

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.6426 of 2016

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by petitioners/defendants aggrieved by the Order dt.24.12.2016 passed in I.A.No.1280 of 2016 in O.S.No.232 of 2016 by Principal Junior Civil Judge, Sangareddy, filed under Order 26 rule 9 CPC, denying the appointment of an Advocate Commissioner.

The respondents herein/plaintiffs namely Smt G. Kamamma and G. Sriram Reddy, filed O.S.No.232 of 2016 for grant of perpetual injunction restraining the defendants therein, who are 17 in number, from interfering with the peaceful possession and enjoyment of suit property in an extent of Ac.1.39 guntas of land in S.No.376 and Ac.4.20 cents of land situated in S.No.377 of Chinna Kanjarla Village, Patancheru Mandal, Medak District, which is morefully described in the schedule annexed to the plaint, claiming title and possession over the schedule property. They also obtained an interim injunction to restrain the defendants from interfering with their peaceful possession and enjoyment of the schedule property, in a petition filed under Order XXXI Rules 1 and 2 against the defendants therein/the petitioners herein.

It is the contention of the petitioners/defendants before the trial Court that the respondents herein/plaintiffs, having obtained an interim order, started removing burials/tombs of Muslims, since the land in dispute belong to Dargah Sharif i.e., Chilla Mahaboob Subhani and muslim grave yards were existing, whereunder graves of forefather of petitioners i.e., 14th defendant are existing. Suppressing these facts, they filed the suit with an intention to grab the schedule property.

Taking advantage of interim order, the respondents/plaintiffs started removing burials of forefathers of petitioners and therefore, appointment of an Advocate Commissioner is necessary to note down the physical features of the schedule property and also the existence of Dargah Sharif or otherwise i.e., burial/grave yard and others graves existing on ground as on that date.

The respondents/plaintiffs filed Counter denying the material allegations made in the petition and while asserting that they are the owners of the property, contended that a commissioner cannot be appointed for obtaining evidence on behalf of any party specifically when there is no documentary evidence to prove that suit schedule property is a grave yard registered and notified as Wakf, and, before appointing a Commissioner, the Court has to scrutinize the evidence available on record and, therefore, a commissioner cannot be appointed for inspection to note down the physical features of

the schedule property and existence of Dargah Sharif i.e., Chilla Mahaboob Subhani.

Upon hearing both counsel, the trial Court dismissed the petition on the ground that a commissioner cannot be appointed under Order 26 Rule 9 CPC to collect evidence in a suit for bare injunction.

Aggrieved by the Order and Decretal order passed by the Principal Junior Civil Judge, Sangareddy, the present revision is filed on various grounds, mainly contending that the suit land belongs to Dargah Sharif and there existed tombs of forefathers of petitioners and grave yard of muslims, but taking advantage of the interim order, the respondents/plaintiffs are removing grave yards of muslims and the same is photographed by the petitioners and filed positive photographs along with the petition before the trial Court. But, the trial Court did not consider the law declared by the Court in *Hanumantha Rao @ Anjaneyulu v. Battigiri Ramulu and others*¹ and another judgment of this Court in *Bandi Samuel and another v. Medida Nageswara Rao*² and committed an error in dismissing the petition.

During hearing, Sri Mohd. Ghulam Hussain, learned counsel for petitioners/defendants, has drawn the attention of

¹ 2008 (1) ALD page 466

² 2017(1) ALT 493

this Court to various photographs to show that there existed certain grave yards of muslim and the removal of those graves of muslims can be seen from the photographs filed along with the petition. But, the plaintiffs, taking advantage of the interim order, are obliterating the physical features of the land, which belongs to Dargah Sharif, and where existed tombs of muslims and also Dargah, as on that date. But, the trial Court did not consider the scope under Order 26 Rule 9 r/w 75 CPC and drawn the attention of this Court to a judgment of this Court in *Bandi Samuel's* case (2 supra).

The counsel for the respondents/plaintiffs reiterated the contentions raised before the trial Court, mainly contending that appointment of an Advocate Commissioner in a suit for injunction simplicitor for collection of evidence is impermissible under law and prayed for dismissal of the petition.

