

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3065 of 2018

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by the unsuccessful petitioner/plaintiff assailing the order, dated 04.05.2018, passed by the learned Junior Civil Judge, Parchur, passed in I.A.no.142 of 2018 in O.S.no.95 of 2009.

2. I have heard the submissions of *Sri Venkateswarlu Chakkilam*, learned counsel appearing for the petitioner-plaintiff ('plaintiff', for brevity) and of *Sri A.Abhishek Reddy*, learned counsel appearing for respondents 1 to 5/defendants 1 to 5 ('defendants', for brevity). I have perused the material record.

3. To begin with, it is to be noted that the plaintiff filed the suit against the defendants for a perpetual injunction in respect of Ac.0.13 ½ cents of vacant site situated at Vankayalapadu village, H/o Pusapadu village, Prakasam District, more fully described in the schedule annexed to the plaint. The defendants having filed their written statement are resisting the suit. In that suit, the plaintiff filed the subject interlocutory application under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908, requesting to appoint an Advocate Commissioner to measure the plaint schedule site as per the measurements that are furnished in the schedule of the plaint and also to measure the site of the defendants as per exhibits A2 and A9, which are documents anterior to exhibits B3 and B2, and file his report with plan/s. The said interlocutory application was resisted by the contesting defendants. On merits and by the order impugned in the revision, the

trial Court dismissed the said application of the plaintiff. Hence, the plaintiff is before this Court.

4. The case of the plaintiff in support of the aforesaid request, in brief, is this: Though the suit is filed for perpetual injunction, the dispute is with regard to the boundaries. The dispute arose at the time of raising the level of plaintiff schedule property and that of the property of the defendants situated on the West of the plaintiff schedule property. As per the version of DW1, his late father, Bhavanam Venkata Subba Reddy, purchased the property that is being claimed by the defendants under exhibits B2 and B3; and, that the vendor under exhibit B3, in his turn, purchased the said property under a registered sale deed, dated 01.09.1945; and, that the vendor under exhibit B2, in his turn, purchased the property under a registered sale deed, dated 19.09.1958. The certified copies of the said two documents of the vendors under exhibits B2 & B3 are exhibited as exhibits A2 & A9. Whereas, the plaintiff claims that his property is his ancestral property. The defendants are thus claiming their property on the West of the plaintiff schedule property under exhibits B2 & B3. Exhibits A9 & A2 are the link documents or the antecedent title deeds related to the property of the defendants. The defendants cannot claim any extents, which are more than the extents that are mentioned in exhibits A9 & A2, the antecedent title deeds. But, the defendants are making a claim for a larger extent of property than the property originally owned and possessed by their vendors. Since the death of the father of the plaintiff, he is enjoying his property. For better appreciation of evidence, it is necessary to appoint an Advocate Commissioner for the purpose stated by the plaintiff.

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

The material allegations in the affidavit of the plaintiff are false. There is no need for appointment of an Advocate Commissioner for the purpose desired by the plaintiff. In a suit for perpetual injunction, the plaintiff has to establish his possession over the plaint schedule property. The plaintiff has not filed any documents in respect of the plaint schedule property much less a document issued by either a Panchayat or any authority concerned revealing his alleged possession over the plaint schedule property. The plaintiff admitted in his cross-examination that there are no documents showing the enjoyment of the plaint schedule property by his father. A commissioner had already visited the schedule property and filed a report with plan. The plaintiff did not make an attempt at the earliest point of time to serve a work memo on the Advocate Commissioner and thus failed to make a request to measure the disputed properties. All the witnesses on the side of the plaintiff were examined. The suit is neither a suit for declaration of title nor a suit for recovery of possession. The suit is a simple suit for perpetual injunction. The defendants filed a plan showing the topographical details of the properties in the vicinity and also the certified copies of their sale deeds besides partition deed executed in the year 1982 amongst the defendants 2 to 5 and their father besides tax receipts to establish their case. Hence, a Commissioner cannot be appointed.

