

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CIVIL REVISION PETITION No.4718 of 2014

ORDER:

This revision petition is filed by the respondent/defendant assailing the order and decree dated 10.11.2014 passed in I.A.No.828 of 2013 in O.S.No.47 of 2008 on the file of Family Court-cum-III Additional District Judge, Vizianagaram (hereinafter referred to as, the trial court).

2. The parties will be referred to as they are arrayed before the trial court to avoid confusion.

3. The facts leading to filing of the present revision petition, in brief, are as follows: The respondent filed O.S.No.15 of 2008 before the trial court for declaration and consequential injunction against the petitioners and others in respect of an extent of Ac.40.89 cents in Survey Nos.5, 7 and 31/1 of Kella village, Gurla Mandal, Vizianagaram District. The first petitioner filed O.S.No.47 of 2008 on the file of Principal Junior Civil Judge, Vizianagaram for perpetual injunction against the respondent in respect of wet land admeasuring Acs.8.70 cents in Survey No.5 of Kella Village, and the said suit was transferred to the trial court. The trial court clubbed O.S.No.15 of 2008 and O.S. No.47 of 2008 and recorded the evidence in O.S.No.15 of 2008. During the pendency of the suits, the petitioners filed I.A.No.828 of 2013 in O.S.No.47 of 2008 for appointment of advocate commissioner to inspect the suit schedule property, constructed pucca house and the existing crops therein, and submit the report. After hearing both parties, the trial court allowed the petition on 10.11.2014 appointing the advocate commissioner. Feeling aggrieved by the order and decree of the trial Court, the respondent filed the present revision petition.

4. Heard Sri Sivalenka Rama Chandra Prasad, learned counsel for the revision petitioner-respondent and Sri V.Ch.Naidu, learned counsel for the respondents-petitioners.

5. The contention of the learned counsel for the revision petitioner-respondent is three fold: (1) the trial court failed to consider that petitioner Nos.2 and 3 in I.A.No.828 of 2013 are not parties in O.S.No.47 of 2008; (2) the trial court, without considering the recitals of plaint in O.S.No.47 of 2008, allowed the petition on assumptions and presumptions; and (3) the order of the trial Court is not sustainable either on facts or on law.

6. Per contra, learned counsel for the respondents herein-petitioners submitted that the trial court rightly considered the scope of both suits and allowed the petition. He further submitted that the appointment of advocate commissioner no way affects the legal rights of the respondent.

7. Now, the points that arise for consideration, in this revision petition, are:

1. Whether the trial Court is justified in allowing I.A.No.828 of 2013 or not?
2. Whether there is any illegality or irregularity in the order passed by the trial Court?

Point Nos.1 and 2:

8. Both the points are inter-linked and hence, I am inclined to address both the points simultaneously, in order to avoid confusion or repetition.

9. It is an admitted fact that the respondent filed O.S.No.15 of 2008 for declaration and consequential injunction in respect of an extent of Ac.40.89 cents (Ac.13.56 cents in Sy.No.7, Ac.11.23 cents in Sy.No.5, Ac.16.10 cents in Sy.No.31/1) of Kella village of Gurla Mandal, Vizianagaram District. The petitioners 1 to 3 are defendants 1, 4 and 8 respectively in O.S.No.15 of 2008. The first petitioner filed O.S.No.47 of 2008 seeking perpetual injunction against the respondent in respect of an extent of Ac.8.70 cents in Sy.No.5 of Kella village. Survey No.'5' of Kella village is the subject matter in both the suits.

10. The first petitioner, who is sole plaintiff in O.S.No.47 of 2008, along with defendant Nos.4 and 8 in O.S.No.15 of 2008 filed the petition seeking appointment of advocate commissioner in order to localise the house constructed by him in

Sy.No.5. If really the first petitioner constructed the house prior to filing of O.S.No.47 of 2008, he might have mentioned the same in the plaint. I have carefully perused the plaint in O.S.No.47 of 2008. There is no such pleading in the plaint that he constructed a house in Sy.No.5 in an extent of Ac.8.70 cents. There is no mention in the schedule about the existence of the house as pleaded in the affidavit filed in support of the petition. In the schedule, it is mentioned as "*Zeroyiti wet land measuring Ac.3.60 Cts. and Ac.05-10 Cents making a total of 08-70 Cts.*". The fact remains that the first petitioner has not taken such plea at the earliest point of time, i.e., at the time of filing of the suit. It seems that the trial court has not gone through the recitals of plaint. If the trial court had gone through the recitals of the plaint and plaint schedule, the finding of the trial court would be otherwise.

