

THE HON' BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.5499 OF 2016

ORDER:

This Civil Revision Petition is filed under Article 227 of the Constitution of India, challenging the order dated 26.06.2016 passed in I.A.No.669 of 2012 in O.S.No.73 of 2008, by Senior Civil Judge, Suryapet, Nalgonda District, dismissing the I.A. filed under Order XXVI Rule 9 r/w Section 151 C.P.C. for appointment of an Advocate Commissioner.

2. The petitioner filed O.S.No.73 of 2008 for various reliefs i.e., to declare that the plaintiff is the owner of the suit schedule property, perpetual injunction restraining the defendants, their successors, etc., from interfering with the possession and enjoyment of the suit schedule property, alternatively, to recover possession of the schedule property, contending that the petitioner is in possession and enjoyment of house plot admeasuring 484 Sq.yards in Sy.No.231 of Bechirag Madharam Village, Suryapet Mandal and the defendants are making efforts from interfering with the possession and that they have no right or title over it. Therefore, sought the above reliefs in this present suit. Earlier the plaintiff filed O.S.No.76 of 2001 before the Junior Civil Judge, Suryapet and the suit was dismissed on the ground that the plaintiff is not entitled to claim ad-interim injunction without seeking declaratory relief and the

matter was carried in appeal in A.S.No.15 of 2005 before the II Additional District Judge, Nalgonda, vide judgment dated 15.04.2008, the appeal was dismissed and again carried in S.A.No.518 of 2008 before this Court and during pendency of Second Appeal, the present suit in OS.No.73 of 2008 is filed for the reliefs referred above.

3. The defendants contesting the suit, filed their written statement.

4. The present petition in I.A.No.669 of 2012 in O.S.No.73 of 2008 was filed for appointment of an advocate commissioner while asserting that the plaintiff is not in possession and enjoyment of the property but an allegation is made at the end of para-2, five lines that 'as anticipated by plaintiff by the time of filing the suit, the defendants 1 and 2 illegally occupied her plot to the maximum extent and raised compound wall including their plot. Since, defendants 1 and 2 have illegally occupied the suit plot without any right and title over it, the plaintiff, in the guise of alleged encroachment, sought for appointment of an advocate commissioner to get the land surveyed by fixing boundaries etc., as the Commissioner report is helpful to the Court to decide the *lis* pending before it, factually.

5. The defendants/respondents opposed the application for appointment of advocate commissioner on various grounds, while asserting that plaintiff filed the suit for injunction against

Sankaramaddi Somi Reddy and Vadde Shyam Sunder Reddy, who are respondents 1 and 2 herein and defendants before the Junior Civil Judge, Suryapet, which ended in dismissal and finally dismissed the Second Appeal. Thereafter, the 2nd respondent, after obtaining permission from 3rd respondent, raised structures after getting the plan approved and the same was disclosed in I.A.No.346 of 2008 filed in the present suit and as such, the question of occupying the plot of petitioner by them is false. He also further contended that in O.S.No.76 of 2001, the husband of the petitioner by name Sudhakar Reddy, who was examined as PW.2, during his cross examination clearly admitted that he submitted an application to the Mandal Revenue Officer to get the suit schedule land surveyed and got suit land surveyed by him through the Mandal Revenue Officer. In such case, the plaintiff is not entitled to claim relief of appointment of advocate commissioner for the said purpose and prayed for dismissal of the petition.

