

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3287 of 2017

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful petitioner-plaintiff is directed against the order, dated 22.03.2017, of the learned Junior Civil Judge, Mahabubnagar, passed in IA.No.157 of 2014 in OS.No.29 of 2012.

2. I have heard the submissions of *Sri V.H.V.R.R.Swamy*, learned counsel for the petitioner-plaintiff, and of *Sri N.Ashok Kumar*, learned counsel for the respondents-defendants. I have perused the material record.

3. The facts, which are necessary to be stated as a preface to this order, in brief, are as follows:

The plaintiff filed the suit against the defendants requesting to grant a decree declaring that the defendants have no right in the suit road and also a mandatory injunction for removal of the wall and gate erected in the suit road, situated on the Western side of the house of the plaintiff at Addakal village and Mandal, Mahabubnagar District, more fully described in the schedule annexed to the plaint. The defendants are resisting the suit by filing a written statement. The defendants are *inter alia* contending that the plaintiff has no *locus standi* to file the suit. In the pending suit, the plaintiff filed the aforesaid interlocutory application for appointment of an advocate commissioner to measure the suit road according to the plaintiff's sale deed with the help of a qualified surveyor and note down the physical features and also to note as to whether the gate was erected in the suit road and as to whether the wall that was constructed by the defendants on the Southern side of

the house of the defendants is on the suit road and also to take down the photographs of the suit road and file a report. The said petition was resisted by the defendants by filing a counter. On merits and by the order impugned in this revision, the trial Court dismissed the said petition. Therefore, the plaintiff is before this Court.

4. The case of the plaintiff, in support of the request for appointment of Commissioner, in brief, is this:

The plaintiff is the owner and possessor of a house plot of an extent of 194 square yards by virtue of a sale deed, dated 18.05.2005. Possession of the said property was delivered to the plaintiff, as per Vastu Sastra, after leaving about 6 feet wide open place for road on Western side. The plaintiff constructed a house, having left 4' - 5" wide place on the Western side, as per Vastu Sastra. Hence, the said road including the open site left by the plaintiff became a 705 feet wide road. It is 83 feet in length. The said road is shown in the sketch annexed to the plaint. The defendants constructed their house in the land purchased by them leaving the suit road. Both parties have got no right, title or interest whatsoever in the suit road. The defendants have purchased a open place/ plot in an extent of 514 square yards by virtue of registered sale deed, dated 28.09.1995. In those days, the land to the East of the said property was vacant. Hence, boundary was mentioned in their document as open land in survey no.20. On 20.01.2011, in the absence of the plaintiff, the defendants have constructed a wall on the Southern side blocking the road. The plaintiff raised an objection for removal of the wall and demanded to remove the wall. But, the defendants evaded removing the wall one pretext or the other. When the plaintiff having constructed 1st and 2nd floors of his house is proceeding with the plastering work, the defendants started

quarrelling with him and prevented him from completing the plastering work by stating that due to dumping of sand and cement inconvenience is being caused to them. To prevent the plaintiff from completing the plastering work and to cause loss and damage to the plaintiff, the defendants erected a gate on the Northern side of the road by force and blocked the suit road. Therefore, the suit is filed for declaration and mandatory injunction for removal of the wall and gate erected in the suit road by the defendants, which is situated on the Western side of the plaintiff's house. The defendants denied the construction of the wall and erection of the gate road in the suit road and alleged that this plaintiff created false documents and occupied the land and court yard. To determine the issue involved in the suit it is necessary to appoint an advocate commissioner to measure the suit road according to the plaintiff's sale deed with the help of a qualified surveyor and note down the physical features and also to note as to whether the gate was erected in the suit road and as to whether the wall that was constructed by the defendants on the Southern side of the house of the defendants is on the suit road and also to take down the photographs of the suit road and file a report. If a commissioner is appointed there is a possibility for permanent settlement of the issue involved in the suit. Hence, it is just and necessary to appoint a commissioner as prayed for by the plaintiff. If commissioner is appointed no prejudice would be caused to the defendants. If a commissioner is not appointed for the above said purpose great prejudice will be caused to the plaintiff.

