

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.2819 of 2014

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, by the unsuccessful petitioners/ plaintiffs is directed against the order, dated 03.07.2014, of the learned Principal Junior Civil Judge, Kalwakurthy, passed in I.A.No.327 of 2012 in O.S.No.100 of 2009.

2. I have heard the submissions of *Sri P.Shashi Kiran*, learned counsel for the petitioners/ plaintiffs, ('plaintiffs', for brevity); and, of *Sri K.Srinivas*, learned counsel for the respondents/ defendants ('defendants', for brevity). 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 plaintiffs filed the above suit against the defendants for permanent injunction in respect of the suit 'A', 'B' and 'C' schedule properties in Sy.no.184/ A, 184/ AA and 184/ E in extents of Ac.0.39 guntas, Ac.1.00 guntas and Ac.1.00 guntas situated in Yellikal village, Kalwakurthy Mandal, Mahabubnagar District. The defendants filed their written statement claiming *inter alia* that they and the wife of the 2nd defendant dug bore Wells in Sy.no.472 and that they are bailing water from the said bore Wells to the citrus and coconut trees in Sy.nos.471, 472 and 473 situated at Kondareddypally village, Vangoor Mandal, Mahabubnagar District, and are employing drip irrigation system and are also raising paddy, ground nut and watermelon crops. The defendants are also claiming that their lands in the said Sy.nos.471, 472 and 473 are situated towards the Eastern side of the suit schedule lands of the plaintiffs. In view of the rival contentions, the plaintiffs filed the

subject interlocutory application for appointment of an advocate commissioner to note down the physical features of the schedule properties and also to fix the boundaries between the suit schedule properties and the lands of the defendants in Sy.nos.471, 472 & 473. 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 plaintiffs are before this Court.

4. The case of the plaintiffs, in support of the request for appointment of an advocate-Commissioner, in brief, is this:

‘The 1st plaintiff is the absolute owner and exclusive possessor of the suit ‘A’ schedule property of an extent of Ac.0.39 guntas in Sy.no.184/ A; the 2nd plaintiff is the absolute owner and exclusive possessor of the suit ‘B’ schedule property of an extent of Ac.1.00 guntas in Sy.no.184/ AA; and, the 3rd plaintiff is the absolute owner and exclusive possessor of the suit ‘C’ schedule property in Sy.no.184/ E in an extent of Ac.1.00 guntas situated in Yellikal village, Kalwakurthy Mandal of Mahabubnagar District. The defendants with a *mala fide* intention alleged that the plaintiffs are claiming as belonging to them, the citrus and coconut trees of the defendants in Sy.no.471, 472 and 473 situated at Kondareddypally village, Vangoor Mandal, Mahabubnagar District, and further raised a boundary dispute. In fact, the plaintiffs never entered the lands of the defendants. Moreover, the defendants erased a part of the boundary between their respective lands to create a boundary dispute and to also to mislead the Court. Hence, the plaintiffs are constrained to file the interlocutory application for appointment of an advocate commissioner to note down the physical features of the suit schedule properties and also to fix the boundaries between the suit

schedule properties and the lands of the defendants in Sy.nos.471, 472 & 473 situated at Kondareddypally village. Therefore, it is just and necessary to appoint an Advocate Commissioner. If an Advocate Commissioner is not appointed, the plaintiffs will be put to irreparable loss and injury.'

5. The case of the defendants, in brief, is this:

'The averments in the affidavit filed in support of the petition are false and are hence, denied. The suit is of the year 2009. The plaintiffs are unnecessarily filing applications, one after the other, to drag on the suit proceedings. On 03.11.2009, the Head Quarter Deputy Inspector, Mahabubnagar, inspected and measured the lands in Sy.nos.472 & 473 of Kondareddypally village, and also lands in Sy.nos.184 & 185 of Thimmaraspally, H/o Yellikal village of Kalwakurthy Mandal, and confirmed the measurements and the boundaries fixed earlier and a panchanama was also conducted on the spot. Therefore, there is no boundary dispute. There is no necessity to measure the lands, as the boundaries were already fixed on land and the properties of the parties were clearly segregated. Therefore, the petition is not maintainable. A Commissioner cannot be appointed for collecting evidence. The subject petition is filed without assigning any reasons or stating the purpose. The petition is intended to drag on the suit proceedings. The petition is devoid of merit and is liable to be dismissed.'

