

(2016) 02 AP CK 0035

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1414 of 2014

Mohammed Jaffer Abdul Qadeer Qureshi

APPELLANT

Vs

Aziz-ur-Rehman Qureshi and Others

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Section 151, Section 75, Section 94

Constitution of India, 1950 — Article 227

Citation : (2016) 164 AIC 370 : (2016) 3 ALT 477 : (2016) 3 AndhLD 38 :
(2016) 3 CivCC 389 : (2016) 3 ICC 151

Hon'ble Judges : M. Seetharama Murti, J.

Bench : Single Bench

Advocate : Chavali Ramanand, for the Appellant; T. Janardhan Reddy, for the Respondent

Final Decision : Dismissed

Judgement

M. Seetharama Murti, J.—1. This civil revision petition under Article 227 of the Constitution of India by the plaintiff is directed against the order and decretal order dated 02.04.2014 of the learned III Additional District Judge, Ranga Reddy District passed in IA. No. 1104 of 2013 in IA. No. 918 of 2013 in OS. No. 1228 of 2013 filed by the defendants 1, 3, 4 and 5 under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (the Code, for short) requesting to appoint an Advocate Commissioner to visit the suit schedule properties and note down the physical features of the suit C schedule property and the existence of a road-C schedule property and file a report.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff and the learned counsel for the respondents/defendants 1, 3, 4 and 5. I have perused the material record.

3. The said defendants in support of their request for appointment of an advocate commissioner inter alia urged, in the affidavit of the 5th defendant, as

follows:

"The plaintiff brought the suit for partition and allotment of 2/13th share in ABDEF and G schedule properties and for a perpetual injunction restraining the defendants including the present defendants from altering the nature or physical features and causing any obstruction or obstacle or hindrance on the use of the C schedule property as a road and for recovery of money. In the said suit, the plaintiff had also filed IA. No. 917 of 2013 for grant of a temporary injunction in respect of C schedule property. However, there is no road as described in C schedule property. Even the police of Pahadisheriff Police Station inspected the land on a complaint of the plaintiff and had closed the said complaint as there was no road as alleged. The plaintiff is trying to create a road by obtaining order from the Court (trial Court). In order to know the existence or otherwise of such road as C schedule property in the entire suit schedule property, it is just and necessary to appoint an Advocate Commissioner. Hence, the petition is filed for the purpose mentioned in the petition."

4. The said application was resisted by the plaintiff by filing a counter affidavit inter alia contending as follows:

"The material allegations in the affidavit filed in support of the petition are false. The contentions that there is no road as described in the C schedule property and that the Police of Pahadisheriff Police Station inspected the land on complaint of the plaintiff and had closed the said complaint as there was no road etcetera are all false. The complaint was never closed. The complaint does not relate to the verification of the existence of the road. The contents of the said complaint have no nexus to the relief sought in the instant application nor are they relevant for deciding the instant application. The plaintiff is trying to create a road is incorrect. It is not just and necessary to appoint an Advocate Commissioner for the purpose sought for by the defendants. The existence or otherwise of the road can be proved by adducing necessary evidence. Appointment of an Advocate Commissioner is neither necessary nor permissible; and the appointment of an Advocate Commissioner for the desired purpose tantamounts to collection of evidence. The petition is devoid of merit and is liable to be dismissed."

5. The Court below by the order impugned had allowed the application and appointed an Advocate Commissioner and directed for entrustment of a warrant to him to execute the warrant in respect of the following works.

"1. The Commissioner is directed not to take photographs or video graph the property;

2. The commissioner is directed t draw rough sketch showing the existence of the schedule C property;

3. The commissioner is directed not to give his/her opinion;

4. The commissioner is at liberty to take the assistance of the surveyor if necessary;

5. The commissioner fee is fixed at Rs. 3,000/- payable by the petitioner directly."

Aggrieved of the said orders, the plaintiff is before this Court.