6. Be it noted that the trial Court observed in the impugned order that previously an Advocate Commissioner was appointed to note down the physical features of the plaint schedule property and the surrounding properties and that the said Commissioner visited the properties and filed a report and that if the plaintiff wanted to have the properties

measured, he ought to have made a request in the said regard in the earlier application filed for appointment of a Commissioner or in the alternative, he ought to have served a work memo on the Commissioner earlier appointed requesting therein to measure the properties, if necessary, with the help of a Surveyor and that the plaintiff failed to do so and that the instant second application for appointment of a Commissioner once again was not filed before the commencement of trial or atleast after cross examination of DW1 and that the instant application is filed only after the conclusion of the trial and that the plaintiff made the present request in the instant application at a belated stage. Thus, only on the ground of delay in filing the instant application seeking appointment of a Commissioner for measurements of the properties, the trial Court dismissed the application of the plaintiff. Aggrieved thereof, the plaintiff filed this revision and contended that in the facts & circumstances stated by both the parties, and as there is a boundary dispute, appointment of an Advocate Commissioner for measurement of the properties of the defendants as per their antecedent title deeds, exhibits A9 & A2, is highly necessary to measure, localize and demarcate on ground, the defendants' property from that of the plaintiff and such a course is necessary not only in view of the boundary dispute but also in view of the fact that the plaintiff's case is based on long possession of his father till his death and the plaintiff's possession thereafter and as the plaintiff's claim is that his property is an ancestral property and for such ancestral property, there cannot be any documents like title deeds. It is also the submission of the plaintiff that unless the Commissioner measures the properties as desired and files a report with plan clearly demarcating the properties and fixing the boundary between the two properties of the plaintiff and of the

defendants, there cannot be a possibility for effective adjudication of the *lis*. It is submitted that the plaintiff who is a villager and not well-versed with the worldly affairs and the Court procedures could not make the present request at the earliest point of time and that on the mere ground of delay, if the petition is dismissed, injustice would be done to the plaintiff and that the dispute remains unresolved without proper adjudication and that if that is so, the plaintiff's rights and possession over a part of his immovable property will be lost forever as the plaintiff's contention is that the defendants are claiming more extent than that was originally mentioned in the title deeds of their vendors and as the law is well settled that the defendants cannot claim more extent of site/land than that was mentioned in antecedent title deeds, that is, the title deeds of their vendors, in view of the settled principle of law that no one can convey a better title than what he has.

7. Per contra, learned counsel for the defendants while supporting the orders of the Court below contended that the plaintiff failed to avail the opportunity of getting the properties measured despite the fact that an Advocate Commissioner was appointed earlier at his request and that his present attempt is intended to delay the disposal of the suit as he has no case and that as rightly held by the trial Court, the belated request of the plaintiff does not merit consideration and that the trial Court is justified in dismissing the petition.

8. In the case on hand, the properties of the plaintiff and defendants are situated side by side and the defendants' property is on the Western side of the property of the plaintiff is borne out by record. The plaintiff claims that his property is an ancestral property and his suit for injunction is based on long settled possession and enjoyment. Whereas,

the defendants are having their title deeds, exhibits B2 & B3. They did not file their antecedent title deeds, viz., the title deeds of the vendors under exhibits B2 & B3. However, the plaintiff exhibited the said antecedent title deeds, exhibits A9 & A2. The plaintiff mentioned in the plaint schedule, the measurements of the plaint schedule property on all four sides. Now, the plaintiff wants a Commissioner to be appointed to measure the plaint schedule property as per enjoyment and also to measure the property of the defendants as per their link documents/antecedent title deeds and localize the properties of the plaintiff as well as of the defendants on ground and fix the demarcating line between the two properties. In the considered view of this Court, when there is a dispute regarding the boundary between the properties of both the sides, even in a suit for perpetual injunction, a Commissioner can be appointed for the desired purpose as the issue related to granting or not granting the perpetual injunction cannot be effectively adjudicated without clear evidence as regards the location of the property of the plaintiff and the defendants on ground and the demarcation line between the properties of the parties. In this regard, it is profitable to refer to the following decisions of this Court: Varala Ramachandra Reddy v. Mekala Yadi Reddy<sup>1</sup>, wherein the facts disclose that a revision was directed against the order of the Court below dismissing the application for appointment of a Commissioner to fix up the boundary between the suit land and the land of the respondent with the help of a Surveyor. The trial Court while dismissing the said application *inter alia* observed that a Commissioner cannot be appointed for the desired purpose in a suit for injunction. This Court having considered the principles of law laid down in various decisions had held that the trial Court committed a serious error in dismissing the

