

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.348 of 2013

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed challenging the Order 10.10.2012 in I.A.No.719 of 2008 in O.S.No.659 of 2008 passed by Additional Junior Civil Judge, Cyberabad, Kukatpally at Miyapur, allowing an application filed under Section 151 CPC to appoint new Advocate Commissioner to locate the suit schedule plot with the help of Mandal Surveyor or Assistant Director of Survey and Settlement, Serilingampally Mandal, Ranga Reddy District.

The respondent herein filed suit O.S.No.659 of 2008 for injunction simplicitor alleging that the he purchased a plot for Rs.12,000/- under registered Sale Deed, Document bearing No.9275 of 1990, dt.24.07.1990 from Erani Mallaiah and others and since then she is in possession and enjoyment of the property and the revision petitioner/defendant allegedly made an attempt to infringe or invade the legal right of the plaintiff. The schedule of the property is annexed to the plaint and described as follows:

“ all that residential Plot No.116 in Sy.No.78 admeasuring 300 sq.yards equivalent to 250.80 sq.mtrs situated at Madhapur village Grampanchat, Serilingampally Mandal and Municipality Ranga Reddy District.

North: Road, South: Neighbour's; East: plot No.115 and West—Plot No.117”.

The respondent herein/plaintiff filed I.A.No.3148 of 2004 under Order 26 Rule 9 CPC to appoint an advocate commissioner to note the physical features of the suit schedule property, reminiscence of compound wall in the suit schedule site and other physical features. Initially, an Advocate Commissioner was appointed by the Court and he visited the suit schedule property and filed his report.

The petitioner herein/defendant appeared before the Court and filed Written Statement raising several objections with regard to identity of the property while contending that he is the owner of Plot No.2/A in Sy.No.77(part) of Patrika Nagar, Madhapur, Serlingampally and the property purchased by the respondent/plaintiff is distinct and thereby denied the right of the respondent/plaintiff in the schedule property.

To identify the schedule property with the help of Mandal Surveyor, the respondent herein/plaintiff sought appointment of an advocate commissioner.

The respondent therein filed Counter denying the material allegations, *inter alia*, contending that an *ex parte* order was passed appointing an Advocate Commissioner in I.A.No.3148 of 2004 and the Commissioner filed his report before the Court and later interim injunction granted by the Court was set aside and the CMA preferred against it was

also dismissed confirming the Order passed by the trial Court. He further admitted that his plot is situated in 2/A in Sy.No.77(part) of Patrika Nagar, Madhapur, Serilingampally. However, disputed the appointment of Advocate Commissioner since appointment of an Advocate Commissioner to localise the schedule property amounts to collection of evidence.

The trial Court, upon hearing both the counsel, appointed Smt Shalini, Advocate, as Commissioner with a specific direction to localize the suit schedule property with the help of Mandal Surveyor.

Aggrieved by the Order dt.10.10.2012 in I.A.No.719 of 2008 in O.S.No.659 of 2008, the respondent before the trial Court preferred this revision, under article 227 of the Constitution of India, raising several contentions and the main ground urged before this Court is that when earlier Commissioner Report was not expunged on the objections raised by him, second commissioner cannot be appointed for the same purpose and appointment of commissioner in a suit for injunction simplicitor amounts to collection of evidence and prayed to set aside the Order dt.10.10.2012.

Learned counsel for the revision petitioner/defendant, while reiterating the grounds urged in the petition, placed reliance on the judgment of this Court in CRP No.571 of

2015 dt. 27.02.2015 (*C. Vamshidar Reddy v. P. Suryanarayanarao*) and based on the principle laid down in the above judgment, he requested to set aside the Order dt.10.10.2012 passed by the trial Court.

Learned Counsel for the respondent/plaintiff, while supporting the Order in all respects, placed reliance on two judgments of this Court reported in *G.L. Purusotham and others v Y. Nagaraju and another*¹ and *Donadulu Uma Devi v. Girika Katamaiah @ Basaiah and others*².

Considering rival contentions and perusing the material available on record, the point that arise for consideration is:

“Whether an Advocate Commissioner can be appointed in a suit for injunction simplicitor to localise the suit schedule land with the assistance of Mandal Surveyor or with Assistant Director of Survey and Settlement, Serilingampally Mandal, R.R. District and if so, whether the order passed by the trial Court be sustained” ?

POINT: Undisputedly, the suit is filed for injunction simplicitor and identification of the property is not in dispute for the reason that the schedule is annexed to the plaint with specific plot numbers and boundaries, as required under Order 7 Rule 3 CPC, which enables the Court to identify the property, but because of denial of identify of

¹ 2015 (5) ALD 460

² 2013(1) ALT 548

the property by the defendant in the Written Statement, the respondent herein/plaintiff sought appointment of an Advocate Commissioner to localise the schedule property.

