

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

CIVIL REVISION PETITION No.307 of 2017

ORDER:

The revision petitioners, who are the unsuccessful defendants/ respondents 1, 2 and 4 to 9, filed this Civil Revision Petition, under Article 227 of the Constitution of India, assailing the orders, dated 28.11.2016, of the learned Senior Civil Judge, Gadwal, Mahabubnagar District, passed in I.A.No.277 of 2013 in O.S.No.100 of 2011, filed by the plaintiffs under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908, ('the Code', for brevity) requesting to issue a commission to an experienced senior advocate to elucidate the matter in dispute with the assistance of District Surveyor and for identifying the survey nos.116, 118 and 147 of Shantinagar village of Waddepalli Mandal with reference to their boundaries and extents and prepare plans after making local inspection and to conduct survey and note down the physical features and survey numbers of the plaint schedule properties and note down in which survey numbers they are and draw a plan and file a report.

2. I have heard the submissions of Sri O. Manohar Reddy, learned senior counsel representing Sri G. Savan Kumar, appearing for the defendants/ revision petitioners. I have heard the submission of the learned counsel for the respondents 1, 6 and 7. I have perused the material record.

3. The parties shall hereinafter be referred to as 'plaintiffs' and 'defendants', as arrayed in the original suit for convenience and clarity.

4. The introductory facts, in a nutshell, are as follows:

The plaintiffs brought a suit against the defendants for declaration that the plaint schedule land of the plaintiffs is part and parcel of survey nos.118 & 116 and for delivery of possession of the plaint schedule lands to them; and, for

a mandatory injunction for removal of constructions made in the plaint schedule land. The plaint schedule is in respect of Ac.0.60 cents with constructions mentioned in item nos. 1 to 6. Items 1 to 5 respectively are – (i) house measuring 59' x 100'; (ii) shops together measuring 51' x 100'; (iii) house measuring 23' x 100'; (iv) house-cum-shops together measuring 19' x 100'; and, (v) house-cum-shop measuring 19' x 100'; whereas item no.6 is an open site of an extent of Ac.0.15 cents. The defendants are resisting the suit by filing a written statement. During the pendency of the suit, the plaintiffs filed the subject Interlocutory Application under Order XXVI Rule 9 read with Section 151 of the Code seeking the afore-stated relief. The said petition was resisted by the defendants. On merits, the trial Court allowed the petition of the plaintiffs and appointed an advocate commissioner. Therefore, the defendants are before this Court.

5. Before proceeding further, it is necessary to refer to the pleadings of the parties.

6. The case of the plaintiffs, as stated in the affidavit filed by the 1st plaintiff in support of the request for appointment of an advocate commissioner for the purpose mentioned in the introductory paragraph of this order, in brief, is as follows: 'The plaintiffs 1 to 6 are brothers. Their father is the owner and possessor of the lands in Sy.Nos.114, 115/ B, 116/ B, 117 & 118 situate in Shantinagar village. Their father got the property by inheritance. He died intestate on 29.06.1996, leaving behind the plaintiffs. The plaintiffs succeeded to the above-said landed properties of their father. All the plaintiffs are having equal rights in the said properties. Sixth plaintiff gifted away, on 29.05.2009, some extent of land including Ac.0.16 guntas in S No.118 to his daughter, that is, the 7th plaintiff. The plaint schedule land admeasures Ac.0.60 cents and is denoted as ABCD in the plaint plan. It is part and parcel of Sy.no.118 which admeasures Ac.2.36 guntas. The plaint schedule land even

