

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION Nos.355 AND 357 OF 2014

COMMON ORDER:

These two revisions are filed under Article 227 of the Constitution of India, challenging the orders, dated 20.11.2013, passed in I.A.No.523 of 2011 in O.S.No.3135 of 2011 and in I.A.No.511 of 2011 in O.S.No.3028 of 2011 on the file of X Junior Civil Judge, City Civil Court, Hyderabad.

2. The petitioner in both the revision petitions is one and the same, but the respondents are different. However, the issue involved in both the revision petitions is one and the same. Therefore, I find that it is expedient to decide both the matters by a common order.

3. The parties to the revision petitions will hereinafter be referred to as petitioner and respondents.

4. The petitioner - India Media Services Private Limited filed the aforesaid Interlocutory Applications, under Order XXVI Rule 9 read with Section 151 C.P.C., to appoint an Advocate Commissioner to make local investigation of the suit schedule properties, alleging that it is the absolute owner of the property known as Indian Express Building (Rose Biscuit Property) admeasuring 23466.56 Square Yards or 19601.32 Square Meters covered by T.S.Nos.6/1, 6/2 and 6/3, Block-A, Ward No.55, Gaganmahal Village, Musheerabad Taluq, covered by M.Nos.1-2-528 to 591, Lower Tank

Bund Road, Hyderabad, having purchased the same from M/s. Indian Express Newspapers (Bombay) Limited and Express Publications (Madurai) Limited, under a registered sale deed, dated 08.07.2010, bearing Document No.937/2011 registered in the office of Sub-Registrar, Chikkadpally, Hyderabad. It is also alleged that an extent of 20 Square Yards of land is in occupation of respondents in both the Suits.

5. The vendor of the petitioner, Indian Express Newspaper, has filed a Suit in O.S.No.579 of 1993 on the file of II Senior Civil Judge, City Civil Court, Hyderabad, for declaration of title and recovery of possession against respondent No.1 in both the Suits. The said Suit was dismissed on 31.03.2004. Being aggrieved, the plaintiff in the said Suit preferred an appeal in C.C.C.A.No.317 of 2004 on the file of this Court and the said appeal is pending adjudication.

6. As the suit properties are conveyed to the petitioner during pendency of the litigation, the petitioner became the owner subject to the litigation and is bound by the decree whatever passed and is intending to take steps to get impleaded itself in the pending litigation. The respondents are not owners of the suit properties and a finding was recorded in the judgment in O.S.No.1062 of 1980 on the file of VIII Assistant Judge, City Civil Court, Hyderabad, that unless respondent No.1 in both the Suits and others seek relief of declaration or prove their ownership, they cannot seek perpetual

injunction against the original owner. In the said judgment, it was also observed that if injunction is granted to the respondents and others, it will lead to further complications. Further, to the knowledge of the petitioner, respondent No.1 in both the Suits and others have not filed any appeal against the said judgment and decree passed in O.S.No.1062 of 1980. Thus, it is clear that respondent No.1 in both the Suits are in possession of the property admeasuring 20 Square Yards as workers/labours of JB Mangaram and Company and respondents have no independent status. Taking advantage of the dismissal of the Suit filed by the vendor of the petitioner in O.S.No.579 of 1993, respondents are trying to induct third parties into possession of the suit properties, thereby making the petitioner to multiply the litigation with an idea to squat over the suit properties. The petitioner also learnt that the respondents are trying to encroach upon all the common areas i.e., left for roads, footpaths, pathways and the open area in the suit properties. As such, appointment of an Advocate Commissioner to make local inspection to note down the physical features of the suit properties is necessary and hence, prayed to appoint an Advocate Commissioner for the above purpose.

7. Respondent No.1 in both the Suits filed counters contending that the petitioner and its predecessor, M/s. Indian Express Newspaper, were never in possession and enjoyment of the property admeasuring 5000 Square Yards of land bearing

M.Nos.1-2-529 to 571. The respondents and their predecessors were in possession of the property bearing M.Nos.1-2-529 to 571, which fact was upheld in O.S.No.1062 of 1980 and O.S.No.579 of 1993 and the present Interlocutory Applications are filed seeking to appoint an Advocate Commissioner to make local inspection and report about the exact area in occupation of the respondents and such petitions are not maintainable and if Commissioner is appointed, it would amount to collection of evidence and hence, prayed for dismissal of the Interlocutory Applications.

