

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P.No.7301 of 2018

O R D E R:

This Revision is filed assailing the order dt.14.08.2018 in I.A.No.2346 of 2017 in O.S.No.18 of 2005 of the Principal District Judge, Ranga Reddy at L.B.Nagar.

2. Petitioners are LR's of deceased-defendant in the above suit.

3. The respondent/plaintiff filed the said suit for specific performance of an Agreement of Sale dt.02.04.2003 allegedly executed by the deceased-defendant, who is mother of the petitioners, in favour of respondent agreeing to sell 2nd and 3rd floors of the plaint schedule property.

4. The deceased-defendant filed a Written Statement opposing grant of such relief specifically alleging that they are in possession of 2nd & 3rd floors of the plaint schedule property and that the respondent/plaintiff is in possession of ground and first floors of the said premises, apart from other pleas raised therein.

5. Pending the suit, deceased-defendant filed I.A.No.652 of 2015 alleging that the respondent was preventing them from entering into 2nd and 3rd floors of the building and sought a temporary injunction restraining the respondent from doing so.

6. On 14.10.2015 temporary injunction was granted in favour of the deceased-defendant restraining the respondent to forebear

from interfering with her entry and exit and that of her relatives to the suit schedule property from the road through ground and 1st floors of the said premises.

7. Alleging that subsequently the respondent had dismantled the staircase from 1st to 3rd floors with an ulterior motive to prevent the petitioners from reaching the 2nd and 3rd floors of the building, petitioners filed an application to implement the order dt.14.10.2015 in I.A.No.652 of 2015 in O.S.No.18 of 2005.

8. Petitioners also filed I.A.No.2346 of 2017 under Order XXVI Rule 9 CPC to appoint an Advocate-Commissioner for local inspection to find out, whether the stair case of the building bearing Municipal Nos.10-11-32 and 10-11-33 situated at Fatehnagar, Balanagar Mandal, R.R. District (the suit schedule property) is in existence or is demolished from 1st floor to 3rd floor of the building. In addition thereto, they also contended that it was necessary to take measurements of the plinth area of ground and first floors of the building with the help of a licensed Civil Engineer.

9. This latter part is based on their contention that their mother was induced to execute certain documents which were not acted upon; that under the guise of such fictitious documents, respondent was claiming ground and first floors in the premises; that even assuming that the documents of the respondents are considered, balance plinth area of approximately 2000 sq. feet of

each of the ground and first floors is under the petitioners' possession; and the balance requires to be demarcated in each of the ground and first floors for the petitioners' exclusive use and occupation.

10. Counter affidavit was filed in I.A.No.2346 of 2017 by the respondent/plaintiff denying the averments of the petitioners but admitting that there was an injunction granted in favour of the mother of the petitioners in I.A.No.652 of 2015 on 14.10.2015 as mentioned above. He contended that 2nd and 3rd floors of the premises already has a stair case on the North-East side and that the respondent constructed a stair case from ground floor to first floor only. He denied that the documents executed in his favour by the mother of the petitioners are false and created, and contended that he had paid full consideration and was delivered possession of the same by the mother of the petitioners. He further contended that the relief claimed in suit O.S.No.18 of 2005 does not relate to ground and 1st floors of the premises and the present petition prayer goes beyond the scope of the suit O.S.No.18 of 2005 and this application is filed only to drag on the proceedings.

11. By order dt.14.08.2018, the Court below rejected I.A.No.2346 of 2017. After referring to the contentions of both sides, the Court below observed that the pleadings in the plaint clearly show that the suit is filed for registration of area in the 2nd and 3rd floors of the subject property and is not filed seeking any

relief in ground and 1st floors; and the prayer of the petitioners in the application I.A.No.2346 of 2017 would exceed the scope of the main suit. It also held that pleadings of the petitioners are self contradictory, since they were on one hand claiming to be in possession of the portion of the ground floor and denying sale of portion in the ground and first floor in favour of the respondent, but in the same breath they were claiming to be entitled to 2,000 sq.fts in ground and first floors which is in their possession and seek demarcation of the same for their exclusive use and occupation. It observed that if they are in occupation of a portion, then there is no need to demarcate it. It even entertained a doubt over the petitioners' possession over the portion of the ground and 1st floors of the suit property. It then recorded the contention of the respondent that there was a stair case to the 2nd and 3rd floors from Northern and Southern side and held that petitioners did not state that there is no other stair case to approach 2nd and 3rd floors. It observed that petitioners have to plead that there is a stair case and that the same has been demolished and therefore they are not entitled to any relief in this I.A.

