

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.4560 of 2015

ORDER:

This civil revision petition is filed by the petitioners—plaintiffs under Article 227 of Constitution of India assailing the order dated 26.8.2015 passed in I.A. No.902 of 2013 in O.S. No.210 of 2010 on the file of the court of Principal Junior Civil Judge, Mancherial.

2. The parties to this revision will hereinafter be referred to as they are arrayed before the trial court.

3. The petitioners filed O.S. No.210 of 2010 for declaration to declare the petitioners as absolute owners of suit schedule land admeasuring 835.55 Sq.yards in survey No.416/27 of Mancherial town and consequently to direct the respondents to deliver the same to them. During the pendency of trial, the petitioners filed I.A. No.902 of 2013 under Order XXVI Rule 9 read with Section 151 of CPC seeking appointment of Advocate Commissioner to localize the suit schedule land.

4. The averments made in the affidavit accompanying the petition are briefly as follows: The first petitioner inherited the land admeasuring Ac.0.14 guntas in survey No.416/27 of Mancherial town, after death of her husband—N.Rajeswara Rao. Her name was mutated in the revenue records. The first petitioner sold an extent of 835.55 Sq.yards out of Ac.0.14 guntas in favour of the second petitioner under registered sale agreement—cum—General Power of Attorney dated 05.9.2007. The respondents, without having any right, grabbed the suit schedule land under the guise of different sale deeds in respect of survey No.416. Hence, the

petitioners have sought for appointment of Advocate Commissioner to demarcate total land in survey No.416/27 admeasuring Ac.0.14 guntas of Mancherial village and Mandal, localize the suit schedule land admeasuring 835.55 Sq.yards and consequently determine whether suit schedule land falls in survey No.416/27 total admeasuring Ac.0.14 guntas forming part of survey No.416 of Mancherial village or not with the help and assistance of Assistant Director of Survey and Settlements, Adilabad District.

5. The first respondent filed counter denying all the averments made in the petition, *inter alia*, contending that one Smt.Prabhavathi and her husband–Giridhar Popet have purchased the land admeasuring Acs.8.32 guntas in survey Nos.414 and 416 of Mancherial including a factory which belonged to Hyderabad Steel and Wire Products Limited under two separate sale deeds in the year 1970. The said transactions were taken place through the Official Liquidator–Sri Madhukar Rao, Advocate, in Liquidation proceedings. The first respondent being one of the members of joint family of Smt.Prabhavathi and Giridhar Popet got some property including suit schedule land in the family partition. The first respondent sold the land fallen towards his share to different persons. The second respondent purchased the suit schedule land from the first respondent. There is no possibility to conduct survey in the suit schedule land as the entire survey No.416 is covered with constructions by forming the roads. The petitioners filed the present suit by mentioning the wrong boundaries. The first petitioner's husband, by taking undue advantage of his official position as Patwari of Mancherial Shivar, manipulated the revenue records. The agreement of sale–cum–General Power of Attorney was created with ulterior motive to deprive the legal rights of the

respondents in the suit schedule land. The present petition is filed to collect evidence, which is not permissible under law. Hence, the petition may be dismissed.

6. After affording reasonable opportunity to both parties, the trial court arrived at a conclusion that this is not a fit case to appoint Advocate Commissioner. Feeling aggrieved by the said order, the present civil revision petition is filed.

7. The contention of learned counsel for the petitioners is three fold: (1) the finding of the trial court that in order to localize the suit schedule land admeasuring 835.55 Sq.yards, Advocate Commissioner, with the help of Assistant Director of Survey and Settlements, has to measure entire extent of Ac.0.14 guntas in survey No.416/27, is not sustainable in law; (2) the finding of the trial court that appointment of Advocate Commissioner would amount to facilitate the petitioners to collect evidence is factually incorrect; and (3) the order passed by the trial court is not sustainable either on facts or in law. ***Per contra***, learned counsel for the respondents submitted that it is not possible to identify the suit schedule land without measuring entire extent of land in survey No.416/27 as rightly observed by the trial court. He further submitted that the petitioners filed the present petition at the fag end of the trial with an ulterior motive to collect evidence thereby to cover up lacunae and laches in their evidence, which is not permissible under law.

8. Now the points that arise for consideration are:

- (1) Whether the petitioners have made out grounds much less valid grounds for appointment of Advocate Commissioner? and
- (2) Whether there is any illegality or irregularity in the order passed by the trial court so as to interfere in this

revision petition?

Points:

9. Both the points are interlinked with each other; hence, I am inclined to address both the points simultaneously to avoid repetition.

10. A perusal of the record reveals that the petitioners filed the suit for declaration to declare them as owners of an extent of 835.55 Sq.yards in survey No.416/27 of Mancherial town and consequently to direct the respondents to deliver the same to them. The petitioners contend that the first petitioner inherited the land admeasuring Ac.0.14 guntas in survey No.416 after death of her husband—N.Rajeswara Rao. It is further contended that the first petitioner sold the suit schedule land admeasuring 835.55 Sq.yards to the second petitioner under registered sale agreement—cum—General Power of Attorney dated 05.9.2007. On the other hand, the case of the respondents is that the first respondent got some property in survey Nos.414 and 416 in family partition and he sold the suit schedule land to the second respondent. It is an admitted fact that the suit schedule land has been in possession and enjoyment of the respondents since 12.9.2007.

