

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.4221 OF 2017

ORDER:

The Civil Revision Petition under Article 227 of the Constitution of India is filed challenging the order dated 07.07.2017 in I.A.No.2531 of 2016 in O.S.No.187 of 2011 passed by the Principal Junior Civil Judge, Ongole appointing advocate commissioner to localize the plaint schedule property with the assistance of Assistant Director of Surveyor and Land Records, Prakasam Bhavan, Ongole.

2. The petitioners are plaintiffs and respondents are defendants. The application filed by the 1st defendant for appointment of advocate commissioner was allowed by the impugned order holding that the petitioners filed suit for permanent injunction restraining the respondents/defendants and their men from interfering with the peaceful possession and enjoyment of the plaintiffs. The respondents/defendants filed written statement stating that the petitioners/plaintiffs are not even aware about their property and that only to blackmail the respondents/defendants and without any basis filed the suit and that in fact, the suit Survey No. TS700/1 of Ongole Town is adjacent to west of Ongole Rural Survey No.292/1(B). So the property of the 1st respondent/1st defendant is within the defined boundaries as per the registered sale deed stands in the name of the father of the 1st respondent/1st defendant. But the plaintiffs without having any semblance of right filed suit for wrongful gain and very recently they dumped numerous documents without having any relevancy and only to confuse the issue in the Court. Therefore, he was advised to file application to appoint advocate commissioner to locate the plaint schedule property with the assistance of Assistant Director of Survey and Land Records to

ascertain the truth or otherwise in the matter.

3. The petitioners filed counter denying material allegations *inter alia* contending that PW.4-Town Surveyor was examined and produced Exs.A.4 and A5 to substantiate his contention that the plaintiffs are in possession and enjoyment of the property and at the end of the trial, petition for appointment of advocate commissioner is not maintainable and that Exs.A6 to A.23 are sufficient to establish the possession and title of the petitioners as on the date of filing suit. Therefore, appointment of advocate commissioner is unnecessary and it is filed only to protract the case for some more time and requested to dismiss the petition.

4. Upon hearing both counsel and considering material on record, the impugned order is passed appointing advocate commissioner for the said purpose.

5. During hearing, learned counsel for the petitioners contended that at the fag end of the trial the advocate commissioner cannot be appointed and the burden is on the 1st respondent to prove that he is in lawful possession and enjoyment of the property as on the date of filing the suit and that the 1st respondent infringed or invaded legal right of the plaintiffs in a suit for bare injunction. Therefore, appointment of advocate commissioner for localization of the suit schedule property amounts to collection of evidence, which is impermissible, in view of law laid down in **A.Gopal Reddy v R.Subramanyam Reddy and another**¹ and requested to set aside the impugned order.

6. Whereas, learned counsel for the 1st respondent mainly contended that when the 1st respondent specifically raised dispute about identify of the property in the written statement while claiming possession and enjoyment of the same, the appointment of advocate commissioner is

¹ 2013(3) ALT 623

necessary to elicit the truth or otherwise in the matter and requested to affirm the impugned order.

7. The petitioners/plaintiffs filed suit for permanent injunction to restrain the respondents/defendants, and their men from interfering with peaceful possession and enjoyment of the schedule property on the ground that the suit schedule property is part of Survey No.296 of Ongole One Town. Throvagunta Gopala Krishnaiah son of Subbaih purchased Ac.1.77 cents of land in Survey No.296 of Ongole for valuable consideration under registered document No.1617, on 30.08.1913 and during his life time, he enjoyed the property with absolute right. The said Gopalakrishnaiah got two sons by name Venkata Subba Rao and Mallikharjuna Rao. Gopalakrishnaiah having purchased the properties along with the above property executed Will on 03.04.1922 bequeathing the schedule property to his sons. Venkata Subba Rao died leaving his two minor sons by name Venkata Krishna Rao and Seshagiri Rao and in terms of the will executed by Gopalakrishnaiah, his grand sons succeeded the property in to three shares. Subsequently, Mallikarjuna Rao was looking after the welfare of sons of Venkata Subba Rao and after some time, the second son Seshagiri Rao died even before his marriage and after some time Mallikharjuna Rao also died. So Venkata Krishna Rao become the only rightful owner of the property including suit schedule property and enjoyed the property till his death without any objection as he had no issues and died intestate leaving his wife Venkata Ramanamma as his legal heir and that she enjoyed the same without any disturbance. Survey No.295 was changed as Town Survey No.700/1 in the year 1937 and as per R.S.R. Throvagunta Venkata Ramanamma sold the entire property in T.S.No.700/1 except retaining the suit schedule property for her personal use. The said Venkata Ramanamma executed Will on 19.4.1977 bequeathing her entire properties including the suit schedule property to