6. The learned counsel for the plaintiff would contend that the plaintiff had earlier filed two interlocutory applications in IA. Nos. 917 and 918 of 2013 for grant of a temporary injunction in respect of C schedule property; and for a temporary injunction restraining the defendants from alienating the suit schedule properties to third parties; and the IA. No. 918 of 2013 was allowed on 27.01.2014; however, the present application viz., IA. No. 1104 of 2013 was filed in IA. No. 918 of 2013, when it was pending; and as the said IA. No. 918 of 2013 was already disposed of, the present application, which is an interlocutory application in the said IA is not maintainable and is liable for dismissal as the main IA was already disposed of; the plaintiffs only contention is that the mother of the parties, who is admittedly the owner of a large extent of Ac.54.00 cents of land, has only carved out a private road in the land adjacent to the land gifted to the plaintiff under a oral Hiba, which was later reduced into writing; the said fact is also acknowledged by the revenue authorities; and no Commissioner can be appointed for collection of any evidence; the existence or otherwise of a road can be established by adducing evidence; to prove the existence of a road and to disprove the same evidence can be adduced; and, hence, for the said purpose a Commissioner cannot be appointed; and by the words carving out a road as stated in the plaint, the plaintiff only intended to say that there was no black top road or a kacha road, but, only a passage was provided to the property gifted to the plaintiff; the order, which was passed without application of mind by the trial Court, is erroneous and unsustainable.

7. On the other hand, the learned counsel for the defendants while supporting the impugned orders of the Court below inter alia contended that the defendants filed written statements specifically contending that there is no road as being claimed by the plaintiff in the plaint and that the C schedule property is not a road and that there is no road in existence on land and that appointment of a Commissioner to note down the physical features of the property and to file a report after noting the features as to the existence or otherwise of a road would not amount to collection of evidence and that, therefore, the order impugned is sustainable both under facts and in law.

8. In reply, the learned counsel for the plaintiff would submit that since both the IAs filed for injunction in IA. Nos. 917 and 918 of 2013 are already allowed for the purpose of maintenance of the road and as a Hiba along with the copy of the property gifted showing the existence of a road, which is carved out, and a surveyor report are also filed, no purpose would be served by now appointing an advocate commissioner and that the report of the commissioner, if any, filed is not going to advance the defence of the defendants.

9. The learned counsel for the defendants brought to the notice of the Court, the fact that a Commissioner who was already appointed made a visit and filed his

report and that the plaintiff herein filed IA. No. 1136 of 2014 for discarding the said report and the said application was dismissed giving an opportunity to the plaintiff to file objections to the report and that in the circumstances, the revision petition is not maintainable.

10. Before proceeding further, it is apt to note that the learned counsel for the plaintiff placed reliance on a decision of this Court in Sagi Vijaya Ramachandra Raju and others v. Koppiseti Satyanarayana and others , 2009(5) ALD 459 in support of the contention that a Commissioner cannot be appointed for collection of evidence and also in support of the contention that the fact that the Commissioner appointed by the Court had already filed the report will not make the revision infructuous, as the report would be kept out of consideration and will not be looked into by the trial Court, if the revision filed by the plaintiff is allowed, and that, therefore, the revision petition can be entertained.

11. On the other hand, the learned counsel for the defendants placed reliance on the following two decisions. (1) Badana Mutyalu and another v. Palli Appalaraju , 2014(5) ALD 376 and (2) Jajula Koteswar Rao v. Ravulapalli Masthan Rao , 2016 (1) ALT 134.

12. I have gone through the precedents. In Sagi Vijaya Ramachandra Raju and others Badana Mutyalu , 2009(5) ALD 459 (supra) cited by the learned counsel for the plaintiff, the suit is one for perpetual injunction whereas in the case on hand, the suit is for partition of A, B, D, E, F and G schedule properties, besides injunction in respect of C schedule property, which is the property in question and which is said to be a road carved out, and for recovery of money. In the said cited decision, the facts disclose that in that suit for perpetual injunction a dispute was also about the identity of property. In the decision in Badana Mutyalu (2nd cited) the facts disclose that the parties are neighbours and there is an allegation that property belonging to the respondent is being interfered with by the petitioner; and, therefore, it was observed that it is incumbent on the Court to decide where the disputed portion is located and whether or not it forms part of the property being claimed by the respondent. In the decision in Jajula Koteswar Rao (3 cited), the suit is one filed for declaration of right in the plaintiff schedule property and consequential mandatory injunction for removal of a disputed wall on the allegation of encroachment/occupation of the land/site belonging to the respondent and his family in their absence from the village. Ultimately, the decisions in the three cases turned on the facts of the cases. There is no hard and fast rule or a settled possession of law that an advocate commissioner cannot at all be appointed for any purpose in a suit for perpetual injunction and it cannot be laid down as a rule of thumb that in no suit for perpetual injunction, an advocate Commissioner can be appointed; however, the law is well settled that a Commissioner cannot be appointed to find out as to who amongst the parties is in possession of the property as it is the function of the Court to decide the issue as to who amongst the parties is in possession of the property and the said judicial function cannot be delegated to an advocate

commissioner. Under law, in any suit in which the Court deems local investigation is requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to an advocate or any competent person and direct to make such investigation and to report to the Court.