8. During enquiry, on behalf of both parties, no evidence, either oral or documentary, was adduced.

9. Upon hearing argument of both the counsel, the trial Court concluded that the Commissioner cannot be appointed, as the intention in getting the Commissioner appointed is for collection of evidence, which is impermissible under law. That apart, the physical features of the Suit properties are not in dispute and they are not relevant for the purpose of deciding a Suit for perpetual injunction.

10. Aggrieved by the orders passed in the aforesaid Interlocutory Applications, the plaintiff in both the Suits preferred the present revision petitions, under Article 227 of the Constitution of India, raising several contentions, mainly, on the ground that the Commissioner can be appointed when there is a dispute regarding the exact area in possession of each of the parties and when the

Court failed to exercise jurisdiction that is vested in it, this Court can interfere with the orders under challenge. It is also contended that when the respondents are making efforts to create third party interest in the suit properties, appointment of a Commissioner is permissible, but the trial Court, on misinterpreting the material on record and law, concluded that Commissioner cannot be appointed and finally, prayed to set aside the orders passed by the trial Court in the aforesaid Interlocutory Applications and to appoint an Advocate Commissioner for the above purpose by allowing the aforesaid Interlocutory Applications.

11. During hearing, Sri S. Balchand, learned counsel for the petitioner, would contend that when there is a dispute with regard to exact area in occupation of the parties, Commissioner can be appointed, for the reason that the Commissioner alone can decide as to who is in possession of the property. Though, oral or documentary evidence, if any, is produced, it is difficult to prove the possession of either of the parties and the actual extent of the property. When the respondents are making efforts to create third party interest, and if created, it would be difficult for the petitioner to get a decree for the entire property and if they are allowed to encroach upon the property, again the petitioner is required to amend the plaint, which would multiply the litigation unnecessarily. The learned counsel, while contending so, placed reliance on the judgments of this Court in **Badana Mutyalu and another v. Palli**

Appalaraju¹ and Shaik Mahammad Rafi v. Correspondent of Saint Francis Integrated English Medium School, Dommarapalem, Venkatagiri, SPSR Nellore District². Based on the law declared by this Court in the two judgments referred to above, he requested this Court to set aside the impugned orders and appoint an Advocate Commissioner for local inspection of the suit properties as claimed.

12. Learned counsel for the respondents contended that before the trial Court, the respondents filed undertakings that they would not create any third party interest during pendency of the Suits. Therefore, the question of appointment of Commissioner to avoid creation of third party interest in the suit properties would not arise. Apart from that, the respondents are claiming that houses bearing M.Nos.1-2-529 to 571 are in their possession, having obtained the same from their predecessors. It is also contended that the suit properties are covered by M.Nos.1-2-557 and 1-2-562 admeasuring 20 Square Yards each within the four boundaries mentioned in the suit schedule in both the Suits. In a Suit for injunction simplicitor, the Commissioner cannot be appointed and even according to the contention of the petitioner, the purpose of appointment of a Commissioner is to find out the exact area, which is in occupation of the respondents in both the Interlocutory Applications, who are defendants in the Suits. Such appointment would amount to

¹ 2013 (5) ALD 376

² 2014 (1) ALD 537

collection of evidence, which is impermissible under law and prayed to confirm the orders under challenge by dismissing the revision petitions.

13. Perused the material available on record.

14. The point that arises for consideration is,

“Whether appointment of an Advocate Commissioner for local inspection to find out the exact area in occupation of the respondents in both the revision petitions amounts to collection of evidence? If not, whether an Advocate Commissioner be appointed to conduct local inspection to find out the exact area in occupation of the respondents in both the revision petitions?”

Point:

15. The petitioner filed the Suits for injunction simplicitor, where the Court is required to record its finding as to whether the petitioner is in lawful possession and enjoyment of the properties as on the date of filing of the Suits and if there is any attempt to infringe or invade the legal right of the petitioner (plaintiff), the Court may grant perpetual injunction. It is discretionary in nature under the provisions of Specific Relief Act. In fact, there was absolutely no dispute with regard to the physical features of the suit properties. On the other hand, the respondents contended that the petitioner was not in possession of the properties covered by the schedules in both the Suits, while asserting that the respondents are

in possession of M.Nos.1-2-529 to 571. In both the Suits, the exact area of the houses and its abutting sites were not disclosed anywhere either in the plaint or in the written statement, except contending in the plaint that 20 Square Yards of land is in occupation of respondents in both the Suits. Thus, the suit properties in both the Suits are confined to 20 Square Yards of land each with houses bearing M.Nos.1-2-557 and 1-2-562 within the boundaries mentioned therein. Thus, the subject matter of the Suits is only 20 Square Yards of land each with houses therein with two different door numbers as described in the schedule annexed to the plaints.