her brother's wife Ulchi Venkata Lakshmma with limited interest and after her life time vested remainder to her three sons Ulchi Venkata Subba Rao, Ulchi Venkata Siva Ramakrishna and Ulchi Sri Ramachandrasekhara Rao has enjoyed the same with absolute right. Therefore, the petitioners became owners of the property. But the respondents filed written statement denying material allegations *inter alia* contending that they purchased the property under registered sale deed and since the date of purchase, they are in possession and enjoyment of the same and that the respondents obtained loan by mortgaging property and the petitioners are not aware about the property and also contended that without knowledge and identity of the property and possession filed the suit for injunction simplicitor.

8. Based on the pleadings, the Court below framed issues and completed major part of trial. At this stage, the 1st defendant filed petition for appointment of advocate commissioner to elicit the truth or otherwise.

9. In a suit for injunction, the initial burden of proof is on the plaintiff to prove that they are in lawful possession and enjoyment of the property and that the defendants made an attempt to infringe or invade their legal right, when the plaintiffs discharged their initial onus of proof, the burden will itself on the defendant to adduce evidence, but instead of resorting such procedure, the defendants filed petition to appoint advocate commissioner. In para 4 of the written statement, the 1st defendant claimed that he is in possession and enjoyment of the property described in the schedule property. Therefore, the dispute is only with regard to the possession as on the date of filing the suit and not the identity. As such appointment of advocate commissioner in a suit for injunction to note down the physical features and identify the property is not permissible in view of the law laid down in **A.Gopal Reddy's** case referred supra and

where the single judge of this Court held that when the suit is filed for relief of perpetual injunction, the only question that assumes significance in that suit is whether the plaintiff is in possession and enjoyment of the property. The burden squarely rests upon the petitioner to prove his possession. The appointment of advocate commissioner to note the physical features or to undertake other related activities in a suit for injunction is a rarity. The reason is that the plaintiff cannot be permitted to gather evidence to prove his possession and he has to satisfy the Court through oral and documentary evidence. When that is the law on the subject, the appointment of commissioners at the instance of the defendant in such suit is a still rare phenomenon. At any rate, the occasion to appoint an advocate commissioner would arise, if only the trial of the suit is in progress and a typical question, which needs the examination by a commissioner arises. The appointment of a commissioner cannot be made at the threshold. Such an effort would be treated as a measure to gather evidence.

10. If the above principle is applied to the present facts of the case, Advocate commissioner cannot be appointed for collection of evidence and if for any reason, the plaintiffs failed to establish their possession as on the date of filing the suit besides claim of perpetual injunction, the suit has to be dismissed since the burden is on the plaintiffs to establish the same. The defendants are asserting that they are in possession and enjoyment of the same having purchased under registered sale deed and the only question to be decided is as to lawful possession and such possession can be established by adducing oral and documentary evidence and not by appointing advocate commissioner more particularly, when there is no dispute with regard to the identity of the property. In the affidavit filed along with the petition, except making certain allegations about claim of the plaintiffs, no other reason is assigned except to elicit

facts by appointment of advocate commissioner to measure the land with the help of Assistant Director of Survey and Land Records and the same is contrary to law and thereby, the impugned order is liable to be set aside.

11. In the result, the civil revision petition is allowed setting aside the order dated 07.07.2017 in I.A.No.2531 of 2016 in O.S.No.187 of 2011 passed by the Principal Junior Civil Judge, Ongole and I.A.No.2531 of 2016 is dismissed. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending shall stand closed.

12.11.2018
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M. SATYANARAYANA MURTHY, J