11. In para 6(C) of the impugned order, the trial court made an observation that the petitioner Nos.2 and 3 are defendant Nos.4 and 5 in O.S.No.15 of 2008, which is factually incorrect. In fact the petitioner Nos.2 and 3 are defendant Nos.4 and 8 in O.S.No.15 of 2008.

12. The respondent in I.A.828 of 2013 has taken a specific plea in the counter that the petitioner Nos.2 and 3 are not parties to O.S.No.47 of 2008. At the time of arguments, both counsels in one voice submitted that the petitioner Nos.2 and 3 in I.A.No.828 of 2013 are defendant Nos.4 and 8 in O.S.No.15 of 2008. I am unable to understand how the petitioner Nos.2 and 3 are entitled to file I.A.No.828 of 2013 along with the sole plaintiff in O.S.No.47 of 2008. Suffice it to say a person, who is not a party to the main proceedings, is not entitled to file an interlocutory application, without prior permission or leave of the Court. A perusal of the record clearly reveals that the petitioner Nos.2 and 3 have not taken permission from the trial Court to file the petition for appointment of advocate commissioner. The trial Court has not given any finding with regard to the maintainability of the petition so far as petitioner Nos.2 and 3 are concerned. Merely because, petitioner Nos.2 and 3 are defendants in O.S.No.15 of 2008, that itself does not confer any right in their favour to file a petition under Order XXVI Rule 9 CPC in O.S.No.47 of 2008. The trial Court has not considered this aspect. The maintainability of the petition is very much doubtful. In such circumstances, allowing of the petition is not sustainable.

13. The suits are pending from the year 2008 onwards. If really the house was constructed by the petitioner prior to filing of the suit, what prevented him to file a similar petition for appointment of advocate commissioner at the earliest point of time. A perusal of the record reveals that the trial court posted the matter for judgment on 30.04.2013. Thereafter on 28.06.2013, the trial Court reopened the matter as per the orders dated 03.07.2013 in I.A.No.691 of 2013. For one reason or other, the first petitioner did not take any steps to file the petition for appointment of advocate commissioner at an earliest point of time, i.e., before commencement of the trial. This petition was allowed after hearing of arguments on both sides in the main suit. It is needless to say that an advocate commissioner cannot be appointed for collection of evidence. The Court has to ascertain the intention of the party from the recitals of the affidavit. A careful perusal of the affidavit filed in I.A.No.828 of 2013 clearly reveals the intention of the petitioners to file the present petition for appointment of advocate commissioner. As rightly pointed out by the learned counsel for the petitioners, mere delay in filing of the petition itself, is not a valid ground to dismiss the petition without considering its merits. But, in the instant case, the conduct of the first petitioner in filing the petition nearly five years after filing of the suit, that too when the matter is coming up for judgment, indicates his intention to drag on the matter on one pretext or the other. In a suit for declaration, the plaintiff may succeed or fail basing on the strength and weakness of his case. Even if the advocate commissioner was not appointed in O.S.No.47 of 2008, the same may not cause any prejudice to the petitioners. It is a settled principle of law that in a suit for declaration, the plaintiff has to establish his case by preponderance of probability. Viewed from that angle also, there is no necessity for appointment of advocate commissioner in this case.

14. Having regard to the facts and circumstances of the case, I am of the considered view that it is not a fit case to appoint an advocate commissioner. If the trial court had considered all these aspects, the finding of the trial court would be otherwise. Moreover, the petitioners No.2 and 3 have no *locus standi* to file the petition or join in this petition along with petitioner No.1. Viewed from that angle also, the present petition is not maintainable. Basing on the factual or legal aspects, the order passed by the trial court is not sustainable. If the order of the trial court is allowed to stand, certainly it would hamper the progress of the suit. There are valid grounds to set aside the

order passed by the trial Court. Accordingly, the points are answered.

15. In the result, the civil revision petition is allowed at the admission stage setting aside the order dated 10.11.2014 passed in I.A.No.828 of 2013 in O.S.No.47 of 2008 on the file of the Family Court-cum-III Additional District Judge, Vizianagaram. No order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this revision shall stand closed.

T.SUNIL CHOWDARY, J

Date: 07.04.2015

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