6. Learned counsel for the plaintiffs submitted as follows: 'The order of the Court below is contrary to law, well established legal principles and facts & circumstances of the case. The Court below ought to have seen that the request in the application filed under Order XXVI Rule 9 of the Code by the plaintiffs is squarely covered by the cardinal principles

of law, and therefore, it ought not to have dismissed the application. The Court below erred in dismissing the application holding that the boundaries are already fixed and panchanama was also prepared. The Court below had erroneously dismissed the application ignoring the settled principle of law that in a suit for permanent injunction an advocate commissioner can be appointed when the boundaries are seriously disputed. The Court below ought to have seen that appointment of an Advocate Commissioner to note down the physical features would not cause any loss or prejudice to the defendants. The reasons given by the Court below for dismissing the application filed under Order XXVI Rule 9 of the Code are unsound and unsustainable.'

7. On the other hand, learned counsel for the defendants supported the order impugned by *inter alia* stating as follows: 'The survey of the properties was already done. During such survey, the boundaries and measurements are confirmed and a panchanama was also prepared on the spot. The said survey discloses that the boundaries are clear and that the lands are situated apart. Hence, as rightly held by the trial Court, there is no need to appoint an Advocate Commissioner to once again conduct survey and demarcate the lands of the parties.'

8. In reply, learned counsel for the plaintiffs would submit that the alleged survey was done behind the back of the plaintiffs and that the survey report, if any, is not produced before the trial Court and that, therefore, the trial Court committed a grave error in dismissing the application on the ground that survey was already conducted. He placed reliance upon the decisions in *Mundladinne Gopal Reddy v. P.Ramachandra Reddy*¹; and, *Smt. A.Laxmamma v. Smt.*

¹ 2016 (5) ALT 728

A.Venkatamma² and contended that mere oral assertions on oath made by the parties during the course of trial would be of no avail in a case of this nature and that the appointment of an Advocate Commissioner is essential to bring before the Court the ground realities and that a report the Commissioner may file would be helpful to the Court below in conclusively and effectively adjudicating the *lis*.

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

10. It is true that 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; it is also undisputed that appointment of Commissioner for noting down the physical features and for demarcating the properties of the parties on land after conducting survey would not amount to appointing a Commissioner for collection of evidence. 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.

² 2016 (6) ALT 795 (D.B)

11. Reverting to the facts of the case, it is to be noted that the plaintiffs filed the suit against the defendants for perpetual injunction restraining the defendants, their agents, workmen and persons claiming through them from interfering with the plaintiffs' peaceful possession and enjoyment over the suit schedule properties in Sy.nos.184/ A, 184/ AA and 184/ E at Yellikal village of Kalwakurthy Mandal. The defendants are claiming rights in their lands situate in Sy.nos.471, 472 & 473 of Kondareddypalli village of Vongur Mandal. The plaintiffs claim that they never entered the lands of the defendants and that they are only concerned with the suit schedule lands. The defendants *inter alia* contend that the plaintiffs are claiming their lands, which are admittedly in different survey numbers of a different village. From the pleadings, it is discernable that there is a boundary dispute and also a dispute with regard to the identity of the lands on ground. Therefore, the plaintiffs filed the subject interlocutory application seeking appointment of an advocate commissioner to note down the physical features of the schedule property and also to fix the boundaries between the suit schedule properties and the lands of the defendants to resolve the dispute once and for all. The trial Court dismissed the said application merely on the ground that survey was already done as per the defence raised by the defendants and that a Commissioner cannot be appointed for collecting evidence and that one more survey will only procrastinate the matter. However, the plaintiffs contend that the alleged survey was done behind their back and that the survey report, if any, is not produced before the trial Court and that the defendants have erased the boundaries between the lands of the respective parties. It is to be restated that from the pleadings and the contentions advanced in line with the pleadings, it is discernable that the core issue is with

regard to the boundaries between the properties of the parties and the demarcation or differentiation of the properties on land.

