

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1339 of 2017

ORDER:

In this civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful petitioner-plaintiff, the challenge is to the order, dated 24.01.2017 of the learned Junior Civil Judge, Peddapalli, passed in IA.No.435 of 2016 in OS No.49 of 2009.

2. I have heard the submissions of Sri Ramchander Rao Vemuganti, learned counsel for the petitioner-plaintiff, and of Sri Alladi Ravinder, learned counsel for the respondents-defendants. I have perused the material record.

3. The facts which are necessary to be stated as a prelude to this order, in brief, are as follows: - 'The sole plaintiff brought the suit against the defendants for a perpetual injunction restraining the defendants from dismantling the bund and from interfering with the peaceful possession and enjoyment of the plaintiff over the suit schedule land and for costs. Along with the suit, the plaintiff also filed a rough sketch demarcating the disputed extent of Ac.0.04 guntas in Sy.No.459. The 2nd defendant filed a written statement resisting the suit. The 1st defendant adopted the same by filing a memo. Pending suit, the plaintiff filed the subject application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908, requesting to appoint an advocate commissioner to demarcate the lands in Sy.Nos.458 and 459 of Peddakalvala village with the assistance of Mandal Surveyor for resolution of the boundary dispute completely. The defendants by filing counter resisted the said application. By the order impugned in this

revision, the trial Court dismissed the application of the plaintiff. Therefore, the plaintiff is before this Court.'

4. The case of the plaintiff in support of his afore-stated request, in brief, is this: - 'The plaintiff is the owner and possessor of the land bearing Sy.No.459 admeasuring Ac.0.34 guntas situate in the sivar (outskirts) of Peddakalvala village in Peddapalli Mandal. The subject matter of the suit is only Ac.0.04 guntas out of the said extent of land. The suit is filed as the defendants are interfering with the peaceful possession and enjoyment of the plaintiff over the said Ac.0.04 guntas. The defendants are adjacent land holders and their land is situate in Sy.No.458. There are boundary disputes between the parties. The defendants filed a written statement claiming the disputed extent of Ac.0.04 guntas in Sy.No.459. They also stated that the Mandal surveyor surveyed the suit land and the survey map and the panchanama revealed that there is clear demarcation between the lands in survey nos. 458 & 459. The defendants are claiming the disputed extent of Ac.0.04 guntas of the plaintiff's land as their land as per the survey said to have been done by the Mandal surveyor. As per the map annexed to the plaint, there is no possibility of the disputed Ac.0.04 guntas of land coming within the purview of survey no.459. Therefore, it is necessary to appoint an advocate commissioner to demarcate the lands by fixing the boundary stones of survey nos.458 & 459 for resolving the boundary dispute completely. If the boundary dispute is thus resolved both the parties would be able to enjoy their respective extents of properties peacefully, in future.'

5. The case of the defendants in the counter, in brief, is this: - 'The suit is filed for perpetual injunction simpliciter. Therefore, the application filed for appointment of commissioner for the desired

purpose is not maintainable. The burden is on the plaintiff to prove his possession and the boundaries of his property by placing the documents before the Court. The petition may be dismissed.'

6. Learned counsel for the plaintiff submits that the plaintiff's land in Sy.No.459 and the defendant's land in Sy.No.458 are adjacent to each other and that the plaintiff is claiming that the disputed Ac.0.04 guntas of land as shown in the plaint plan is a part of the plaintiff's land in Sy.No.459 of a total extent of Ac.0.34 guntas and that there is only a boundary dispute and that the plaintiff is not claiming the land of the defendant in Sy.no.458 and that similarly the defendants are not claiming any land of the plaintiff in Sy.no.459 and that, therefore, if the boundary between the two lands in the two survey numbers is directed to be demarcated by appointing a Commissioner to conduct a survey with the help of a Mandal surveyor, the dispute would be resolved once and for all.

7. Learned counsel for the defendants would reiterate that the defendants have already got surveyed the land and that the survey map and panchanama revealed that there is a clear demarcation between the two survey numbers and that the defendants have also obtained pattadar pass books from the revenue authority and that the record shows that the defendants are in possession of the disputed extent of land. He would also submit that the suit is at an advanced stage of cross examination of DW1 as on the date the order was passed by the trial Court and that, therefore, the trial court is justified in dismissing the petition, which was belatedly filed by the plaintiff.