In normal course, when a suit is filed for injunction simplicitor, the initial onus is on the plaintiff, who approached the Court, to establish his independent case by adducing positive evidence, instead of resorting such procedure, the respondent/plaintiff wanted to get the property localised though he is certain about the identity of the property, in view of the schedule annexed to the plaint. That apart, earlier Commissioner filed his report and the same was considered along with the objections filed by the petitioner herein and it is still pending for consideration. In such a case, filing of an application for appointment of second commissioner, without expunging the earlier Commissioner's report, is impermissible under law, in view of the judgment of this Court reported in *Durgam Mangamma vs P. Mohan And Another*³, wherein this Court held that unless first commissioner's report is expunged, second Advocate Commissioner cannot be appointed.

Here, according to the respondent/plaintiff, first commissioner's report is not expunged and it is pending for

³ 1991 1 ALT 269

consideration. Therefore, in view of the law declared by this Court, referred to supra, appointment of an Advocate Commissioner for the same purpose is illegal.

In C. Vamshidhar Reddy's case, referred to supra, this Court held that an Advocate Commissioner cannot be entrusted with the task of resolving the dispute as to which of the parties is in possession of the suit schedule property, lest, such a course amounts to appointing an Advocate Commissioner to gather evidence.

The principle laid down in the above judgment is applied, the appointment of second Advocate Commissioner, without expunging the earlier Commissioner's report in I.A.No.3148 of 2004, is not maintainable.

The learned counsel for the respondent herein while contending that the commissioner can be appointed to localise the property and placed reliance on a judgment of this Court in *G.L. Purusotham's case* (1 supra), wherein this Court while deciding an application under Order 26 Rule 9 CPC held that when the Advocate Commissioner went to note down the physical features, no one disputed about the identification of the suit property and after lapse of six months, the petitioners came up with this petition, because the pleadings of the parties mandate the Court to decide as

to who encroached whose land. Therefore, the appointment of second Advocate Commissioner to re-visit the schedule property is permissible.

Similarly in *Donadolu Uma Devi's* case (2 supra), this Court held that in a suit for permanent injunction when there is a dispute or issue with regard to identity of a property, advocate commissioner can be appointed.

The law declared in the above two judgments is that when there is a dispute regarding identity of the property, a commissioner can be appointed even in a suit for injunction simplicitor.

In the present case, the respondent herein is not disputing the identity of the property, whereas, the defendant/petitioner herein is disputing identity of the property with reference to boundaries. Therefore, the burden is on the defendant to prove that the property, which the petitioner is claiming, is different from the property based on the boundaries. But the petitioner cannot entrust the task of identifying his own property to Advocate Commissioner when he is certain about the property in dispute based on boundaries, survey numbers and plot numbers.

This Court in an identical situation in *Batchu Narayana Rao v. Batchu Venkata Narasimha Rao*⁴, *Koduru Sessa Reddy v. Gottigundala Venkata Rami Reddy and others*⁵ and *Yenugonda Bal Reddy v. Manemma and others*⁶, held that a commissioner cannot be appointed for collection of evidence in a suit for declaration and permanent injunction or in a suit for injunction simplicitor, to note down the physical features of the land as it amounts to collection of evidence. Similar view was expressed by this Court in *Malla Bhaskara Rao and others v Konchada Ananda Rao*⁷. Therefore, in view of the law declared by this Court, referred to supra, the appointment of second Advocate Commissioner for the same purpose, without expunging the first commissioner's report, is illegal and therefore, the trial Court committed a grave error in appointing Smt. Shalini, Advocate, to locate the suit schedule plot with the help of Mandal Surveyor or Assistant Director of Survey and Settlement, Serilingampally Mandal, Ranaga Reddy District and therefore, the present Revision Petition is liable to be allowed.

⁴ 2010 (5) ALD 83

⁵ 2006(1) ALD 372

⁶ 2011(2) ALD 472

⁷ 1999 (5) ALD 113

In the result, this Civil Revision Petition is allowed setting aside the Order dt.10-10-2012 in I.A.No.719 of 2008 on the file of Additional Junior Civil Judge, Cyberabad, Kukatpally at Miyapur. However, the Additional Junior Civil Judge, Cyberabad, Kukatpally at Miyapur, is directed to dispose of the suit, as expeditiously as possible, in view of the request made by the learned counsel for petitioner.

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

Date: 29-06-2017.
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M. SATYANARAYANA MURTHY, J



HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



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Dt. 29-06-2017

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