6. The trial Court upon hearing both the counsel, dismissed the petition assigning specific reasons.

7. The present revision is filed under Article 227 of the Constitution of India, raising several contentions pointing out illegalities in the orders passed by the trial Court. The main ground urged before this Court is that when the earlier suit in O.S.No.76 of 2001 was culminated into dismissal, whereas

O.S.No.73 of 2008 is for declaration. Therefore, dismissal of the earlier suit for mere injunction is of no consequence and that apart petitioner claimed declaration of title and prohibitory injunction, alternatively for recovery of possession. In such a case, dismissal of I.A. under Order XXVI Rule 9 C.P.C. by the trial Court is erroneous and the trial Court did not consider the effect of the use of the commissioner's report if filed and submitted after execution of warrant and erroneously dismissed the petition culminating the relief under Order XXVI Rule 9 C.P.C. and finally prayed to allow the revision setting aside the order dated 24.06.2016 in I.A.No.669 of 2012 in O.S.No.73 of 2008 passed by the Senior Civil Judge, Suryapet, Nalgonda District.

8. During hearing, learned counsel for the plaintiff mainly contended that when there is a boundary dispute with regard to the land encroached, the Court can appoint an advocate commissioner and placed reliance on judgments of this Court in *Bandi Samuel v. Medida Nageswara Rao*¹, *Bandaru Mutyalu v. Palli Appalaraju*² and *Sarala Jain v. Sangu Gangadhar*³.

9. On the strength of the principles laid down in the above judgments, the learned counsel for the petitioner, Sri M.Venkat Ram Reddy, contended that even in the present suit, an

¹ 2017(1) ALT 493

² 013 (6) ALT 6

³ 2016(3) ALT 197

appointment of Advocate Commissioner would be helpful to the Court to decide the real controversy, since the boundaries of the land occupied by the defendants is a disputed question of fact and such fact cannot be proved by adducing oral evidence and if the advocate commissioner is appointed the commissioner's report is sufficient to decide the extent of the land of the defendants/ respondents occupied and requested this Court to appoint an advocate commissioner setting aside the impugned order passed by the trial Court in I.A.No.669 of 2012 in O.S.No.73 of 2008.

10. Per contra, Sri M.Paja Malla Reddy, learned counsel for the respondents contended that when suit is filed for declaration of title, consequential perpetual injunction and alternatively for recovery of possession of the suit schedule property, which is described in the schedule annexed to the plaint, within the four boundaries, the question of localizing the property with the help of Surveyor and to find out the exact extent which is occupied by the respondents allegedly would not arise, while asserting that the respondents themselves are in possession and enjoyment and 2nd respondent raised construction after obtaining necessary approval from the 3rd respondent and that a commissioner cannot be appointed to collect evidence and relied on judgment of this Court in Arvind Kumar Agarwal v. Legend Estates (P) Ltd., Ranga Reddy

District, Hyderabad⁴, while drawing attention of this Court to the law declared by this Court in Sarala Jain (referred supra) on the strength of the principles laid down in the above, taking into consideration of the facts and circumstances, a commissioner cannot be appointed and prayed for dismissal of the petition.

11. On perusal of the material, the point that arise for consideration is:

“Whether appointment of an advocate commissioner in the present set of facts in a suit filed for declaration, prohibitory injunction and alternative relief of recovery of possession of the entire schedule property is helpful to the Court to decide the real controversy between the parties, if so, the order passed by the trial Court be sustained?”

12. The plaintiff, undisputedly, filed suit for declaration of title, consequential prohibitory injunction, alternatively for recovery of possession. The schedule property described in the schedule annexed to the plain is an extent of 484 Sq.yards equivalent to Ac.0.04 guntas in Sy.No.31 located within the revenue village of Bechirag Madharam, within the boundaries; East-house plot of K.Krishna Reddy, West-House plot of defendants/ respondents, North-House plot of K.Pavinder Reddy and South-Internal 25 Feet wide road. As seen from the allegations made in the plaint as well as the schedule annexed to the plaint, the petitioner is claiming possession as on the date of the suit. It is not the case of the plaintiff that plaintiff was dispossessed at any time, but, strangely claimed recovery of