16. One of the allegations made in the aforesaid Interlocutory Applications is that the respondents are trying to create third party interest and making attempts to extend their encroachment to the common places like footpath, pathways etc. If the respondents are making such a violent attempt to encroach upon the common places like footpath, pathways etc., the remedy open to the petitioner is to obtain an interim injunction during pendency of the Suits restraining the respondents from extending the encroachment into common places like footpath, pathways etc., but for such purpose, an Advocate Commissioner cannot be appointed in the guise of conducting local inspection to note down the exact area in occupation of respondents in both the Suits. When the petitioner itself is clearly asserting that respondents are in occupation of suit properties along with houses bearing M.Nos.1-2-557 and 1-2-562,

this Court cannot appoint an Advocate Commissioner to inspect the properties, which are now subject matter of the Suits, since common places like footpath, pathways are not the subject matter of the Suits. In such a case, appointment of an Advocate Commissioner for the purpose referred to above would amount to granting relief beyond the scope of the Suits, which is impermissible under law, in view of the judgment of the Honourable Supreme Court in **Sree Jain Swetambar Terapanthi VID (s) v. Phundan Singh and others**³ and the judgment of this Court in **Kolli Butchi Koteswara Rao v. District Level Committee and others**⁴. Therefore, appointing an Advocate Commissioner to note down the exact area in possession of respondents in both the Suits, while asserting that respondents in both the Suits are in possession of the suit properties, is impermissible. Even otherwise, it amounts to collection of evidence as held by this Court in **Sagi Vijaya Ramachandra Raju and others v. Koppiseti Satyanarayana and others**⁵, **Batchu Narayan Rao v. Batchu Venkata Narasimha Rao**⁶, **Koduru Sesha Reddy v. Gottigundala Venkata Rami Reddy and others**⁷, **Yenugonda Bal Reddy v. Manemma and others**⁸ and **Sarala Jain and others v. Sangu Gangadhar and others**⁹.

³ (1999) 2 SCC 377

⁴ 2004 (3) ALT 822

⁵ MANU/AP/0396/2009

⁶ MANU/AP/0356/2010

⁷ MANU/AP/0794/2005

⁸ MANU/AP/0633/2010

⁹ 2016 (3) ALD 197

17. In **Sarala Jain's** case (supra 9), it was held thus:

“The main contention of learned counsel for the respondents is that appointment of advocate commissioner to make local investigation amounts to collection of evidence and, in support of his contention, placed reliance on Sagi Vijaya Ramachandra Raju MANU/AP/0396/2009 : 2009 (5) ALD 459 (supra), Batchu Narayana Rao MANU/AP/0356/2010 : 2010 (5) ALD 83 (supra), Koduru Sesha Reddy MANU/AP/0794/2005 : 2006 (1) ALD 372 (supra) and Yenugonda Bal Reddy MANU/AP/0633/2010 : 2011 (2) ALD 472 (supra). In all the above four judgments, this Court consistently held that appointment of advocate commissioner, in a suit for declaration of title and permanent injunction or in a suit for injunction simplicitor, to note down physical features amounts to collection of evidence. A similar view was expressed by this Court in **Malla Bhaskara Rao and others v. Konchada Ananda Rao** MANU/AP/0588/1999 : 1999 (5) ALD 113.”

18. One of the contentions raised before the trial Court and this Court is that the respondents are making an attempt to create third party interest, but the respondents gave an undertaking that they would not create any third party interest and recording the said undertaking, the trial Court declined to grant interim injunction. The learned counsel for the petitioner, Sri S. Balchand, fairly admitted about the undertaking given by the respondents that they would not create any third party interest in the suit properties. Therefore, on

the allegation that the respondents are trying to create third party interest, appointment of an Advocate Commissioner is unwarranted.

