

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3700 of 2018

ORDER:

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908, is filed by the unsuccessful respondent –plaintiff assailing the judgment and decree, dated 28.03.2018, of the learned I Additional District Judge, Ongole, passed in CMA.No.19 of 2016. By the said judgment, the learned Additional District Judge, while allowing the said CMA had set aside the order and decretal order, dated 08.11.2016, of the learned III Additional Junior Civil Judge, Ongole, passed in IA.No.361 of 2016 in OS.No.418 of 2016.

2. I have heard the submissions of Sri G.V.L. Murthy, learned counsel, appearing for the revision petitioner –plaintiff ['plaintiff', for brevity], and of Sri T. Ravi Kumar, learned counsel, appearing for the respondent –defendant ['defendant', for brevity]. 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 defendant for a perpetual injunction restraining the defendant from interfering with the plaintiff's peaceful possession and enjoyment of 205.86 Square meters of site [with tiled house] in Sy.No.114 of Ongole Town morefully described in the schedule annexed to the plaint. The defendant filed a written statement resisting the suit. In the said suit, the plaintiff filed the above said Interlocutory Application under Order XXXIX Rules 1 & 2 of the Code requesting to grant a temporary injunction. The defendant filed a counter resisting the said application. During the course of enquiry before the trial Court, no oral evidence was adduced; however, exhibits P1 to P6 and R1 to R3 were marked. The trial Court by its orders, dated 08.11.2016, allowed the application of the plaintiff and granted temporary injunction as prayed for. However, by the

judgment impugned in this revision, the learned Additional District Judge had set aside the decree and decretal order of the trial Court by allowing the CMA filed by the defendant and remanded the matter for adjudication afresh. Aggrieved thereof, the plaintiff is before this Court.'

4. From the pleadings and the submissions made before this Court, the following facts are noticeable:

The defendant is the owner of the property situated on the Southern side of the plaint schedule property. The defendant made arrangements to construct a building in his property and accordingly started making constructions. The grievance of the plaintiff is that the defendant, while constructing his building, is trying to encroach into the mud wall, which is towards North, and that the defendant is further trying to encroach into the site of the plaintiff by digging the said mud wall. The trial Court took note of the fact that the dispute between the parties is with regard to the mud wall and that the complaint of the plaintiff is that the defendant is trying to dig the mud wall and encroach into the property of the plaintiff, which is on the Northern side of the plaint schedule property, and that the grievance of the plaintiff is that if the mud wall is allowed to be dug up or demolished, her constructions would get affected. The trial Court also observed in its order that if the temporary injunction sought for by the plaintiff is not granted, the defendant may demolish the mud wall and that in such a case, the construction of the plaintiff would collapse. Be that as it may. In the judgment impugned, the learned Additional District Judge adverted to the contentions of the parties and the documents exhibited and observed verbatim as follows: -

'So the dispute can be resolved on determining the encroachment if any in the suit schedule property that can only be adjudicated on measuring the suit schedule property with reference to the tile of the documents of the petitioner so also with reference to the title deeds and documents of the respondent. The respondent chose to file a petition for

appointment of a commissioner to localise the suit schedule property and to measure the suit schedule property with reference to the documents of either of the parties. This Court deems fit it just for localisation of the suit schedule property by advocate commissioner with the assistance of a surveyor more particularly a municipal surveyor to ascertain the encroachment if any in the suit schedule property by the respondent with reference to the title deeds of either of the parties and such localisation of the suit schedule property would also minimise the oral evidence likely to be adduced on either of the parties and would also pave the way to assess the evidence qualitatively rather than quantitatively. So this Court deems fit just to remand back the matter to the lower Court to dispose of the matter afresh on giving reasonable opportunity to both the parties so also on giving reasonable opportunity to the respondent also to file a petition, if any, for appointment of advocate commissioner for localisation and for demarcation of suit schedule property and to note down the physical features.'

Observing accordingly and without going into the merits of the matter, the decree and decretal orders of the trial Court were set aside and the matter is remanded, with a direction to the trial court to dispose of the matter afresh.