⁴ 2015(2) ALD 206

possession as an alternative relief while asserting that she is in possession of the property. But, a different story is invented in the affidavit for the first time, last five lines at para-22 of the affidavit that the respondents illegally occupied plot to a maximum extent, without disclosing the date of alleged encroachment and other details and what action the plaintiff has taken against the respondents, when they illegally occupied the site. In the absence of any details and amendment to the plaint appropriately, if the allegations made in para-2 of the affidavit is a subsequent event, but alleged encroachment subsequent to filing of the suit needs no consideration unless the plaint is the pleading within the definition of pleading under Order VI Rule 1 C.P.C. and to decide an application for appointment of an advocate commissioner, the Court shall take into consideration the pleadings of both parties, nature of the relief claim by the parties in the suit. If that is taken into consideration the pleading available on record is that the plaintiff alone is in possession and enjoyment of the property as asserted in para-4 of the plaint and similarly, the respondents also asserted that the respondents are in possession and enjoyment of the property and raised construction after obtaining approval from the 3rd respondent. Therefore, the dispute is with regard to the date of encroachment, since the respondent himself admitted that he is in possession of the

property in the written statement as well as in the counter filed in the present petition, the question of appointing an advocate commissioner to localize the property is unnecessary. The boundaries of the property are not in dispute, as the respondents specifically contended in the written statement that the 2nd respondent raised construction in the schedule property not within a part of it. Therefore, localization of property and fixation of boundaries would not serve any purpose to decide the real controversy between the parties in the main suit.

13. Learned counsel for the plaintiff would draw the attention of the judgment in Bandi Samuel (referred supra), where this Court placed reliance on Shaik Zareena Kasam v. Patan Sadab Khan (2011(4)ALT 541) and Mallikarjuna Srinivasa Gupta v. K.Sheshirekha(2006(4) ALT 162) and Varala Ramachandra Reddy V. Mekala yadi Reddy (2010(4) ALD 198) held that a commissioner can be appointed when there is a dispute regarding the boundaries. The same principle was laid down in the earlier judgment in Bandaru Mutyalu v. Palli Appalaraju (2013 (6) ALT 26). Thus, the consistent views of this Court in both the judgments is that, where there is a dispute with regard to the identity of the property and boundaries, an advocate commissioner can be appointed to elucidate the facts of the case and it enables the Court to decide the dispute effectively.

But in other judgment of this Court in Arvind Kumar Agarwal (referred supra), relied on by the learned counsel for the respondents, in a suit for injunction, advocate commissioner cannot be appointed to collect evidence. Only in cases, where there is a dispute regarding identity of the property and the boundaries thereto, an advocate commissioner can be appointed even in a suit filed for injunction and the Court relied on Haryana Wakf Board v. Shanti Sarup (2008(8) SCC 671). Even if the principle laid down in the above judgment is applied to the facts of the case, there is absolutely no boundary dispute or identity of the property, thereby, question of localization of property with the help of Mandal Surveyor is unnecessary to decide the real controversy. The physical features of the property is also not in dispute even assuming for a moment that what the petitioner contended at para-2 of the affidavit is true, the appointment of advocate commissioner is unnecessary, as the respondents themselves admitted that they are in possession and enjoyment of the property raising construction after obtaining approved plan from the 3rd respondent. Even in the plaint, the plaintiff claimed recovery of possession of entire schedule property within the boundaries specified in the schedule annexed to the plaint. In such circumstances, whether respondents allegedly encroached a part of the schedule property or total property is in consequential and if the Court

concludes that the plaintiff is the owner of the property and declared her as a owner, the relief of recovery of possession or injunction are consequential, the Court after recording a finding that the possession of the respondents is illegal, the Court can pass a decree for recovery of possession. In the present facts and circumstances of the case, appointment of an advocate commissioner is unnecessary and therefore no interference of this Court is called for in the order impugned, while exercising power under Article 227 of the Constitution of India, with the order passed by the trial Court since the order of the trial Court is free from any legal infirmities.

14. In the result, this Civil Revision Petition is dismissed. No costs.

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

M. SATYANARAYANA MURTHY, J

Date: 28.07.2017
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