5. The case of the defendants is in the nature of denial. Their specific case is that they purchased the open plot admeasuring 514 square yards out of survey no.20 by virtue of registered sale deed, dated 28.09.1995, and that their said plot was within the specific boundaries

and that the plaintiff has purchased his open house plot subsequent to the purchase made by the defendants, that is, by virtue of sale deed, dated 18.05.2005, and that the plaintiff purchased 195 square yards only towards Eastern side of the house of the defendants and that the plaintiff illegally occupied the road and filed the suit suppressing the real facts.

6. Learned counsel for the plaintiff submits that in view of the contentions of the parties and the relief claimed in the suit, appointment of a Commissioner is highly essential for the purpose desired by the plaintiff and that unless commissioner appointed measures the properties including the suit road, it would be impossible for the plaintiff to establish his case and that if a commissioner appointed measures the properties including the road, with the help of a surveyor, and files a report with a plan, the said evidence would be helpful to the trial Court in effectively adjudicating the dispute between the parties.

7. Per contra, learned counsel for the defendants supported the orders of the trial Court.

8. I have given earnest consideration to the facts and submissions.

9. From the pleadings and the contentions advanced in line with the pleadings, it is discernable that the core dispute is about the road in between the properties of both the parties and its alleged occupation by either of the parties. The plaintiff's suit is for declaration with regard to the road and for mandatory injunction for removal of wall and gate said to have been erected by the defendants on the suit road. Now, the plaintiff seeks appointment of a commissioner to resolve the dispute with regard to the suit road in between the properties of the two parties

and the wall and gate allegedly constructed and erected over the said suit road. The trial Court dismissed the application for appointment of an advocate-commissioner *inter alia* observing that a commissioner can be appointed for local investigation; but, if a commissioner is appointed for the purpose desired by the plaintiff, it would amount to permitting collection of evidence. With that sole observation, the trial Court dismissed the application of the plaintiff.

10. The specific case of the plaintiff is that there is a road in between the properties of both the parties. The defendants are also not disputing the existence of the said road. According to the plaintiff, there was originally a 6 feet wide open place and that it was left for road on the Western side of the plaintiff's property and that the plaintiff having left 4' - 5" wide place on the Western side constructed a house as per Vastu Sastra and, therefore, on the Western side, there is a road of 705 feet width and 83 feet length as shown in the sketch annexed to the plaint. The plaintiff *inter alia* contends that both the parties have no right, title and interest whatsoever in the said road. Whereas, the defendants contend that they purchased the open plot admeasuring 514 square yards out of survey no.20 by virtue of registered sale deed, dated 28.09.1995, and that the plot that was purchased by them was within the specific boundaries and that the plaintiff has purchased his open house plot subsequent to the purchase made by the defendants, through sale deed, dated 18.05.2005, and that the plaintiff having purchased only 195 square yards towards Eastern side of the house of the defendants illegally occupied the road. The further case of the plaintiff is that the defendants constructed a wall on the Southern side blocking the road and that despite raising an objection and demanding to remove the wall, they failed to remove the wall and that while the plaintiff is

proceeding with the plastering work in the 1st and 2nd floors over his property, the defendants caused obstruction by erecting a gate on the Northern side of the road by force and also blocked the road and that, therefore, the suit is filed for granting a declaratory decree declaring that the defendants have no right, title and interest over the suit road and for mandatory injunction for removal of the road and gate erected said to have been erected by the defendants on the suit road.

11. In a suit of the present nature, in the considered view of this Court, appointment of a commissioner for localising the road on the ground is highly essential. Unless the Commissioner measures the properties of both the parties and localises the road on the ground after taking measurements with the help of a qualified surveyor and files a report with a plan it is not possible to effectively adjudicate the issues involved in the suit. Unless such course is adopted there will not be assuring material before the trial Court for effectively adjudication the */is*. If the Commissioner is not appointed for the desired purpose, after the conclusion of the trial, there will only be oral assertions on both the sides and such evidence in the absence of localisation of the road on ground would be of no help to the Court below for effectively adjudicating the */is*. Further, the evidence which the Commissioner gathers by making local inspection and conducting survey cannot otherwise be procured and such evidence can be procured only by issuing a commission. If a Commissioner is appointed and does the work as desired by the plaintiff and files a report with a plan after localising the disputed road on ground, the said report with plan and the evidence the Commissioner may give, if he is examined before the trial Court, would perhaps enable the trial Court to better appreciate the other evidence that may be let in by the parties during the course of trial. Be