Undisputedly, the respondents/plaintiffs filed a suit in O.S.No.232 of 2016 for injunction simplicitor and the relief claimed by them is limited to restrain the defendants therein/petitioners herein from interfering with the peaceful possession and enjoyment of suit schedule property, which is morefully described in the schedule annexed to the petition. The scope of trial in a suit for injunction is limited; the Court is required to record its finding whether the plaintiff is in lawful possession and enjoyment of the property as on the

date of filing the suit; whether the defendant therein made any attempt to infringe or invade the legal rights of the plaintiff and when the defendant invades or threatens to invade the plaintiff's right or enjoyment of property, the Court may grant perpetual injunction where the defendant is trustee of the property for the plaintiff, where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion, where the invasion is such that compensation in money would not afford adequate relief and where the injunction is necessary to prevent multiplicity of judicial proceedings. Therefore, in view of the limited scope of trial in a suit for perpetual injunction, the Court need not record any other finding beyond the scope of Section 38 of Specific Relief Act, 1963. However, the present dispute is with regard to ownership and identity of property on ground, with reference to survey numbers. The initial onus of proof is on the plaintiffs to establish that they are in lawful possession and enjoyment and the defendants made an attempt to infringe or invade the legal rights of the plaintiffs. If, for any reason, the plaintiffs failed to prove or establish their lawful possession and enjoyment of the property in the alleged invasion or infringement of the right/obligation, they will not succeed in such suit. But, the present contention of the petitioners/defendants is that the schedule property is wakf property belonging to Dargah Sharif i.e., Chilla Mahaboob Subhani.

Learned counsel for petitioners submitted that it is notified as wakf property as per Gazette dt. 29.12.2001. The property in S.No.376 and 378 is classified as Tank and the nature and object of wakf property is mentioned as Errection of Alamss and nature of object is Fatheha, which means recitation of Quran, according to the counsel for petitioners. But, it is not classified as burial ground, as per the Gazettee furnished by him to this Court. The suit schedule property is in S.No.376 and 377. The extent in S.No.376 is only Ac.1.39 guntas and the boundaries were specifically given in the schedule annexed to the plaint. But, they are not tallying with the boundaries as per Gazette Page No.71, referred to supra. Therefore, even according to Gazette Notification, the schedule property is not classified as burial ground. Even otherwise, if it is a burial ground belonging to Dargah Sharif, still, the revenue records are sufficient to prove that it is a burial ground belong to Dargah Sharif i.e., Chilla Mahaboob Subhani, which is a wakf property. A list of burial grounds are being maintained in the collector's office for Hindus, Muslims and Christians. If such document is produced, with the help of such document, the petitioners can prove that it is a burial ground. All the more, the Field Measurement Book of the village would disclose the burial grounds with dots. But, no such document is produced before the Court. In any view of the matter, the purpose of seeking appointment of an

Advocate Commissioner is to note down the physical features in a suit for bare injunction.

However, there is little controversy about power of the Court to appoint an Advocate Commissioner in a suit for bare injunction or injunction simplicitor. But, in recent judgment of this Court in *Bandi Samuel and another's* case (2 supra), this Court took a view that there are circumstances in which, it is only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to property from threat of changing or obliterating the existing physical features to destroy valuable evidence on ground, could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable rights of the parties and a commissioner can be appointed in a suit for bare injunction. The law declared by this Court is based on the earlier judgment of Apex Court in *Haryana Wakf Board and others v. Shanti Sarup and others*³ and this Court extracted the sentence from para No.18 of the judgment of Apex Court. But, there, controversy was with regard to fixation of boundaries of the property and there the issue was different. In para Nos.4 to 8 of the Judgment it was held as follows:

³ 2008 (8) Scc 671

“ admittedly, in this case, an application was filed under Order 26 Rule 9 of CPC, which was rejected by the trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to direct the investigation by appointing a local commissioner under Order 26 Rule 9 CPC.

The Appellate Court found that the trial Court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of suit land by them as per para No.3 of the Plaint. But only controversy between the parties was with regard to demarcation of the suit land because the land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial Court was wrongly rejected.

It is also not in dispute even before the appellate Court, the appellate Board had filed an application for appointment of a local commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the local commissioner should be appointed for the purpose of demarcation in respect of the suit land. For the reasons aforesaid, we are of the view that the High Court ought to have considered this aspect of the matter and then decided the second appeal on merits.

In view of the above, a commissioner can be appointed for demarcating property even if the law laid down by this Court is ignored, in view of the inconsistency in the law declared by this Court. Here, the physical features were in dispute including identity of the property on ground. But, a commissioner cannot be appointed in a suit for bare injunction, more particularly, for collection of evidence. Here, the relief sought for is that appointment of an Advocate Commissioner to note down the physical features, and existence of burials, Dargah Sharif etc. So, appointment of an Advocate Commissioner for such purpose would certainly amount to collection of evidence.

There are two sets of decisions, one set is in favour of appoint of an Advocate Commissioner in a suit for bare injunction and another set of judgments are to the effect that

a commissioner cannot be appointed in a suit for bare injunction for collection of evidence.