spreads into Sy.No.116 to a small extent. The father of the plaintiffs 1 to 6 and the plaintiffs are under a mistaken impression that the plaint schedule land is in Sy.no.115/ B and partly in Sy.no.147. However, after the 6th plaintiff gifted away some extent to his datuther/ 7th plaintiff, as stated above, some disputes arose among the plaintiffs 1 to 6. In order to bury the hatchet, on 12.06.2011, the plaintiffs 1 to 6 got surveyed the land in Sy.no.118. Then it was revealed that the plaint schedule land admeasuring Ac.0.60 cents is actually in Sy.no.118 to a large extent and in Sy.no.116 to small extent. The defendants 1 to 9 made constructions in the plaint schedule land without any manner of right or title by taking advantage of the absence of the plaintiffs 1 to 6 from the village and the further fact that they are residing at different places. The constructions made by the defendants are stated, in detail, in the plaint schedule. When the plaintiffs brought to the notice of the defendants that they have wrongly raised structures/ made constructions in the plaint schedule land without any right or title and asked them to remove the same and surrender vacant possession of the plaint schedule property to them, they baldly refused to oblige. Thereafter, the defendants started making hectic efforts to create third party interests in respect of such structures/ constructions in the plaint schedule land with a *mala fide* intention to avoid delivery of possession to the plaintiffs, who are the rightful owners. The defendants have no right, title and interest to make constructions and create third party interests. The constructions made by the defendants are illegal and are liable to be removed. Hence, the plaintiffs brought the suit for declaration as stated, recovery of possession and mandatory injunction. While so, the defendants filed a written statement falsely contending that the land mentioned in the plaint schedule is situate in Sy.no.147 but not in Sy.nos.118 & 116 and that they purchased respective sites under various registered documents from different individuals who are said to be the owners. Sy.No.147 is a 'devuni manyam' and it is situated far away from the plaint schedule land. Hence, there is no nexus between the plaint

schedule land and the land in Sy.no.147, which is an inalienable inam land. The persons who were said to have sold the lands to the defendants are not title holders and they have no right to sell the lands, which are being claimed by the defendants. In the stated circumstances, unless the lands in Sy.no.116, 118 and 147 are surveyed it is difficult to resolve the issue as to in which survey number the plaint schedule lands are situated. Hence, it is expedient to issue a commission. Therefore, the petition is filed.'

7. The case of the defendants, in brief, is this:-

The petition filed by the plaintiffs is to be ignored as the petition is not maintainable. The plaintiffs want to create evidence out of surveyor's report. Even according to the plaint averments, plaintiffs came to know the location of the survey numbers after survey only. Then again having the lands surveyed with the assistance of surveyor is only an un-necessary and multiple exercise. The lands in the said survey numbers are in the middle of the village, Shantinagar, and are covered by constructions and buildings. It is not possible to survey and identify the survey numbers. The plaintiffs also stated that land in Sy.no.147 is a 'devuni manyam' and it is situate far away from the plaint schedule land and that there is no nexus between the two lands in Sy.no.147 which is an inalienable inam land and the plaint schedule land. It is for the plaintiffs to explain as to how the mother of the plaintiffs 1 to 6 purchased land in Sy.no.147 from Medari Eswarappa when the said land in the said survey number is a 'devuni manyam' and is inalienable. This fact is known to the plaintiffs and their ancestors also. Knowing the facts fully well, the plaintiffs filed the petition to prejudice the cause of the defendants. As per boundaries shown in the registered sale deed, dated 04.05.1999, the defendants' site is adjacent to Raichur road and after that the plaintiffs' land is situate to the Southern side. There are no merits in the petition. The petition may be dismissed.

8. Learned senior counsel for the defendants would contend as follows:
'The requirements of the provision of Order XXVI Rule 9 of the Code are not satisfied. Therefore, the trial Court ought to have dismissed the petition. A commissioner cannot be appointed for the purpose of gathering evidence. The plaintiffs are required to prove their right and title to the property. A Commissioner cannot be appointed, merely because no prejudice would be caused to the defendants. The trial Court relied upon a decision of the Supreme Court which is inapplicable to the facts of the case. The appointment of Commissioner is not legal and correct.'