19. Learned counsel for the petitioner relied on **Badana Mutyalu's** case (supra 1), wherein this Court held that when there is a dispute between the parties with regard to a particular part of the land, which is vacant site shown in the plaint plan, and both the parties are asserting that they are in possession of the property, the Court can appoint an Advocate Commissioner on the application of either of the parties. In the situation, where there is controversy as to identification, location or measurement of land, local investigation should be done at an early stage so that parties are aware of report of Commissioner and go to trial prepared.

20. In the other judgment in **Shaik Mahammad Rafi's** case (supra 2), this Court held that normally, a plaintiff in the Suit applies for appointment of an Advocate Commissioner. In appropriate cases, however, a defendant may make such an application. The Court may *suo motu* appoint a Commissioner. There is no provision which prevents a defendant from applying for appointment of a Commissioner. It is settled law that the Court is empowered to appoint an Advocate Commissioner to note down the physical features of a disputed property. In most of the cases, the physical features of a disputed property collected by the Advocate Commissioner would certainly help the Court to appreciate the rival

contentions of the parties. Therefore, appointment of an Advocate Commissioner to note down the exact physical features of the suit property by taking measurements is upheld by this Court.

21. In the facts of aforesaid two judgments, the physical features, identification and measurement of the property were in dispute. In the present facts of the case, the dispute is only with regard to the actual extent in possession, which is required to be established by the petitioner by adducing cogent and satisfactory evidence. But, instead of proving the said factum independently, the petitioner intends to take the assistance of the Court by appointing an Advocate Commissioner, who is an officer of the Court. Therefore, in view of the law declared by this Court in the judgments referred supra, Commissioner cannot be appointed for collection of evidence. A vain attempt has been made by the learned counsel for petitioner, Sri S. Balchand, during hearing that appointment of Advocate Commissioner is necessary to verify as to who is in actual possession of the property and its extent.

22. In **Bongu Ramulu and another v. Gudur Narender Reddy**¹⁰, this Court took a view that though the petitioners stated that the purpose of appointment of an Advocate Commissioner is to verify as to who is in actual possession of the suit property and also to note down the physical features of the suit land, no reason or

¹⁰ 1998 (3) ALT 473

purpose has been stated in the affidavit filed in support of the petition as to why the physical features should be noted by the Commissioner nor there is any allegation that the respondent – plaintiff having filed the suit, is trying to change the nature of the property or indulging or damaging or wasting the suit property.

23. Similarly, in **Arredla Ram Reddy and others v. Arredla Alivelamma**¹¹, this Court held that appointment of an Advocate Commissioner to note down the physical features in a Suit for injunction is not necessary, since the physical features are hardly of any relevancy and necessity to appoint a Commissioner does not arise.

24. Even according to the principles laid down in the aforesaid two judgments, the Commissioner cannot be appointed to note down the exact extent in occupation of the respondents, since it is required to be proved independently by the petitioner during trial of the Suits without assistance of the Court. But, the petitioner, instead of adducing independent evidence, wanted to take advantage of the report of the Commissioner, if appointed, to establish the exact area in occupation of the respondents. Such procedure is impermissible under law.

25. On overall consideration of the entire material on record, appointment of Advocate Commissioner to note down the actual

¹¹ 2004 (5) ALD 388

extent in occupation or atleast to note down the attempts made by the respondents to extend the encroachment to the common areas like footpath, pathways etc., is beyond the scope of the Suits, since the suit schedule properties are confined to 20 Square Yards of land each and the houses therein. In such a case, appointment of an Advocate Commissioner for the said purpose is unwarranted.

26. Therefore, the orders under challenge in these two revisions are in accordance with law referred to supra and added to that, I find no infirmity warranting interference, while exercising power under Article 227 of the Constitution of India, which is supervisory in nature to keep the sub-ordinate Courts and Tribunals within their bounds. Hence, I find no ground to reverse or set aside the orders under challenge. Consequently, the revision petitions are liable to be dismissed, as they are devoid of merit.

27. In the result, the revision petitions are dismissed confirming the orders, dated 20.11.2013, passed in I.A.No.523 of 2011 in O.S.No.3135 of 2011 and in I.A.No.511 of 2011 in O.S.No.3028 of 2011 on the file of X Junior Civil Judge, City Civil Court, Hyderabad. Miscellaneous Petitions, if any, pending in these revision petitions, shall stand closed. There shall be no order as to costs.

M. SATYANARAYANA MURTHY, J

29th June, 2017.
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