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<sup>1</sup> 2010 (4) ALD 198

application filed by the respondent for local inspection of the suit property and to fix up the boundary with the help of a Surveyor and had accordingly, allowed the petition for appointment of an Advocate Commissioner. If a suit of this nature comes to be disposed of without giving an opportunity to the parties to have the demarcating line between the properties of the parties fixed on ground, the perpetual injunction decree that comes to be granted eventually leads to complex situations and will be of no avail and such a decree does not help in giving a quietus to the dispute once and for all. Further, the evidence that will be made available to Court on the measurements of the properties by a Surveyor in the presence of an Advocate Commissioner can be secured only by issuing a Commission. If the Commissioner is appointed and he files a report with plan, such 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.

9. There is no hard and fast rule that in no suit for perpetual injunction, Commissioner can be appointed. Further, on mere ground of delay, if the petition is to be dismissed, the plaintiff will not be able to place before the Court one more piece of evidence, which will be useful to the trial Court in evaluating the evidence and in coming to a just decision in the matter. If the facts of the case warrant, a Commissioner can be appointed even at the stage of the second appeal. If any authority is needed for this proposition, a profitable reference can be made to the decision of the Supreme Court in *Haryana Wakf Board v. Shanti Sarup & Others*<sup>2</sup>. Reverting to the facts of the case, it is to be

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<sup>2</sup> (2008) 8 SCC 671

noted that neither of the parties want to make a claim over the property of the other. Therefore, when the plaintiff's title to his property is not in question and when the dispute is with regard to the boundary between the two properties of the parties, the plaintiff need not be driven to file a suit for declaration of title merely by observing that in a suit for perpetual injunction, a Commissioner cannot be appointed. It is axiomatic that in the oral evidence, which both the parties adduced, they might have naturally asserted their respective pleaded cases and might have also stated that their respective claims are only correct. On such oral evidence, 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. Therefore, if a Commissioner is appointed for the purpose desired by the plaintiff and if the Commissioner, with the help of a competent Surveyor, gets measured and localizes the properties and gets the demarcating line between the properties of the parties fixed and files a report with a plan, the said report with plan, in the considered view of this Court, will be of immense help to the trial Court in adjudicating the *lis* in an effective manner. In that view of the matter, this Court finds that the trial Court was in error in dismissing the application of the plaintiff merely on the ground of delay and negligence on the part of the plaintiff.

10. On the above analysis of facts and legal position, this Court finds that this is a fit case for granting the request of the plaintiff and that the revision petition deserves to be allowed and that the order of the trial Court brooks interference.

11. In the result, the Civil Revision Petition is allowed and the impugned order is set aside. As a sequel to this order, I.A.no.142 of 2018 is allowed. Accordingly, the trial Court is now directed to appoint the same Advocate Commissioner, who was earlier appointed for the purpose desired by the plaintiff. The trial Court shall, however, give necessary further directions in the warrant that may be entrusted to the Commissioner for completion of the commission work at the earliest and as expeditiously as possible. In view of the fact that the suit is a sufficiently old suit, the trial Court shall endeavour to dispose of the suit as expeditiously as possible. It is needless to state that the trial Court shall consider harmoniously the first report of the Commissioner and also the second report, which the Commissioner may file pursuant to these orders, along with objections, if any, the parties may file to the said report in conjunction with the other evidence let in by the parties while evaluating the evidence brought on record.

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

24<sup>th</sup> September, 2018  
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