

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.5394 of 2016

ORDER:

The revision petitioners, who are some of the unsuccessful defendants/respondents, filed this Civil Revision Petition, under Article 227 of the Constitution of India, assailing the orders, dated 21.10.2016, of the learned III Additional District Judge, Gadwal, Mahabubnagar District, passed in I.A.No.136 of 2016 in O.S.No.7 of 2015, filed by the plaintiffs under Order XXVI Rule 9 read with Sections 75 and 151 of the Code of Civil Procedure, 1908, ('the Code', for brevity) requesting to appoint an Advocate Commissioner with a direction to take the assistance of technical surveyor or deputy surveyor of Survey and Land Records of Gadwal division or licensed engineer and make a local inspection of the lands described in the schedule annexed to the petition and note down the physical features and get measured the same in his presence and furnish a report for proper adjudication of the dispute in the suit.

2. I have heard the submissions of Sri G.Rajeshwar Rao, learned counsel for the revision petitioners/defendants and Ms.Malathi Naidu, learned counsel for the respondents/plaintiffs. I have perused the material record.

3. The parties shall hereinafter be referred to as 'plaintiffs' and 'defendants', as arrayed in the original suit for convenience and clarity.

4. The case of the plaintiffs, in support of the request for appointment of an advocate commissioner for the purpose mentioned in the introductory paragraph of this order, in brief, is as follows:-

'The suit is filed for partition of plaint 'A' and 'B' schedule properties into three equal shares and allotment of separate shares to the plaintiffs. In the plaint, it is specifically pleaded that all the properties described in plaint 'A' and 'B' schedule are ancestral undivided joint family properties and they are liable for partition. Defendants 1 to 7 filed written statement resisting the suit. In view of the rival contentions and for proper adjudication of the /s, it is to be ascertained as to whether item numbers 2 and 5 are one and the same property or separate distinct properties. The said aspect is to be decided basing on the physical features and boundaries and on measurement of the said items of properties in the 'A' Schedule. Further, the defendants 1 to 8 are trying to change the physical features of item number 5 of 'A' schedule property, which is known as 'Dama Buddappa Doddi'. The said property is situated in survey number 342; it is an open site of an extent of 3,500 square yards with a house number allotted to it. It is surrounded by a compound wall constructed with stones, mud and plaster of Paris. Within the area covered by the compound wall, towards East and North, one new construction was illegally made and is in existence. Towards South and West sides, the tombs of ancestors of the plaintiffs and tamarind trees are in existence. The rough sketch is also filed earlier by the plaintiffs. Basing on the pleadings of the co-owners/co-sharers, the issue about the identity of the property has arisen. Therefore, it became necessary to seek appointment of an advocate commissioner to measure the properties with the

assistance of a qualified surveyor and file a report with a plan after noting down the physical features. The plaintiffs are claiming that item number 5 of the 'A' schedule property belongs to the grandfather of the first plaintiff and that abutting the compound wall of the said property, towards West, there is open land existing in the same survey number 342 and it is covered with plots and it is a separate property. Noting down of the physical features and identification of the properties is necessary for effective adjudication of the matter in dispute.'

5. The case of the defendants 1 to 7 in their counter, in brief, is as follows:-

'In the written statement filed on behalf of these defendants, the following specific pleas are taken:

The plaintiff NO.1 is the owner and possessor of the house No.1-40/1 extent 60 X 17½ = 116.66 square yards that is the item No.2 of the Schedule A property. It is not liable for partition. Let it be with the Plaintiffs.

The house No.1-16 item No.5 of the schedule A property was doddi. The plaintiff No.1 has constructed a house in the open place of the said doddi and it is house No.1-40/1. The plaintiff No.1 has been living in the said house. The item No.2 and the item No.5 are one and the same and hence the item No.5 of schedule A is to be deleted.'

Therefore, the case of the plaintiffs that the said properties are liable for partition is not correct; the said properties are not liable for partition. By seeking appointment of a commissioner, the plaintiffs are trying to collect and secure evidence; and, the said course is impermissible in law. The defendants never disputed the extent of land. Therefore, there is no need to measure item No.5 of 'A' schedule property. The defendants are not trying to disturb the physical features of the property.

By using the word 'Gramakantam' in their pleadings, the plaintiffs are introducing new facts. The plaintiffs are required to prove the existence of the lands mentioned in the plaint schedule and also their locations within the specific boundaries, as given in the plaint schedule. Otherwise, the plaintiffs cannot seek the relief of partition. They cannot secure the evidence by seeking appointment of a commissioner. Hence, the petition may be dismissed.'

6. On merits and by the orders impugned in this revision, the trial Court allowed the petition and appointed an advocate commissioner to note down the physical features of the properties and measure the same with the help of the documents and file a report after answering the points in the work memoranda, if any, of the parties.

7. Aggrieved thereof, some of the unsuccessful respondents/defendants preferred this revision.

8. At the hearing, the learned counsel for the parties advanced arguments in line with the respective contentions of the parties, which are stated supra, in detail.

