

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.3212 of 2018

ORDER:

This Civil Revision Petition by the unsuccessful respondents 2 and 3- defendants 2 and 3, under Article 227 of the Constitution of India, is directed against the order, dated 22.02.2018, of the learned Principal Junior Civil Judge, Ongole, passed in I.A.No.1895 of 2017 in O.S.No.337 of 2012.

2. I have heard the submissions of *Sri Subba Rao Jandhyam*, learned counsel for the petitioners - defendants 2 and 3, and of *Sri Ravi Kumar Tolety*, learned counsel for the respondent – plaintiff. I have perused the material record.

3. The facts, which are necessary to be stated as a prelude to this order, in brief, are as follows:

“The plaintiff filed the suit against the defendants for perpetual injunction restraining the defendants from interfering with his peaceful possession and enjoyment of 10 Gadies of vacant site and basement walls therein at Chimakurthy Village situated on the Northern side of Ongole – Kurnool road, more-fully described in the schedule annexed to the plaint. The plaintiff also filed a rough sketch along with the plaint and sought apart from a perpetual injunction, a mandatory injunction directing the defendants to close the P, P1, P2 and P3 pits by removing the pillars in the pits. Alternatively he sought liberty to have them removed, in the event the defendants fail to comply with the said directions and recover costs. In the said suit, the plaintiff earlier filed I.A.No.616 of 2012 for appointment of an Advocate Commissioner for the purpose of filing a report after noting down the physical features of Plots ‘A’ and ‘B’ shown in the plaint plan and taking measurements of Plot ‘A’ as well

as photographs of the plaint plan property. The trial Court allowed the said application and appointed an Advocate Commissioner. The said Commissioner visited the petition schedule property and filed his report & rough plan along with photographs taken during the course of his inspection. No objections are filed by both parties to the said report of the Advocate Commissioner. While so, the plaintiff again filed the subject Interlocutory Application for appointment of an Advocate Commissioner to measure, as per the registered Sale Deed, dated 22.09.1960, the plaintiff's Plot 'A' shown in the plaint plan, with the assistance of Mandal Surveyor, Chimakurthy Mandal, and fix boundaries of the plot and file a report & plan. The 3rd defendant filed a counter and resisted the subject Interlocutory application. On merits and by the order impugned in this revision, the trial Court allowed the application of the plaintiff and appointed the same Commissioner, who was earlier appointed, for the purpose desired by the plaintiff. Aggrieved thereof, the defendants 2 and 3 filed this revision petition."

4. Learned counsel for the petitioners - defendants 2 and 3 contended as follows:

"The suit is filed for granting a decree for perpetual injunction and mandatory injunction. Appointment of a Commissioner for the purpose desired by the plaintiff would amount to permitting him to gather evidence by means of Commissioner's report. The Commissioner already appointed at the instance of the plaintiff filed a report. No objections are filed to the said report. Unless the report of the first Commissioner is expunged, a second Commissioner cannot be appointed. The present application is filed after the

cross-examination of PW1 to get over the laches and the points gained by the defendants in the cross-examination of the plaintiff. The plaintiff has to establish the identity of the property with its boundaries by adducing necessary evidence at trial. The plaintiff, in his cross-examination, admitted that a part of the suit land was utilized by the Municipality for road widening. The plaintiff now seeks appointment of an Advocate Commissioner once again for measurement of plaintiff Plot 'A' i.e., the property being claimed by the plaintiff, with reference to the Sale Deed of the year 1960. In the said Sale Deed, the measurements of the property on all four sides are not mentioned. The petition schedule property is a house property and the boundaries all around it are fixed boundaries. When the plaintiff made a request earlier for measurement of the property, he did not make a request for taking measurements with the assistance of a Mandal Surveyor. In the facts and circumstances, the appointment of a Commissioner, a second time for the same purpose, that too for measurement of the property with the assistance of a Mandal Surveyor with reference to the Sale Deed of the year 1960 does not help the plaintiff in advancing his case any further. Without considering the facts in proper perspective, the trial Court erroneously appointed the same Advocate Commissioner a second time contrary to the settled legal position that a Commissioner cannot be appointed second time without expunging the earlier report filed by him. Further, the subject Interlocutory Application is filed after a long delay. As there is no interim order granted by the trial Court, the defendants proceeded with the constructions. Earlier, the construction was at the stage of raising of pillars; but, as on today, the construction is completed; and, the defendants constructed a ground + two storied building. Hence, the

order impugned is liable to be set aside and the application of the plaintiff seeking appointment of an Advocate Commissioner a second time is liable to be dismissed. ”

4.1 Learned counsel, in support of his afore-stated contentions, placed reliance on a decision of this Court in **J. Venkateswar Rao v. Vijaya Lakshmi**¹.