9. Per contra, learned counsel for the plaintiffs while supporting the orders of the trial Court would submit as follows:

By no stretch of imagination the appointment of commissioner for identifying/ localising the plaint schedule property on land and ascertaining its survey numbers after conducting a survey work with the assistance of a District surveyor can be termed as gathering evidence more particularly when the suit is for declaration that the plaint schedule is part and parcel of Sy.no.118 & 116 and when the defendants are disputing the said contention of the plaintiffs. Unless the plaint schedule property is identified and is localised after survey with reference to its boundaries and survey numbers, any decree that may be passed in favour of the plaintiffs will be of no avail to the plaintiffs. In view of the defence raised by the defendants in their written statement, unless the lands in Sy.no.116, 118 and 147 are surveyed and the plaint schedule property is identified and localised with reference to its survey numbers and boundaries the issue involved in the *lis* cannot be resolved. Hence, it is expedient to issue a commission and the trial court having considered the facts and circumstances appointed an advocate commissioner obviously as the trial court is of the view that a commissioner's report after detailed survey with plan is necessary for effectively adjudicating the *lis*. Further, the commissioner appointed already

executed the warrant and filed a report. In any view of the matter, since the commissioner had already executed the warrant, the revision may be dismissed giving a direction to the trial Court to appropriately consider the report of the commissioner along with other evidence brought on record and dispose of the suit on merits, if necessary, after inviting objections to the commissioner's report from both parties, if the said exercise is not already done. This revision is filed only to drag on the matter and to somehow delay and defeat the just claim of the plaintiffs.

10. I have bestowed my attention to the facts and submissions. It is trite to note that the plaintiffs brought the suit against the defendants for declaration that the plaint schedule land of the plaintiffs is part and parcel of survey nos.118 & 116 and for delivery of possession of the plaint schedule lands to them; and, for a mandatory injunction for removal of constructions made in the plaint schedule land. According to the plaintiffs, the plaint schedule land is in Sy.no.118 to a large extent and in Sy.no.116 to a small extent whereas the defendants who are admittedly in occupation of items 1 to 6 of the plaint schedule and who have raised some constructions in items 1 to 5 of the plaint schedule are claiming that the plaint schedule property is in Sy.no.147. The further case of the plaintiffs is that survey no.147 is a 'devuni manyam' and it is a land inalienable and that it is far away from the plaint schedule land. The total land in Sy.no.118 admeasures Ac.2.36 guntas whereas the plaint schedule property is Ac.0.60 cents. According to the plaintiffs, a large extent out of Ac.0.60 cents is in Sy.no.118 and the remaining small extent spreads into Sy.no.116. Though the plaintiffs got surveyed the land before coming to Court, the said survey which was got done by the plaintiffs without the knowledge of the defendants and without their presence at the time of survey work may not be considered as an assured piece of evidence by the trial Court. In view of the very contentions of the parties, now the dispute revolves round the main issue as to in what survey number the plaint schedule property is situate.

Therefore, the said aspect of the dispute has to be resolved before a quietus is given to the *lis*. The law is well settled that the Court is empowered to appoint an Advocate Commissioner for elucidating the matters in dispute and that the Court can issue a Commission to such person as it thinks fit directing him to make such investigation as may be necessary and report thereon to the Court. The Commission is being sought to inspect the property in Sy.no.118, 116 and 147 as well as the plaint schedule property and survey the properties with the assistance of a District surveyor and localise the properties in the said survey numbers and also identify and localise the plaint schedule property with reference to boundaries and survey numbers and submit a report to the Court with plan. If a commissioner does the work and files a report as directed by the trial Court, the said report with the plan and the evidence the commissioner may give, if he is examined before the trial Court, enables the trial Court to better appreciate the other evidence that may be let in by the parties during the course of trial. Therefore, it cannot be said that the Commissioner's appointment is intended to gather/collect evidence. The evidence which Commissioner gathers by making local inspection and conducting survey cannot otherwise be procured and such evidence can be procured only by issuing a commission. Further, in the case on hand, the Commissioner has already executed the warrant and filed his report. On careful examination of the facts of the case, this Court finds that the trial Court is justified in granting the request of the plaintiffs by allowing the interlocutory application.

11. On the above analysis, this Court finds that there is no merit in the revision and the revision petition is liable to be dismissed.

12. In the result, the Civil Revision Petition is dismissed confirming the order of the trial Court. It is needless to mention that the trial Court shall give an opportunity to both the parties to file their objections, if any, to the

Commissioner's report already filed before the trial court, if such exercise is not already done.

Miscellaneous petitions if any pending in this revision shall stand closed. There shall be no order as to costs.

M. SEETHARAMA MURTI, J

28.04.2017
Vjl

