

(1991) 02 AP CK 0036

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1827 of 1990

Chintapatla Arvind Babu and Another

APPELLANT

Vs

Smt. K. Balakistamma @ Bhargavi and Another

RESPONDENT

Date of Decision : 12-02-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, 115

Citation : (1992) 1 ALT 319

Hon'ble Judges : Neeladri Rao, J

Bench : Single Bench

Advocate : C. Ramachander Rao, for the Appellant; M. Rama Rao, for the Respondent

Final Decision : Allowed

Judgement

Neeladri Rao, J.—The defendants in O.S. No. 7 of 1990, D.M.C, Nagar Kurnool are the revision petitioners. The suit was filed for injunction in regard to the house bearing No. 15-38. The plaintiffs claim that the plaint schedule property belongs to the 1st plaintiff and 2nd plaintiff is the tenant therein. The defendants contend that their father Srinivasa Chan purchased plot bearing No. 44 Class-D to an extent of 200 square yards under a registered sale deed No. 480/60 dt 17-5-1960 from the National Educational Society of Nagar Kurnool and constructed the houses bearing Nos. 15-38,15-39 and 15-40 after obtaining permission from the panchayat and the 2nd defendant is their tenant in house bearing No. 15-38. It was further urged for the defendants that the father of 1st plaintiff purchased plot bearing No. 43 Class-D of an extent of 200 square yards through a registered sale deed No. 478/60 dt. 17-5-1960 from the same National Educational Society and constructed houses bearing Nos. 15-35,15-36 and 15-37.

2. The defendants filed I.A. No. 77 of 1990 praying for appointment of an advocate-commissioner for localising the plots covered by 44-D and 43-D in order to establish that the house bearing No. 15-38 is in plot No. 44 belonging to them. The lower court dismissed the said petition by observing that it is

sufficient, if prima facie case is established in a suit for injunction and the 1st plaintiff is relying upon the registered will dt.18-2-1988 executed by her father whereby the plaint scheduled house was bequeathed to her, and it is a mere suit for injunction and as it is not a suit for declaration, it is not a fit case for ordering appointment of an advocate-commissioner for locating plots 43 and 44, and Order 26, Rule 9 CPC does not empower the Court to appoint a commissioner for localising the plots and it is intended for appointing the commissioner only to note the features.

3. The learned counsel for the respondent urged that this revision petition is not maintainable, as the order of dismissal of a petition praying for appointment of a commissioner is not a case decided as contemplated u/s 115 CPC. It was further urged that as it is a mere suit for injunction, the lower Court rightly exercised the jurisdiction in refusing to allow the petition, for an injunction can be claimed by a person in possession even against a lawful owner.

4. The judgment reported in *Harvinder Kaur v. Godha Ram*, AIR 1979 P & H 67 supports the contention for the revision petitioners that the order dismissing the application for appointment of Commissioner is not one of case decided as envisaged u/s 115 CPC and thus, the revision is not maintainable. But, in *Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam*, different view was taken. Therein it was held that the order declining to appoint a Commissioner under Order 26, Rule 9 CPC to make local investigation is a "case decided" and revisible u/s 115 CPC. It was observed therein that the adjudication of right or obligation need not necessarily have a nexus to the lis and in the progression of the suit toward its final realisation of the controversy between the parties. It was further held therein that the parties have the right to invoke Order 26, Rule 9 CPC to adduce evidence in substantiation of their case, and an order declining to appoint a Commissioner is one of denial of such right. In *Ram Dass Vs. Smt. Subhash Bakshi*, it was stated that the adjudication may be such as to have the necessary effect of deciding those rights or obligations.

5. It is for the parties to decide as to what evidence has to be adduced in support of their pleas and it is not for the opposite party or the Court to suggest or to indicate the evidence which has to be adduced. So long as the evidence is relevant and if it is not by way of dilatory tactics, the Court is bound to allow" a party to adduce evidence. Order 26, Rule 9 CPC permits a party to move the Court for appointment of an advocate-commissioner for local investigation if it is requisite or proper for the purpose of elucidating the "matter in dispute. The report of elucidating the matter in dispute. The report of such Commissioner shall be held as evidence in the suit and it forms part of the record under Order 26, R-10 CPC. When a party complains that the opposite party was attempting to disturb the features, a type of case considered in *Ponnuswamy's Case*, and applies for appointment of a commissioner under Order 26, Rule 9 CPC, refusal to allow such petition prevents the party from having clinching, evidence in proving the said fact and then it will be one of adjudicating about the right of the

party to adduce evidence. There may be cases where the matter in dispute can be resolved by appointment of a Commissioner for localising the site in dispute with reference to the title deeds and the boundary dispute in regard to the vacant site is one such case. If the Court declines to appoint a Commissioner, it may result in the perpetration of gross injustice if the relief is denied to the aggrieved litigant where it is most needed. Thus, even before the amendment of Section 115 CPC in 1976, the expression "case" was construed as including "a part of proceeding whereby the High Court in exercise of the power of superintendence interferes in such matters: vide Major S.S. Khanna Vs. Brig. F.J. Dillon, . It is now made specific by the explanation to Section 115 CPC after it was amended by Amendment Act. 1976.

