

(1991) 12 AP CK 0033
In the Andhra Pradesh High Court
Case No : C.R.P. No. 1827 of 1997

Chintapatla Arvind Babu and another	APPELLANT
Vs	
Smt. K. Balakristamma alias Bhargavi and another	RESPONDENT

Date of Decision : 05-12-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 1, Order 39 Rule 2, 115

Citation : AIR 1992 AP 300

Hon'ble Judges : Neeladri Rao, J

Bench : Single Bench

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

Judgement

1. 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. 15-30. 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 Chari purchased plot bearing No. 44 Class D to an extent of 200 square yards under a registered sale deed No. 480/60 dated 17-5-1960 from the National Educational Society of Nahar Kurnool and constructed the house bearing Nos. 15-31, 15-33 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 the 1st plaintiff purchased a plot bearing No. 43 Class D of an extent of 200 square yards through a registered sale deed No. 470/60 dated 17-5-1960 from the same National Educational Society and constructed house bearing Nos. 15-35, 15-36 and 15-37.

2. The defendants filed KA. 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. 15-36 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 dated 18-2-1988 executed by her father whereby the plaintiff's 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 O.26, R. 9, C.P.C. 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, C.P.C. 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 and Another Vs. Godha Ram and Another*, supports the contention for the respondent that the order dismissing the application for appointment of Commissioner is not one of case "decided as envisaged u/s 115, C.P.C. and thus, the revision is not maintainable. But in *Ponnusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam*, different view was taken, therein, it was held that the order declining to appoint a Commissioner under O. 26, R.9, C.P.C. to make local investigation is a "case decided and revisable under S. 115, C.P.C. 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 towards 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, C.P.C. 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, C.P.C. 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 such Commissioner shall be held as evidence in the suit and it forms part of the record under O. 26, R. 10, C.P.C. When a party complains that the opposite party was attempting to disturb the features, a type of case considered in *Ponnusamy's* case (2 supra) and applies for appointment of a Commissioner under O.26, R.9, C.P.C. 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 S. 115, C.P.C. 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 S. 115, C.P.C. after it was amended by Amendment Act, 1976.

6. This, the expression "case" in S. 115, C.P.C. includes any order made in the course of suit or other proceedings. The adjudication of the right or obligation by that order need not have any tie 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 whereby the case is decided. The report of the Commissioner appointed under O. 26, R. 9, C.P.C. 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 Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam, to the judgment in Harvinder Kaur and Another Vs. Godha Ram and Another, . So, the impugned order whereby the lower Court declined to appoint Commissioner under O. 26, R. 9, C. P. C. is revisable.

7. While the plaintiffs contend that the 2nd plaintiff is the tenant in house bearing No. 15-39 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 Karthiyanani 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 due 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 O. 39, Rr. 1 and 2, C.P.C. 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, suit for injunction has to be dismissed on that ground alone. Even in the judgment in *P. Saraswathi v. Veerabhadra Rao* (1985) 1 APLJ (SN) 36: (AIR 1985 NOC 202) relied upon for plaintiffs it was held that the question of prima facie title to plaintiff should be gone into in an application for temporary injunction under O. 39, R. 1, C.P.C. when it was prayed (or 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 O. 26, R. 9, C.P.C. 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 conclusively be held that it belonged to the father of the 1st plaintiff. Thus, the impugned order is liable to be set aside. The revision petition is allowed and the impugned order is set aside and T.A. No. 77 of 1990 is allowed. The lower court has to appoint advocate Commissioner as prayed for. No costs.

13. Petition allowed.