

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.6035 of 2016

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful petitioner-plaintiff is directed against the order, dated 02.11.2016, of the learned Principal Junior Civil Judge, Amalapuram, passed in IA.No.1088 of 2016 in OS.No.197 of 2014.

2. I have heard the submissions of Sri Polisetty Radhakrishna, learned counsel for the petitioner-plaintiff, and of Sri M.V. Suresh, learned counsel for the respondent-defendant. I have perused the material record.

3. The relevant introductory facts are as follows: 'The plaintiff brought the suit for declaring the plaintiff's title over half of the width of the existing QX wall and for delivery of possession of the same within the time fixed by the Court and for other sequential reliefs. Along with the plaint the plaintiff also filed a rough sketch showing the topographical details of the properties. The defendant is resisting the suit. In the said suit, the plaintiff filed the afore-stated IA seeking appointment of an advocate commissioner for the following purpose: - 'To inspect the suit schedule property, note the physical features, take measurements and demarcate the properties covered by the title deeds of the petitioner and the respondent and other relevant title deeds of their predecessors in title with the assistance of the Mandal surveyor and file a report along with a plan to meet the ends of justice.' The defendant filed a counter resisting the said application. By the orders impugned in this revision, the trial Court dismissed the said petition. Therefore, the plaintiff is before this Court.'

4. The case of the petitioner-plaintiff in support of his request for appointment of a Commissioner, in brief, is as follows: - 'The plaintiff is the owner of ABCD and BCQP properties in the plaint plan. In the EFGH marked portion in the plaint plan there used to be a tiled house with door no.4-2-59. The same was removed by the plaintiff. The plaintiff's property is situate to the East of QX wall shown in the plaint plan. The defendant has no right over the said QX wall which exclusively belongs to the plaintiff. The defendant started making false claims over the said wall as if he was having joint rights over the said wall, which is of 9 inches width and which is abutting the property of the plaintiff. Such claim is detrimental to the interests of the plaintiff. Hence, the plaintiff filed the suit for declaration of his right, title and interest over half of the entire width, that is, 9 inches throughout the QX wall, which is 105 feet in length and for consequential possession thereof. The present petition is filed for appointment of commissioner for the afore-stated purpose.'

5. Per contra, the case of the defendant is this: - 'The plaintiff already filed OS No.143 of 2003 for perpetual injunction and the same was dismissed on merits and the said decree and judgment of the trial Court were confirmed by the appellate Court in AS No.56 of 2006. Therefore, the present suit is barred by the principle enshrined in the doctrine of resjudicata. Hence, the plaintiff cannot claim any relief regarding QX wall. An advocate commissioner was already appointed in the former suit and he filed a report with plan in the former suit with detailed linear measurements. Hence there is no need to appoint an advocate commissioner. A copy of the said report and plan are filed in the present suit along with the written statement of the defendant. The suit is barred by limitation as the defendant purchased the property with

compound walls on all sides under registered sale deed, dated 21.08.1995, by paying stamp duty in respect of the area covered by the compound walls and has been in possession and enjoyment of the entire property including compound walls for more than 19 years by the date of the suit.'

6. At the hearing, learned counsel for both the parties advanced arguments in line with the respective contentions of the parties.

7. Learned counsel for the petitioner further contended as follows: 'Since the dispute is with regard to QX wall between the properties of both the parties and as in the present suit the reliefs of declaration and possession were sought, the measurements of the properties and localisation of the compound wall is essential for adjudication of the issues settled for determination in the suit. The trial court failed to take note of the fact that the former suit is for injunction and the present suit is for declaration. The trial Court ought to have appointed a commissioner to determine as to where and in whose property, the disputed wall is located. The trial court erroneously observed that this plaintiff suppressed the facts about the earlier suit filed by him and approached the trial Court with unclean hands. Such observations are unwarranted in view of the fact that after the dismissal of the perpetual injunction suit, the present suit is filed for altogether comprehensive reliefs.'