12. Assailing the same, this Revision is filed.

13. Heard Sri V.Hari Haran, Counsel for petitioners and Sri Gajanand Chakravarthy, Counsel appearing for respondent.

14. Counsel for the petitioners contended that having regard to the injunction granted in favour of the petitioners' mother in

I.A.No.652 of 2015 restraining the respondent from interfering with the access of the petitioners to 2nd and 3rd floors, the question, whether the stair case providing access to 2nd and 3rd floors of the premises, which is in occupation of the petitioners, is in existence or not, or whether it is demolished, is critical, because if such demolition is done by the respondent willfully, it would amount to committing contempt of the said order. He further contended that the respondent cannot oppose the said prayer because, the existence or non-existence of the stair case from ground and 1st floors to 2nd and 3rd floors, can only be seen and noted after a visit by the Advocate Commissioner to the subject premises and cannot otherwise be proved.

15. Counsel for respondent on the other hand contended that appointing an Advocate-Commissioner to verify whether the stair case exists or not amounts to collection of evidence and is impermissible in law, and in any event existence of staircase or its absence can also be proved by photographs. He further contended that the suit itself is confined to 2nd and 3rd floors of the premises and so the prayer of the petitioners for measurement through Advocate-Commissioner of ground and 1st floors, is outside the scope of the suit.

16. Counsel for the petitioners refuted the last contention by stating that since the ground and 1st floors of the subject premises is the subject matter of O.S.No.896 of 2007 and since

that suit and the instant suit, both are being tried by the same Court, comprehensive application has been filed.

17. I have noted the contentions of both sides.

18. When it is not disputed by the respondents that there is an injunction granted in favour of the deceased-defendant, who is mother of the petitioners, restraining the respondent from interfering with the entry and exit of the respondent to the suit schedule premises from the road through ground and 1st floors of the same building, and after her death, petitioners were impleaded, the question of existence of access to the 2nd and 3rd floors from the ground and 1st floors of the subject premises, is very crucial. Without a staircase it would not be possible to reach the 2nd and 3rd floors of the property, which is admittedly in possession of the petitioners, and if any such staircase has been removed by the respondent it might amount to committing contempt of the order dt.14.10.2015 in I.A.No.652 of 2015.

19. The reasoning of the Court below that the petitioners have to plead the existence of the staircase is perverse because petitioners were not expected to fly to the 2nd and 3rd floors without such a staircase when the order dt.14.10.2015 in I.a.No.652 of 2015 was passed granting temporary injunction. So there is premise that such a staircase existed from which access is provided to the petitioners in view of the order dt.14.10.2015 in I.A.No.652 of 2015.

20. No doubt, it is the contention of the respondent that there is a staircase to the southern-northern side of the subject premises.

21. Whether there was a separate stair case from the ground and 1st floors (which is said to be in occupation of the respondent), to the 2nd and 3rd floors, and whether it is demolished, in my opinion, is a matter which is necessary to be determined. Such examination would assist the Court in deciding whether there is any violation of temporary injunction order or not.

22. It may be that the suit is filed by the respondent for registration of the area in 2nd and 3rd floors, but the Court below cannot lose sight of the fact that there is a temporary injunction granted in favour of the petitioners in I.A.No.652 of 2015 by the same Court on 14.10.2015.

23. The existence or non-existence of the staircase is a fact which can only be determined by the evidence on the spot and for that purpose, Advocate-Commissioner's appointment is certainly necessary, and it does not amount to collection of evidence as is contended by the counsel for respondent.

24. Coming to the other portion of the relief claimed by the petitioners as to the demarcation of the area of the ground and 1st floors in the same premises, these floors are not subject matter of the suit O.S.No.18 of 2005 and so petitioners could not have filed

I.A.No.2346 of 2017 for such measurement, and they can possibly file it only in the other suit O.S.No.896 of 2007.

25. Therefore, the Civil Revision Petition is partly allowed; order dt.14.08.2018 in I.A.No.2346 of 2017 in O.S.No.18 of 2005 of the Principal District Judge, Ranga Reddy District at L.B.Nagar, to the extent the Court below had rejected it as regards appointment of Advocate Commissioner to ascertain whether the staircase of the building from the 1st floor to 3rd floor of the building is in existence or demolished is concerned, is set aside; and to that extent only, the said I.A., is allowed; and as regards the other portion of the relief claimed in the said I.A., is concerned, the said order is confirmed since such relief could not have been asked in O.S.No.18 of 2005 and can only be asked in O.S.No.896 of 2007. There shall be no order as to costs.

26. Consequently, Miscellaneous Petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

31st January, 2019.

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