13. Reverting to the facts of the case, it is to be noted that from the submissions, the following facts emerge: One Akthari Begum who is mother of the parties is the owner of Ac.54.00 guntas of land. Some property out of it was acquired. She had gifted Ac.6.00 guntas to the plaintiff under a oral Hiba is the claim of the plaintiff. The defendants are disputing the same and are inter alia pleading cancellation of the same. She had also gifted similarly Ac.6.00 guntas, Ac.7.08 guntas and Ac.2.20 guntas to the 4th, 5th and 6th defendants. Excluding the land which was acquired and also the lands that are gifted, the suit is filed for partition of the remaining extents of land i.e., ABDEF and G properties by inter alia stating that the C schedule property is the portion carved out for road in that large extent of property. It is not in dispute that in the plaint it is averred that the said Begum has carved out a private road in the land left out after acquisition by the Government situated in Sy. No. 621, 622, 623 and 624 of Mankhal village, Maheshwaram Mandal and the same has also been acknowledged by the revenue authorities for the use of herself and her legal heirs. The defendants are denying the existence of any such road on land and, therefore, they had sought for the appointment of an advocate-Commissioner to note down the physical features, particularly the existence of road, if any, as C schedule property on land in the suit schedule properties.

14. Coming first to the contention that the instant application is filed in IA. No. 918 of 2013 and that the said IA.918 of 2013 was already disposed of in January 2014 and that, therefore, this instant IA is no longer maintainable, what is to be noted is that it is fairly stated that after the disposal of the said IA. No. 918 of 2013, an amendment of the instant petition was sought and, as of now the defect, which is purely a technical defect, stands cured.

15. Dealing next with the contentions that a Commissioner cannot be appointed for gathering evidence and that the existence or otherwise of a road, which is borne out by the Hiba and the surveyors report, can be proved by adducing oral evidence by both the sides and that, therefore, the commissioner cannot be appointed, what is to be noted is that the law is well settled that for noting down physical features a Commissioner can be appointed. The existence or otherwise of a road, which is being described as C schedule property, is a physical feature is not in dispute. Therefore, this contention has no substance.

16. Dealing lastly with the contention that the report of the Commissioner is not going to serve any purpose, be it noted that issuance of Commissions is dealt with in Section 75 of the Code, which deals with Incidental Proceedings; whereas the other interlocutory proceedings like grant of temporary injunctions and appointment of receivers etcetera are dealt with in Section 94 of the Code which deals with Supplemental Proceedings. Supplemental proceedings are separate

proceedings in a Original action, in which the Court is called upon to exercise jurisdiction in aid of the judgment in action. Incidental Orders are those, which follow as a matter of course being necessary complements in the main order without which the matter would be incomplete or ineffective. [Vide M A Mohamed Ali v. R Ramadoss (, AIR 1966 Madras 441)]. Thus, incidental orders are complementary in nature and are intended to assist the Court in arriving at a just decision in the lis unlike supplemental orders. The request for appointment of a commissioner for noting down the physical features of a property, in the well considered view of this court, by no stretch of imagination can be called as an attempt to gather evidence. The court below having noted that the claim of the plaintiff is that the entire property is divided as A to G parts and that out of that A to G, C schedule property is a road carved out and that the plaintiff also relies upon a plan to that effect and that in turn the defendants are contending that there is no road in existence as claimed by the plaintiff, had eventually appointed a commissioner while observing that there are no tenable objections in the counter and that no prejudice would be caused if a commissioner is appointed.

17. Having regard to the reasons and the legal position obtaining, this court is satisfied that the order of the court below which is sufficiently well reasoned and which is proper in the facts and circumstances of the case calls for no interference.

18. In the result, the Civil Revision Petition is dismissed with costs. It is needless to state that the trial court shall consider the probative value of the Commissioners report at the appropriate time having regard to the facts and the circumstances of the case, however, after giving an opportunity to both the parties to file objections, if any, to the said report. In view of the desire of the learned counsel, this Court deems it appropriate that a direction can be given for expeditious disposal of the suit. Accordingly the Court below is directed to dispose of the suit as expeditiously as possible and preferably within a period of three months from the date of the receipt of a copy of this order.

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