8. Learned counsel for the respondent-defendant while supporting the orders of the Court below contended that a Commissioner was appointed in the former suit and that he inspected the suit schedule properties and filed a report and that the said report which was filed by the commissioner in the former suit between the same parties clearly

reflects that the Commissioner measured all walls on all four sides and noted the then existing features and that the said report, which was considered in the earlier suit as well as the decree and judgment in the former suit are binding on the parties and that there was no need to again appoint a Commissioner for the same purpose simply because the present suit is filed for a declaratory relief.

9. I have given earnest consideration to the facts and submissions. In view of the reliefs claimed in the suit and the defence of the defendant, while answering the issues, which are settled for determination, the important question that falls for determination is as to whether QX wall to the extent claimed by the plaintiff falls within the property of the plaintiff or the property of the defendant. Though the earlier suit is for perpetual injunction and the present suit is for declaration, the issue as to whether the present suit is barred by the principle enshrined in the doctrine of resjudicata has to be decided after full fledged trial in the suit. The issue of limitation has also to be decided, if necessary, after full fledged trial. Be that as it may.

10. I have carefully perused the copy of the Commissioner's report with plan, which was filed in the former suit between the parties, wherein the dispute is also related to the same wall; but, the relief claimed is perpetual injunction. A plain perusal of the said report with plan shows that the Commissioner did not measure the properties of the plaintiff and the defendant on either side of the disputed wall and did not note in his said report his opinion as to whether the said wall either in part or in full is located in the property of either the plaintiff or the defendant. The report and plan do not indicate as to whether the disputed wall is located either in the property of the plaintiff or that of the defendant. Though the contention of the defendant is that a report

with plan was already filed by a Commissioner, who was already appointed in the former suit and, hence, a Commissioner need not be appointed once again, the defendant could not point out from the said Commissioner's report and plan that the Commissioner localised and determined the position of the wall. Therefore, in the considered view of this Court, the earlier report with plan of the Commissioner may not be helpful in resolving the core issue that has to be adjudicated in the instant suit. Unless the Commissioner measures the properties in the presence of parties with reference to their documents and with the help of a qualified surveyor and files a report with findings as to whether the wall is located in the property of the plaintiff or that of the defendant, there will not be assuring material before the trial Court for effectively adjudicating the *lis*. If the Commissioner is not appointed for the desired purpose, after conclusion of trial, there will only be oral assertions on both the sides claiming ownership over the wall and such evidence in the absence of localisation of the wall on land would be of no help to the Court below for effectively adjudicating the *lis*. 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 and files a report with a plan after localising the disputed wall on land, 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. Further, in the considered view of this Court, it would be impossible for the plaintiff to establish title over the disputed wall by mere oral assertions made in his evidence in line with the pleadings that

too when the claim is restricted to half of the width of the disputed wall. It is axiomatic that in the oral evidence both the parties would assert their respective pleaded cases and make claims over the disputed wall and would also state that the respective claims are only correct; and, hence, after adduction of such oral evidence there will be contrary statements made on oath against oath before the court and, therefore, if the Commissioner is appointed and he inspects the property and files a report with a plan after localising the disputed wall on ground, such a report will be of immense aid to the Court. 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 as such a course would only meet the ends of justice.

11. On the above analysis this court finds that the appointment of a Commissioner for the desired purpose in the instant case is essential for effectively adjudicating the *lis* and giving a quietus to the disputes once and for all and that the order impugned brooks interference, in the facts and circumstances of the case,.

12. In the result, the Civil Revision Petition is allowed without costs and the order impugned is set aside. As a sequel, IA.No.1088 of 2016 in OS.No.197 of 2014 on the file of the learned Principal Junior Civil Judge, Amalapuram, is allowed. 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. It is needless to state that the trial court shall consider

the probative value of the Commissioner's report at the appropriate stage, having regard to the facts and the circumstances of the case, however, after giving an opportunity to both the parties to file objections, if any, to the said report. If possible and in the event the Commissioner appointed in the former suit is available, the trial Court, if it thinks fit and proper, may appoint the same commissioner.

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

19.09.2017

Note: Issue CC by 25.09.2017

[B/o]

Vjl

M. SEETHARAMA MURTI, J