11. In a suit for declaration, it is axiomatic that the plaintiff has to establish his case by preponderance of probabilities. Suffice it to say, the plaintiff may succeed or fail basing on the strength and weakness of his case, but he is not entitled for the relief of declaration basing on the lacunae and laches on the part of the defendant. Even as per the affidavit filed in support of the petition, the evidence on their behalf was closed and the matter is coming up for the cross-examination of D.Ws.2 and 3. The suit was filed in

the year 2010. Whatever the facts pleaded in the affidavit were very much within exclusive knowledge of the petitioners by the time of filing of the suit. For the reasons best known to them, the petitioners did not file petition for appointment of Advocate Commissioner at the earliest point of time i.e., before commencement of trial. The present petition is filed only at the fag end of the defendants' side evidence. No doubt, mere delay in filing the petition by itself is not a valid ground to dismiss the same *in limine* without considering the merits of the case. But, a duty is cast upon the petitioners to assign reasons much less cogent and convincing reasons for such delay in filing the petition.

12. While deciding the petitions of this nature, the approach of the court shall be pragmatic and not pedantic. The litigant public shall not feel that the court shuts its doors without giving any reasonable opportunity to ventilate their grievances. That does not mean, the court has to allow whatever the petitions filed by the parties in a routine manner.

13. Challenging the very maintainability of the petition, learned counsel for the respondents has drawn the attention of this court to the extracted portions of the following decisions:

(i) **Sardar Surender Singh v V.K. Constructions, Hyderabad**^[1],
at Para 5, it was observed as under:

This court is of the view that the appointment of an Advocate Commissioner is the prerogative of the trial court. If the trial court is not able to decide the issue on the basis of the material available on record and if it feels that the appointment of an Advocate Commissioner is necessary for arriving at the just decision of the case, it is always at liberty to do so.

(ii) **Papasani Sankara Reddy v Kandula Hanumantha Reddy**^[2],

at para 4, it was observed as follows:

As noted hereinabove, it is the pleaded case of the petitioner that the respondents have occupied a part of the public street and raised constructions. Unless the petitioner has relevant evidence in his custody, he is not expected to file the suit. Being the plaintiff, the initial burden is on the petitioner to prove the plaint averments by adducing cogent oral and documentary evidence. Even though Order XXVI Rule 9 CPC envisages appointment of a Commissioner for elucidation of the matters in dispute, ordinarily, the Commissioner is appointed, where the court is of the opinion that the available evidence is not enough to arrive at proper and correct conclusion for effectual adjudication of the disputes involved in the suit. Though the petitioner has filed his chief-examination affidavit in November, 2010, he has not even started adducing his evidence. Therefore, on the facts of this case, I am in agreement with the observation of the court below that the petitioner has filed the application for appointment of a commissioner to gather evidence instead of discharging his burden by adducing independent evidence.

14. As per the principle enunciated in the cases cited supra, if the court feels that it may not be possible to adjudicate the matter without appointment of Advocate Commissioner to localize the property, Advocate Commissioner can be appointed regardless of the delay in filing the petition. The very purpose of the appointment of Advocate Commissioner is to note down the physical features of the suit schedule property only. It is needless to say that the court cannot appoint Advocate Commissioner so as to facilitate one of the parties to the suit to collect the evidence. The petitioners filed the suit for declaration and recovery of possession of the suit schedule land, which is admittedly in possession of the respondents. As per the provisions of the A.P. Survey and Boundaries Act, 1923, in order to identify a piece of land, surveyor has to measure entire extent of survey number in which such piece of land is situated. The petitioners have not filed rejoinder denying the case of the respondents that entire survey No.416 is

covered by houses and roads. It may not be possible for the surveyor to localize the suit schedule property of 835.55 Sq.yards in survey No.416/27 forming part of survey No.416, without surveying entire extent of Ac.0.14 guntas in survey No.416/27. Therefore, I am unable to accede to the contention of learned counsel for petitioners that the findings of the trial court are not in accordance with law.

15. At the time of arguments, learned counsel for both the parties, in one voice, submitted that there is no dispute with regard to identity of the suit schedule property. In such a situation, there is no need for appointment of Advocate Commissioner. When the petitioners claim the property, which is in possession of the respondents, whether it is situated in survey No.416/27 forming part of survey No.416 or not is of no consequence.

16. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that it is not a fit case to appoint Advocate Commissioner. The trial court has assigned cogent and valid reasons to its findings. I am fully agreeing with the findings recorded by the trial court. The trial court has not committed any illegality or irregularity while passing the order. The order under revision does neither suffer from any fundamental infirmity nor any jurisdictional error, which warrants interference of this court under Article 227 of the Constitution of India. Accordingly, the points are answered.

17. In the result, the civil revision petition is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this revision petition shall stand closed.

Date: 17.12.2015.
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[\[1\]](#) 2012 (4) 120

[\[2\]](#) 2013 (4) ALD 322