8. Learned counsel for the plaintiff would further submit as follows:
- 'The trial court simply dismissed the petition of the plaintiff only for

the reason that the defendants have already got surveyed the land through a Mandal surveyor and got fixed the boundaries and that, therefore the advocate commissioner cannot be appointed as the lands were already measured by a surveyor and that if the petition is allowed no purpose would be served. The trial court failed to see that the survey as stated by the defendants was conducted at the instance of the defendants and that at that time the plaintiff was not put on notice and that the plaintiff was not present and that therefore the survey, if any, conducted at the instance of the defendants by the Mandal surveyor behind the back of the plaintiff is not binding on the plaintiff and that it is in the interests of justice to have the lands surveyed in the presence of both the parties and that the trial court also erroneously observed that the petition is filed at a belated stage and thus commissioner cannot be appointed even though the law does not prohibit filing of an application for appointment of a Commissioner at any stage of the suit provided the facts and circumstances of the case warrant appointment of a Commissioner.'

9. 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/ disputed 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 or disputed 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.

10. Reverting to the facts of the case, though the suit is for a perpetual injunction, in view of the contentions of the parties and the issue to be resolved in the *lis* and the further fact that the defendants are not making a claim in respect of the land in Sy.No.459 and similarly the plaintiff is not seeking any rights over the land of the defendant in Sy.No.458, the only dispute appears to be is with regard to the boundary between the two extents of lands, viz., the land in Sy.no.459 of the plaintiffs and the land in Sy.No.458 of the defendants. Whether, in a suit for perpetual injunction, commissioner can be appointed depends upon facts and circumstances of each case. This view of this Court finds support from the decisions in *Velaga Narayana v. Bommakanti Srinivas and others*¹; *Jajula Koteswar Rao v. Ravulapalli Masthan Rao*²; and *Bandaru Mutyalu v. Palli Appalaraju*³.

11.1 In *Jajula Koteswara's* case, this Court followed the decision in *Haryana Wakf Board v Shanti Sarup and others* [(2008) 8 SCC 671] wherein the Supreme Court also 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 investigation under Order XXVI Rule 9 of CPC.

11.2 In *Velaga Narayana's* case, this Court first noted that the trial Court refused to appoint a Commissioner on the ground of availability of

¹ 2014(3)ALD605

² 2016(1) ALT 134

³ 2013(6) ALT 26

a Mandal surveyor's report and then held that the refusal for appointment of commissioner on that ground is not justified as the said report is disputed by the opposite parties. In paragraph 13 of the cited decision, this Court held as follows:

'The purpose and object of local investigation under rule 9 is to have the evidence from the spot itself to have a correct and proper understanding of the dispute between the parties. The local investigation report submitted by the Commissioner enables the Court to make a correct assessment of evidence on record. When the Court is of the opinion that the material on record requires elucidation, it would be just and reasonable to issue a commission for the said purpose. A commission at the instance of one of the parties to find out as to who is in possession of the property cannot be issued as it enables the party seeking appointment of Commissioner to collect or gather evidence. But, where there exists a dispute regarding the identity of suit property, the Court has to necessarily issue a commission with the assistance of a Surveyor, otherwise, it would be highly difficult for the Court to completely and effectively resolve the dispute and issuing such commission would not amount to collection of evidence. Commission for the said purpose can be issued prior to or after the parties let in their evidence'

11.3 In Bandaru Mutyalus' case, this Court while considering the issue as to whether a Commissioner should be appointed in a suit for perpetual injunction considered the legal position, in detail, and held that in situations 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.

12. Having regard to the facts, submissions and the legal position obtaining, this court is of the considered view that the appointment of a Commissioner, in the facts and circumstances of the instant case is necessary, more particularly, as a dispute exists with regard to the boundary between the properties of the two parties and as to whether

the disputed extent of Ac.0.04 guntas exists in Sy.No.459 or in Sy.No.458. In the considered view of this Court, unless the Court issues a commission to demarcate the boundary between the two extents of lands in the two survey numbers with the assistance of a Surveyor, it would be highly difficult for the Court to completely and effectively resolve the dispute and that issuance of a commission for the purpose desired by the plaintiff would be helpful to the Court below in conclusively and effectively adjudicating the *lis*.

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

14. In the result, the Civil Revision Petition is allowed without costs and the order impugned is set aside. As a sequel, IA.No.435 of 2016 in OS.No.49 of 2009 on the file of the Court of the learned Junior Civil Judge, Peddapalli, 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 plaintiff 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.

28.08.2017
Vjl

M. SEETHARAMA MURTI, J