This Court in a catena of judgments, held that a Commissioner can be appointed in a suit for bare injunction to note down the physical features of the property, which does not amount to collection of evidence including *Bandi Samuel's* case. But, another set of judgments in *Yenugonda Bal Reddy v. Manemma and others*⁴, *Sagi Vijaya Ramachandra Raju and others v. Koppiseti Satynarayana and others*⁵ *Koduru Sesha Reddy v. Gottigundala Venkata Rami Reddy and others*⁶ and *Batchu Narayana Rao v Batchu Venkata Narasimha Rao*⁷, this Court held that appointment of commissioner in a suit for injunction is impermissible, as it amounts to collection of evidence.

In view of the controversy regarding the law declared by this Court regarding appointment of an Advocate Commissioner in a suit for bare injunction, including both sets of judgments, I must examine the necessity of appointment of an Advocate Commissioner in the present case.

⁴ 2011(3) ALT 232,

⁵ 2009(6) ALT 353

⁶ 2006 (1) ALD 372

⁷ 2010(5) ALD 83

As discussed above, the scope of trial in a suit for injunction simplicitor is limited and it is for the plaintiffs to establish that the plaintiffs are in lawful possession and enjoyment of the schedule property as on the date of suit along with other requirements, as contemplated under Section 38 of Specific Relief Act. The petitioner herein/14th defendant, is not under the obligation to prove that he is in possession and enjoyment of the property and no reversal onus is placed on 14th defendant. But, he is required to establish his lawful possession and enjoyment to rebut the evidence adduced by the plaintiffs during trial.

The main purpose of seeking appointment of an advocate commissioner is to note down the existing tombs, burial grounds, Dargah Sharif etc., existing on land as on the date of filing petition. This is nothing but collection of evidence. The contention that the schedule property belongs to him, where Tombs and Dargah Sharif etc., are existing, which is not required to be decided in a suit for bare injunction. That apart, the schedule property i.e., one of the items of schedule property is not notified as Dargah Sharif even according to Gazette and the land in S.No.377. But, land in Sr.No.376 is notified as tank and it is wakf property. Therefore, at best, the land in an extent of Ac.1.30 guntas in S.No.376 is relevant to decide the present dispute. The land in S.No.378, which is classified as tank, is notified that it is

not a part of schedule property. Therefore, when the property is notified in S.No.376 is wakf property and classified as tank, there is no need to decide about the existence of any Dargah Sharif or tombs or grave yard in the schedule property. Therefore, appointment of an Advocate Commissioner for collection of such evidence is against the law. Moreover, if really the respondent Nos. 1 and 2 are destroying the Dargah Sharif and tombs etc., and are obliterating the physical features, the remedy open to the petitioners herein is to obtain necessary restraint order from the Court, either by filing an independent suit or in the present suit, subject to permissibility under law. But, appointment of an Advocate Commissioner, for the above purpose, is wholly unnecessary in the present set of facts. Hence, the trial Court did commit no mistake or error warranting interference of this Court while exercising jurisdiction under Article 227 of the Constitution of India.

The jurisdiction of this Court under Article 227 of the Constitution of India is limited and it is supervisory in nature and hence, this Court cannot set aside the order passed by the Tribunal or Subordinate Courts unless it appears the trial Court has exercised power beyond its jurisdiction or crossing its boundaries. Time and again, the scope of Article 227 of the Constitution of India came up for consideration before the Apex Court and the Apex Court laid down certain principles.

It is well settled law that the High Court can exercise supervisory jurisdiction under [Article 227](#) of the Constitution of India to keep subordinate Courts or tribunals within the boundaries of their jurisdiction. The Apex Court, in *State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and others*, examined the power of High Court to interfere with orders of subordinate Courts or Tribunals in exercise of its supervisory jurisdiction under [Article 227](#) of the Constitution of India. In the light of the law laid down by the Apex Court, it is abundantly clear that this court can exercise only its jurisdiction in exceptional circumstances which is supervisory in nature. Therefore, if the Court finds that there is an illegal exercise of jurisdiction by the trial Court, this Court can interfere with the order under challenge otherwise this Court cannot exercise power though the order is wrong.

Therefore, in view of the limited scope of jurisdiction of this Court under Article 227 of the Constitution of India, this Court cannot interfere with the order passed by the Principal Junior Civil Judge at Sangareddy in I.A.No.1280 of 2016 in O.S.No.232 of 2016 and the Civil Revision Petition is liable to be dismissed as devoid of merits.

Accordingly, this Civil Revision Petition is dismissed. However, the observations made in the above paras shall have no bearing on the issue involved in the suit and the trial

Court is directed to decide the suit and other petitions independently, uninfluenced by the observations made in the above paras. No Costs.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 23-03-2017.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



CRP No.6426 of 2016

Dt. 23-03-2017

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