6. Thus, the expression "case" in Section 115 CPC includes any order made in the course of suit or other proceeding. The adjudication of the right or obligation by that order need not have any lis in regard to the main proceeding. Even if the right or obligation is not decided by the impugned order and even if it will merely have the effect of deciding the right or obligation the said order can be treated as an order where by the case is decided. The report of the Commissioner appointed under Order 26, Rule 9 CPC is evidence. In some cases, the report of the commissioner may be the main evidence, if not the sole evidence and it is generally more credible evidence. Hence, with due respect I prefer the judgment in Ponnusamy's case (2 supra) to the judgment in Harvinder Kaur's case (1 supra). So, the impugned order whereby the lower Court declined to appoint commissioner under Order 26, Rule 9 CPC is revisible.

7. While the plaintiffs contend that the 2nd plaintiff is the tenant in house bearing No. 15-38 belonging to the 1st plaintiff, the revision petitioners urge that house bearing No. 15-38 belongs to them, and the 2nd plaintiff is their tenant. Thus, it is in dispute as to whether the 2nd plaintiff is the tenant of the plaintiff or the revision petitioners. The judgment reported in Karthiyayani Amma Vs. Govindan, relied upon for the plaintiffs lays down the proposition that "the person in possession can seek injunction even against the rightful owner preventing him from disturbing his possession except under process of law." The said decision has no bearing for consideration of the question as to whether the 2nd plaintiff is the tenant of the 1st plaintiff or the revision petitioners.

8. The judgment reported in M. Kallappa Setty Vs. M.V. Lakshminarayana Rao, is also not applicable in view of the facts of this case. It is urged for the revision petitioners that localisation as per the title deeds in favour of the revision petitioners and the plaintiffs will establish as to whether the house bearing No. 15-38 is within the plot purchased by the father of the 1st plaintiff, and it is not a case where the revision petitioners are contending that the father of the 1st plaintiff encroached into their site in construction of the said house. Of course, if it is merely the plea of the revision petitioners that the father of the 1st plaintiff constructed the house bearing No. 15-38 in the site belonging to the revision petitioners, the appointment of the commissioner is not necessary for resolving

the dispute as to whether the plaintiffs are entitled to the injunction as prayed for.

9. The plaintiff is not entitled to the relief of injunction, if he cannot establish possession. Admittedly, in this case the 2nd plaintiff is in possession of the house in question as a tenant. If he is the tenant of the 1st plaintiff, then the latter can claim the possession of the tenant as.....against the 3rd party. But if the 2nd plaintiff is the tenant of the revision petitioners, the 1st plaintiff cannot claim any injunction, for she has to be non-suited on the ground that she had no possession. So, in view of the pleas in this case, it is necessary to consider as to whether the 2nd plaintiff is the tenant of the 1st plaintiff or the revision petitioners. For that, it may be necessary to determine and of course incidentally, as to who is having title for the suit house. The appointment of commissioner is prayed for establishing title. Thus, the appointment of commissioner is requisite for the purpose of elucidating the matter in dispute.

10. The Court below was under misconception in regard to two aspects. The said Court felt that it is enough if prima facie case is established in a suit for possession. Only in an application filed under Order 39, Rule 1 and 2 CPC praying for temporary injunction it has to be established inter alia that the applicant has a prima facie case. But in the main suit, it is necessary to prove that the plaintiff is in possession failing which, the suit for injunction has to be dismissed on that ground alone. Even in the judgment in P. Saraswati v. V. Veerabhadra Rao, 1985(1)APLJ 36 (SN) relied upon for plaintiffs it was held that the question of prima facie title of plaintiff should be gone into in an application for temporary injunction under Order 39, Rule 1 CPC, when it was prayed for on the ground of lawful ownership and possession on the date of the suit.

11. The Court below observed that Commissioner cannot be appointed under Order 26, Rule 9 CPC for localisation. The expression "local investigation" is wide enough to include "localisation with reference to the documents of title/ Thus, it is a case where the Court below refused to exercise jurisdiction, which is vested in it.

12. Of course, the house bearing No. 15-38 was also referred to in the will executed by the father of the 1st plaintiff. But, whether the reference to the said house number is a mistake or not is a matter for consideration in the suit and thereby it cannot be conclusively held that it belonged to the father of the 1st plaintiff. Thus, the impugned order is liable to be set aside.

13. The revision petition is allowed and the impugned order is set aside and I.A. No. 77 of 1990 is allowed. The lower Court has to appoint advocate commissioner as prayed for. No costs.