9. Learned counsel for the defendants/revision petitioners would further submit that in the circumstances stated by the defendants, there was no need to appoint an advocate commissioner and that in a suit for partition, it is for the plaintiffs to establish the nature of the property and their entitlement to seek partition and also that the properties that are mentioned in the plaint schedule are the family properties liable for partition and also the identity of the said properties as per the boundaries

mentioned in the plaint schedule and that without adducing oral evidence and filing the documents to support the claim of partition, the plaintiffs cannot seek appointment of an advocate commissioner, more particularly for measurement of the properties, when the defendants did not dispute the extents of the properties, particularly that of item No.5 of the plaint 'A' schedule property. The trial Court erroneously appointed a commissioner, though the petition for appointment of the commissioner is filed by the plaintiffs to gather evidence and the said course is impermissible in law.

10. The learned counsel for the defendants/revision petitioners specifically brought to the notice of this Court the decision, dated 19.02.2016, of this Court in C.R.P.No.5837 of 2015 between Sarala Jain and others Vs. Sangu Gangadhar and others, wherein, this Court, while dealing with the provisions of Section 75 and Order XXVI of the Code, considered the aspects which are to be kept in mind by a Court while considering the applications for appointment of a commissioner.

11. On the other hand, the learned counsel for the plaintiffs/respondents, while reiterating the case of the plaintiffs and supporting the orders of the Court below, submitted that the commissioner had already executed the warrant and filed his report, along with a plan and documents, on 20.01.2017, and that, therefore, the cause in the revision petition does not survive for adjudication and that in any view of the matter, since the commissioner had already executed the warrant, the revision may be dismissed giving a direction to the trial Court to appropriately consider the report of the commissioner along with other evidence brought on record and dispose of the suit on merits, if necessary,

after inviting objections to the commissioner's report from both parties, if the said exercise is not already done.

12. I have bestowed my attention to the facts and submissions.

13. From the facts, submissions and material record, the following facts emerge for consideration. The plaintiffs brought the suit for partition of plaint 'A' & 'B' schedule properties. Defendants 1 to 7 are resisting the suit. In the said suit, the subject application is filed by the plaintiffs for appointment of an Advocate Commissioner with a direction to take the assistance of technical surveyor or deputy surveyor of Survey and Land Records of Gadwal division or licensed engineer and make a local inspection of the lands described in the schedule annexed to the petition and note down the physical features and get measured the same in his presence and furnish a report for proper adjudication of the dispute in the suit. That application was resisted by some of the defendants, who are the revision petitioner herein. The plaintiffs seek partition of the petition schedule properties as well on the ground that they are ancestral joint family properties and that they are available for partition. The contesting defendants before this Court contend that the petition schedule properties are not in existence; they are not within the boundaries stated in the schedule and that they are not identifiable on land and that the claim for partition of non existent properties is not maintainable. From the rival contentions, a question also emerges as to whether properties at item nos.2 and 5 of plaint 'A' schedule are one and the same property or separate distinct properties. One open site which is the subject matter of the suit which is said to be in Sy.no.342 is surrounded by compound wall

constructed with stone, mud and plaster of paris according to the contentions of the plaintiffs. According to the plaintiffs, there is some property to the West of this property and that property is covered with plots and that it is not part of the said open site but it is a separate property. The defendants not only disputed the extents and also the existence of properties but also the boundaries by *inter alia* contending that the properties within the boundaries as shown in the suit schedule are not in existence on land and the said properties are not available for partition. One of the contentions of the plaintiffs also is that the defendants are changing the physical features of the subject properties, which are mentioned in the schedule of the petition.

14. Having regard to these rival contentions and the questions that emerge for adjudication in the suit for partition, the trial Court felt that it is necessary to appoint an advocate commissioner and direct the advocate commissioner to note down the physical features including boundaries and get the properties measured with the assistance of a qualified surveyor though the defendants did not specifically dispute the extents of properties, which are in dispute. One of the main contentions of the defendants is that the appointment of a commissioner for the purpose desired by the plaintiffs would amount to permitting them to gather evidence. In the considered view of this court, such a contention cannot be countenanced as noting down physical features including nature of properties and identifying the properties on land with reference to boundaries and getting the properties measured in the presence of an advocate commissioner to ascertain whether or not the properties are

different and distinct and are identifiable on land as per the boundaries mentioned in the plaint schedule do not amount to gathering evidence. Further, the best course to ascertain the correctness of boundaries and identity of the property, when the same are disputed, is to appoint an advocate commissioner to ascertain the correct boundaries and identify the properties on land, if necessary, by taking measurements. Further, in the case on hand, the Commissioner has already executed the warrant and filed his report.

15. On the above analysis, this Court finds that there is no merit in the revision and the revision petition is liable to be dismissed.

16. In the result, the Civil Revision Petition is dismissed confirming the order of the trial Court. It is needless to mention that the trial Court shall give an opportunity to both the parties to file their objections, if any, to the Commissioner's report already filed before the trial court, if such exercise is not already done.

Miscellaneous petitions if any pending in this revision shall stand closed. There shall be no order as to costs.

21.02.2017
BVV

M.SEETHARAMA MURTI, J