

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.3217 of 2018

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, is filed by the unsuccessful respondents/defendants assailing the order, dated 02.02.2018, of the learned Principal Junior Civil Judge, Ongole, passed in I.A.No.548 of 2017 in O.S.No.375 of 2012.

2. I have heard the submissions of Sri *M.S.N.Prasad*, learned counsel appearing for the revision petitioners/defendants (hereinafter referred to as 'defendants'); and of Sri *M.Sudhir Kumar*, learned counsel appearing for the respondent/plaintiff [hereinafter referred to as 'plaintiff']. I have perused the material record.

3. From the pleadings, submissions made and the content of the material record, the following facts and aspects are discernible: 'The plaintiff brought a suit for perpetual injunction and mandatory injunction with reference to a wall shown as W1 and W2 in the plan annexed to the plaint. For effective adjudication of the issues involved in the suit, the plaintiff sought appointment of Commissioner for localisation of the said wall on ground after taking measurements of the properties of the parties involved in the *lis*. A commissioner, who was earlier appointed, returned the warrant. Therefore, another commissioner was appointed. The said Commissioner had executed the warrant entrusted to him by the trial Court and filed a report with annexures. The defendants filed their objections. While so, the plaintiff filed the present interlocutory application requesting to direct the advocate commissioner to revisit the plaint schedule property to answer the objections filed by the parties and to comply with the specific

directions in the earlier orders passed in IA.No.110 of 2013. The said application was resisted by the defendants by filing a detailed counter, *inter alia*, contending that the earlier commissioner's report is one obtained in collusion and on the basis of a fabricated FMB plan and that the defendnats already filed objections to the said report and, therefore, the request of the plaintiff to direct the Commissioner to revisit the plaint schedule property for the desired purpose cannot be considered without disposing of the objections to the commissioner's report already filed by the defendants. The trial Court, having examined the matter had allowed the application of the plaintiff and re-entrusted the warrant to the same commissioner, who was earlier appointed, for the purpose of complying with the directions in the warrant and measuring the site in between W1 and W2/the wall with the assistance of a Mandal Surveyor. Aggrieved thereof, the defendants filed this revision petition.'

4. At the hearing, it is submitted that the commissioner had already executed the warrant and filed his report with annexures, on 11.02.2017, i.e., even before an interim order is granted in this revision in favour of the defendants. Be that as it may.

5. In a suit filed complaining encroachment of the property and seeking the reliefs of mandatory injunction and removal of constructions that were said to have been made in the property that was said to have been encroached, generally, the appointment of an Advocate Commissioner to measure the properties involved in the *lis* and fix the encroachment, if any, is absolutely necessary for effective adjudication of the issues related to the said reliefs claimed in the suit. In the case on hand, the relief of mandatory injunction is also being sought by the plaintiff. The Commissioner, who was earlier appointed, filed a report along with annexures. The plaintiff filed the subject application

requesting to direct the same Commissioner to revisit the schedule property to answer the objections filed by the plaintiff and comply with the directions in the earlier orders of the Court by which the Commissioner was appointed. The request of the plaintiff is to direct the Commissioner to locate the 'C' schedule property and arrive at its extent and thereby, arrive at the length of W1-W2 wall. The contention of the plaintiff before this Court is that the said exercise is necessary for effective adjudication of the issues settled for determination in the suit and that unless the said exercise is done by the Commissioner, the issues involved cannot be effectively adjudicated and a quietus cannot be given to the *lis* once and for all. Be that as it may.

6. Further, it is to be noted that the evidence which the Commissioner gathers by making local inspection and conducting survey, on the re-entrustment of the warrant, cannot otherwise be procured; and, such evidence can be procured only by issuing a commission. Thus, in the case on hand, if the same Commissioner re-entrusted with the warrant takes measurements with the assistance of a Mandal Surveyor and does the work entrusted to him and files a report with a plan after localizing the property on ground and localizing the encroachment, if any, into the property of the plaintiff and its extent, 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. As noted, the plaintiff is seeking a mandatory injunction and the defendants are denying plaintiff's entitlement to the said relief. 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 localizing the properties, in view of their respective claims. 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 their respective claims are only correct. Hence, after adduction of such oral evidence there will be opposing statements made on oath against oath before the Court below; therefore, if the same Commissioner, who was earlier appointed, is re-entrusted with the warrant for the purpose desired and he executes the warrant and files a report with a plan, such a report will be of immense aid to the Court below in effectively adjudicating the issues involved in the *lis*. In that view of the matter, this Court is of the considered view that the instant case is a fit case for re-entrustment of the warrant to the same Advocate Commissioner, who was earlier appointed for the purpose desired by the plaintiff and that such a course would sub-serve the ends of justice and that therefore, the trial Court is justified in allowing the application of the plaintiff by its order, which is impugned.

7. Before parting, it is to be noted that the principal objection of the defendants for the same Commissioner revisiting the property and executing the warrant once again is that the Commissioner earlier did not act in a fair manner and failed to answer the points in the work memo served upon him and that the defendants filed objections to the Commissioner's report and that the re-entrustment of the warrant to the Commissioner by the trial Court without disposing of their objections filed to the Commissioner's report is impermissible under law. The plaintiffs are also saying that the Commissioner did not answer the points in their work memo and failed to comply with the directions in the earlier order of the trial Court while executing the warrant during his

first visit. Since both parties are complaining that during the first visit the Commissioner did not properly execute the warrant, the trial Court thought it fit to re-entrust the warrant to the Commissioner for properly executing the warrant and held that it is just and necessary to re-direct the same Advocate Commissioner to take measurements of W1-W2 marked wall with the assistance of a Mandal Surveyor. The trial Court had also taken note of the fact that the Advocate Commissioner had also filed his answers to the objections filed by both the parties to his earlier report. Therefore, the trial Court before passing the impugned order has taken all the aspects of the matter into consideration and then passed a reasoned order.

8. Therefore, for all the reasons afore-stated, this Court does not find any merit in the contentions of the revision petitioners that the trial Court ought not to have re-entrusted the warrant to the Commissioner without disposing of the objections filed by the defendants to the earlier report of the Commissioner. The trial Court can always examine the two reports comprehensively, keeping in view the objections, if any, filed by both parties, which are valid, and also the answers of the Advocate Commissioner to such objections while evaluating the entire evidence that will be eventually brought on record and while considering the aspect of the probative value of the Commissioner's report and also the weight to be attached to it.

9. On the above analysis, this Court holds that the revision petition can be dismissed and the order impugned can be confirmed, however, with appropriate directions which may sub-serve the ends of justice.

10. In the result, the Civil Revision Petition is dismissed, subject to the above observations. However, it is needless to state that the trial Court

shall first give an opportunity to both parties to file objections, if any, to the present commissioner's report (second report) and then consider both the reports of the commissioner with annexed plans, if any, keeping in view the observations supra in this order. It is also made clear that in the event, the Commissioner is examined as a witness before the trial Court, the trial Court shall afford an opportunity to the party concerned to cross-examine the commissioner on various aspects and also with reference to the objections, if any, filed to his reports. There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order.

M.SEETHARAMA MURTI, J

Date: 3rd August, 2018

KL



242

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI**CIVIL REVISION PETITION No.3217 of 2018**Date: 3rd August, 2018

KL