it reiterated that the plaintiff also *inter alia* contends that the plaintiff also left some portion of his site at the time of constructing his house and that the said site left by him is now a part of the suit road. Further, in the considered view of this Court, it would be impossible for the plaintiff to establish the material facts pleaded in the plaint with regard to the disputed road and also his case by mere oral assertions that may be made in his evidence in line with the pleadings. Similarly, it would be impossible for the defendants to establish their defence in the absence of issuance of a commission for local inspection and conducting a survey with the assistance of a surveyor for localising the position of the disputed road on ground. It is axiomatic that in the oral evidence that both parties may adduce, they would naturally assert their respective pleaded cases and would also state that the respective claims are correct. Hence, after adduction of such oral evidence there will be opposing statements made on oath against oath before the court below; therefore, if a Commissioner is appointed and he inspects the property and files a report with a plan after localising the disputed road on ground, such a report will be of immense aid to the Court below. In that view of the matter, this Court is of the considered view that the instant case is a fit case in which a commissioner has to be appointed for the purpose desired by the plaintiff and that such a course would only meet the ends of justice.

12. Be it noted that the learned counsel for the defendants relied upon the following decisions: (i) Sajidunissa v. Sukur Ali (2015 (4) ALD 452). (ii) P. Venkateshwar Rao v. Sunku Srinivasulu (since died) and others (2015 (6) ALD 451). The facts of these cited cases reflect that the suits are filed for perpetual injunctions. (iii) In K. Sambasiva Reddy v. Chilla Rama Rao Reddy and others (2016 (6) ALD 61) the facts disclose

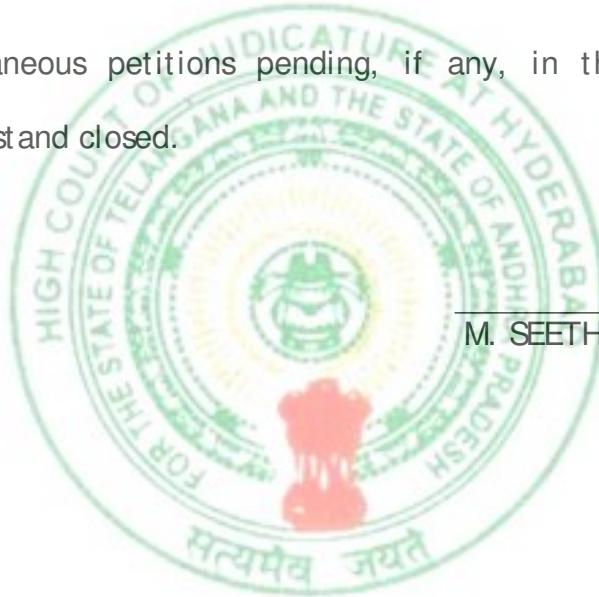
that the suit was filed for declaration and recovery of possession and that appointment of a commissioner was sought for localisation of lands in certain survey numbers along with sub-division numbers and for localising a specific stated item of property with the help of a District Surveyor and with the help of municipal records & documents. As the Court found on facts that the identity of the property was not in dispute the request for appointment of a commissioner was refused. Ultimately, the decisions in the three cases turned on the facts of the cases. 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 property as it is the function of the Court to decide the issue as to who amongst the parties is in possession of the property and the said judicial function cannot be delegated to an advocate commissioner. The instant suit as already noted is not a suit for bare perpetual injunction. Further, whether a commission shall be issued or not depends largely on the facts of a given case. 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.

13. On the above analysis this Court holds that appointment of a Commissioner for the desired purpose in the instant suit is essential for effectively adjudicating the *lis* and giving a quietus to the disputes once and for all and that, therefore, the order impugned brooks interference.

14. In the result, the Civil Revision Petition is allowed with costs and the order impugned is set aside. As a sequel, IA.No.157 of 2014 in OS.No.29 of 2012 on the file of the learned Junior Civil Judge, Mahabubnagar, is allowed with costs. 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.

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

03.10.2017
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M. SEETHARAMA MURTI, J