5. In this backdrop, learned counsel for the plaintiff submits as under:

The trial Court noted that if the mud wall is demolished there is a likelihood of the plaintiff's property collapsing. The learned Additional District Judge committed a grave error in not noticing the said fact & also the finding of the trial Court and in setting aside the orders of the trial Court and in remanding the matter to the trial Court for fresh adjudication. The learned Additional District Judge ought to have seen that the suit is filed for a perpetual injunction; and, that it is not the case of the plaintiff that an encroachment is already made. The learned Additional District Judge ought to have seen that the case of the plaintiff is that an attempt is being made to dig the mud wall and make an encroachment. Even assuming for a moment that the Commissioner's report is necessary for consideration, the learned Judge ought to have directed the parties to maintain *status quo* as regards the mud wall as otherwise the defendant may demolish the mud wall and it may result in collapsing of the property of the plaintiff.

6. Learned counsel for the defendant contended that since the matter is remanded for fresh adjudication, no prejudice is caused to the plaintiff and that the plaintiff can re-argue the case before the trial court. He would further submit as follows: 'The defendant filed IA.No.3 to 2018 in the present revision petition requesting to vacate the interim injunction order granted by this Court. In the counter affidavit, the defendant, *inter alia*, urged that this Court may dispose of this civil revision petition directing the trial Court to dispose of the suit itself within three months by ordering the parties to maintain *status quo* with regard to the mud wall in dispute and permitting the defendant to make constructions in the remaining part of his property without touching the compound wall, which is in dispute, as the defendant has already demolished his present house for making constructions and is living in a rented house. As desired by the parties, the advocate commissioner, who was already appointed, may be permitted to measure the properties of both parties with the help of a municipal surveyor. The above submissions in the counter affidavit of the defendant are made only to avoid delay in the disposal of the suit.'

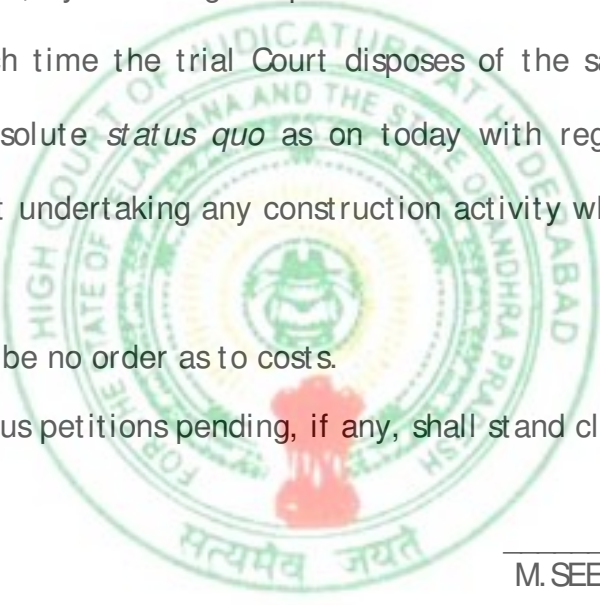
7. A copy of the report of the Commissioner, who was appointed *vide* orders in IA.no.362 of 2016 by the trial Court, is produced before this Court. A perusal of the said report shows that the Commissioner filed his said report into the trial Court, on 28.09.2016, and that while answering the work memo served upon him he mentioned in his report that there are no mud walls in the plaint schedule property. Thus, the Commissioner's report *ex facie* reflects that there are no mud walls in the plaint schedule property even by the date he filed his report, on 28.09.2016; whereas the plaintiff contends that if the mud wall is demolished the plaintiff's property would collapse. It is pertinent to note that the trial Court disposed of the IA for temporary injunction by an order, dated 08.11.2016, that is, after the said report is filed by the Commissioner. Now

that one Commissioner's report is already there on record and both the learned counsel submit that the Commissioner has to now file a further report after measurement of the properties, this Court is of the considered view that this revision can be disposed of protecting the interests of both parties.

8. Accordingly, the Civil Revision Petition is disposed of modifying partly the impugned judgment & decree and directing the trial Court to dispose of afresh the IA.No.361 of 2016 in OS.No.418 of 2016 filed under Order XXXIX Rules 1 & 2 read with section 151 of the Code filed by the plaintiff for temporary injunction within one month from the date of receipt of a copy of this order, however, by following the procedure established by law. It is made clear that till such time the trial Court disposes of the said IA, both parties shall maintain absolute *status quo* as on today with regard to the subject properties without undertaking any construction activity whatsoever until such time.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.



M. SEETHARAMA MURTI, J

10.10.2018
Vjl