5. Learned counsel for the respondent - plaintiff, while supporting the order of the trial Court, contended as follows:

“The suit is filed not for bare perpetual injunction. In a suit seeking a relief of mandatory injunction complaining encroachment by the defendants into the property of the plaintiff, it is necessary to measure at least the property of the plaintiff as per his title deed, if not the properties of both parties and it is necessary to find out and fix the nature of encroachment, if any, and also its extent. Unless such exercise is done and the encroachment, if any, is localized on ground by measuring the property/properties with the assistance of a Mandal Surveyor, it may not be possible to effectively adjudicate the issue with regard to the mandatory injunction. Even according to the defendants, the boundaries of the property are fixed and the road margin is one of the boundaries on one side. Therefore, it is possible to measure the extent or area of the property of the plaintiff with reference to the documents of the year 1960 by taking measurements on all sides and find out whether the extent in possession of the plaintiff is in accordance with his right and title or whether

¹ 2017 (5) ALD 13

the extent is less on account of the encroachment, if any, made by the defendants.”

6. I have given earnest consideration to the facts & submissions.

7. The trial Court passed a reasoned order. The trial Court in its order first noted that there are no doubt laches on the part of the plaintiff and that the plaintiff at the earliest opportunity failed to make a request to have the property measured with the assistance of a Mandal Surveyor. The trial Court also noted in its order that after the Commissioner, who was appointed earlier, filed a report, the plaintiff filed the subject Interlocutory Application for measurement of the property with the assistance of a Mandal Surveyor with reference to the document of the year 1960. Yet, the trial Court appointed the same Advocate Commissioner for visiting the property once again and measuring the property with the assistance of a Mandal Surveyor, as per the Sale Deed of the plaintiff of the year 1960, as the trial Court was of the view that the report and the plan with measurements, which the Commissioner may file after executing the commission warrant, would be helpful for better adjudication of the controversy and for giving a quietus to the dispute once and for all. Coming to the contention that unless the report of the Commissioner already filed is expunged, the warrant cannot be re-entrusted to the said commissioner and the decision relied upon by the learned counsel for the defendants, it is to be noted is that in the cited decision **[J. Venkateswar Rao v. Vijaya Lakshmi]** (referred to supra) the facts reflect that objections are filed by the defendant to the Commissioner’s report and the same were not disposed of by the trial Court and therefore, in the said circumstances, this Court held that

appointment of a second commissioner is impermissible. But, in the case on hand, no objections are filed to the report filed earlier by the Commissioner. In the instant case, the consideration of the question of expunging of the earlier Commissioner's report by the trial Court would have arisen had any one of the parties filed objections to the earlier report of the Commissioner. However, admittedly, neither of the parties filed any objections to the earlier report filed by the Commissioner. The facts borne out by the record disclose that the re-entrustment of the warrant to the same Commissioner was sought, for measurement of the property with the assistance of a Mandal Surveyor to further elucidate the matter in controversy as the Commissioner had earlier executed the warrant and took measurements without any such assistance of a Surveyor much less a competent Surveyor and as the plot of the plaintiff was not measured with reference to the document of the year 1960. In a suit for mandatory injunction complaining encroachment, it is always necessary and it is in the interests of both the parties to have the encroachment, if any, localized and fixed with reference to the documents of the parties and enjoyment by appointing a Commissioner for the said purpose, as it would not be possible to decide the issue as to whether there is any encroachment, if any, and its extent, without resorting to such a course. In **Bandaru Mutyalu and another v. Palli Appalaraju**², the facts reflect that in the cited case, it is not disputed that the respondent and the petitioners are neighbours and the house of the petitioners is to the North of the property of the respondent and that the Commissioner earlier appointed at the instance of the petitioners noted only physical features but did not do the work of localization of the disputed site and that therefore,

² 2013 (5) ALD 376 # 2013 (6) ALT 26

an application is filed for appointment of a Commissioner once again. In that backdrop, this Court held that when the parties are neighbours and there is an allegation that the property belonging to the respondent is being interfered with by the petitioners, it is incumbent on the Court to decide where the disputed portion is located and whether or not it forms part of the property claimed by the respondent. Accordingly, this Court confirmed the order of the trial Court appointing a Commissioner once again. 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 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. The plaintiff is complaining that an encroachment has been made into his property by the defendants. The defendants are denying the same. 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 being respectively claimed by them. 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 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.

8. For the afore-stated reasons, this Court finds that the order of the trial Court does not brook interference.

9. In the result, the Civil Revision Petition is dismissed. It is needless to state that the trial Court shall consider harmoniously, the first report of the Commissioner to which no objections are filed and also the second report, which the same Commissioner may file, with objections, if any, filed to the said report along with the other evidence let in by the parties while evaluating the entire evidence brought on record.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

September 04, 2018
MD