court held that in a case where demarcation of the disputed land is warranted, it would be appropriate for the Court to direct investigation by appointing a local investigator under Order XXVI Rule 9 of C.P.C.

8) In *Pilli Yadaiah and others v. Pilli Komraiah and others*³ another learned Single Judge of this Court while dealing with the application for appointment of commissioner held as under:

“The appointment of Advocate-Commissioner to note the physical features in view of the contradictory stands taken by the parties is essential to avoid voluminous oral evidence.”

9) Having regard to the judgments referred to above and taking into consideration the facts in issue, appointment of advocate-commissioner to note down the physical features of

² (2008) 8 SCC 671

³ (2013) 6 ALT 158

schedule property and file rough sketch may not amount to collecting evidence but on the otherhand it would help to avoid voluminous oral evidence. Though the suit is for title, but having regard to the fact situation more particularly with regard to the encroachments alleged to have been made by the defendants, no prejudice would be caused if an advocate commissioner is appointed.

10) Accordingly, the Civil Revision Petition is allowed setting aside the order, dated 17.01.2017 passed in I.A.No.872 of 2016 in O.S.No.348 of 2016 on the file of the Additional Senior Civil Judge, Tirupati, I.A.No.872 of 2016 stands allowed to the extent of appointment of Advocate-commissioner to note down the physical features of the schedule property with the help of an approved surveyor. The trial Court is directed to appoint the Advocate-commissioner for the said purpose. There shall be no order as to costs.

11) Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

08.08.2017
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