12. A Division Bench of this Court in *C. Veeranna v. C. Venkatachalam*³ held that an Advocate-Commissioner can be appointed *ex parte*, that is, even without issuing notice to the other side. Further, in *Savitramma and another v. B. Changa Reddy*⁴, a learned Single Judge of this Court had held that it cannot be said that no Commissioner could be appointed before the issues are framed or evidence is led. This Court followed the decisions in *C. Veeranna's case* (3rd supra) and *Savitramma's case* (4th supra) in *Bandaru Mutyalu and another v. Palli Appalaraju*⁵ and it was held that where there is controversy as to identification, location or measurement of the land, local investigation should be done. The aforesaid precedential guidance was followed by this Court in *Jajula Koteswar Rao v. Ravulapalli Masthan Rao*.⁶ Therefore, the contention of the learned counsel for the defendants that the appointment of an Advocate-Commissioner for the purpose stated by the plaintiffs would result in collection of evidence is devoid of merit.

13. According to the case of the plaintiffs, the defendants, with a *mala fide* intention alleged that the plaintiffs are claiming their citrus, coconut trees in Sy.no.471, 472 and 473 situated at Kondareddypally village, Vangoor Mandal, Mahabubnagar District, as belonging to them and further raised a boundary dispute and that in fact, the plaintiffs never entered into the lands of the defendants and that the defendants erased a part of the boundary between their respective lands to create a boundary dispute and to also to mislead the Court. In the facts and circumstances of the present case, where the core dispute is about the

³ 1958 (5) ALT 792

⁴ 1988 (6) ALT 353

⁵ 2013 (5) ALD 376 # 2013 (6) ALT 26

⁶ 2015 (6) ALD 483 # 2016(1) ALT 134

boundaries between the lands of the parties and the absence of demarcation of the properties of the parties on land, in the considered view of this Court, fixation of boundaries between the properties of the two sides and differentiation of the properties of the respective parties on land is necessary. This Court is also of the view that unless a Commissioner is appointed for localisation or identification of the properties by fixation of boundaries after conducting survey, the dispute cannot be resolved and a quietus cannot be given to the *lis*. This Court accordingly holds that if a Commissioner appointed by the Court visits the locality and notes down the physical features and localizes the properties mentioned in the plaint schedule as well as those of the defendants after conducting a survey with the help of a competent surveyor and files a report, the dispute can effectively be resolved and a quietus can be given to 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 if only commission is issued. If a Commissioner is appointed and files a report with a plan after localising the property 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. It would be impossible for the parties to establish their respective pleaded cases in the absence of issuance of a commission for local inspection and conducting a survey with the assistance of a surveyor for localising the properties being respectively claimed by the parties. It is axiomatic that in the oral evidence, which both the 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 properties and files a report with a plan, 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 for appointment of an Advocate Commissioner for the purpose desired by the plaintiffs and that such a course would only sub-serve the ends of justice.

14. 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 dispute once and for all and that, therefore, the order impugned brooks interference.

15. In the result, the Civil Revision Petition is allowed without costs and the impugned order is set aside. As a sequel, I.A.no.327 of 2012 in O.S.No.100 of 2009 on the file of the Court of the learned Principal Junior Civil Judge, Kalwakurthy, 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 plaintiffs and direct the Commissioner to do the work with the assistance of a qualified Surveyor and 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.

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

M. SEETHARAMA MURTI, J

16.02.2018

Note:- Issue CC by 19.02.2018
(B/o)
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