

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.3433 OF 2014

DATED 6TH MARCH, 2015

Between:

Akunoori @ Pulla Vasantha Kumari and another .. Petitioners

and

Devarkonda Mariyamma and others .. Respondents

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.3433 OF 2014

ORDER

The defendants in O.S.No.1281 of 2007 on the file of the learned V Additional Junior Civil Judge, Warangal, filed I.A.No.1376 of 2013 therein under Order 26 Rules 9 and 10 CPC. By order dated 26.08.2014, the trial Court allowed the said I.A. as prayed for and appointed an Advocate Commissioner to measure the suit schedule property with Ex.A4 sale deed of the plaintiffs and the area covered within the compound wall of their house with the help of a qualified surveyor and then compare Ex.B6 rough plan on the spot by drawing up another rough plan. Aggrieved thereby, the plaintiffs in the suit are before this Court under Article 227 of the Constitution.

Taking note of the fact that the trial Court had earlier refused appointment of an Advocate Commissioner on a similar plea by the defendants in the suit and as no cogent reasons were forthcoming as to why review of the said order was necessitated, this Court granted interim suspension of the Order under revision. As the respondents/defendants have entered appearance through counsel, the matter is amenable to disposal at the admission stage.

Heard Sri M.Jagannatha Sarma, learned counsel for the petitioners/plaintiffs, and Sri C.A.R. Seshagiri Rao, learned counsel for the respondents/defendants.

Parties shall be referred to as arrayed before the trial Court.

The suit, O.S.No.1281 of 2007, was filed for a perpetual injunction restraining the defendants from interfering with the possession and enjoyment of the plaintiffs over the suit schedule property. The suit schedule property is the house bearing Municipal No.2-12-12, with land admeasuring 484 square yards, situated at Lashkar Singaram Village,

Hanamkonda Mandal, Warangal District. The plaintiffs claimed right, title and possession over the suit schedule property under a registered sale deed dated 23.02.1981 (Ex.A4). The trial Court had already granted a temporary injunction in favour of the plaintiffs in I.A.No.7502 of 2007 filed in the suit.

While so, the defendants filed I.A.No.7693 of 2007 in the suit under Order 26 Rules 9 and 10, r/w Section 151 CPC, for appointment of an Advocate Commissioner to note down the physical features and to measure the suit schedule property within the compound wall. By Order dated 24.06.2008, the trial Court dismissed the said I.A. Perusal of the said Order reflects that the trial Court was of the opinion that an Advocate Commissioner should not be appointed to collect evidence in a suit for a permanent injunction and that the parties have to prove their possession over the suit schedule property by adducing cogent and convincing evidence and not by taking assistance of an Advocate Commissioner. Observing that the defendants were seeking appointment of an Advocate Commissioner to note down the physical features of the suit schedule property and to know as to how much of the property the plaintiffs were in possession of by way of measurement, the trial Court held that the same could not be permitted and accordingly dismissed the I.A.

Surprisingly, the defendants again filed I.A.No.1376 of 2013 in the suit under Order 26 Rules 9 and 10, read with Section 151 CPC, seeking appointment of an Advocate Commissioner to undertake a similar exercise and this time, the trial Court accepted their plea by its Order dated 26.08.2014. Perusal of the said Order reflects that the suit proceedings were at the stage of cross-examination of P.W.1. Relying upon certain statements allegedly made by P.W.1 during his deposition, the defendants seem to have sought appointment of an Advocate Commissioner again to undertake a similar exercise as was refused in I.A.No.7693 of 2007 filed by them earlier. Reliance was sought to be placed on Exs.B2 to B4 photographs and Ex.B6 rough plan prepared by the defendants in this regard.

Astonishing to note, despite being aware of the fact that the earlier

I.A. filed by the defendants for similar relief had been rejected, the trial Court did not even choose to explain as to why it felt the necessity to deviate therefrom and permit appointment of an Advocate Commissioner at that stage and that too at the behest of the defendants. Peculiarly, the trial Court opined that the suit dispute was with regard to identification of the property of the defendants and that the judgments cited relating to appointment of an Advocate Commissioner for gathering evidence in a suit for injunction simplicitor therefore had no application!

In the subject injunction suit, it is for the plaintiffs to substantiate their claim by adducing independent evidence and in the event they fail to do so, they stand the risk of being non-suited. The trial Court completely lost sight of this fundamental aspect and doggedly opined that the crux of the dispute in the suit was as to the identification of the property of the defendants! This issue did not fall for consideration at all in the plaintiffs' suit for injunction against the defendants. Having completely misdirected itself in this regard, the trial Court held that to come to a just conclusion as to the matter in dispute, the appointment of an Advocate Commissioner was necessary and accordingly allowed the I.A.!

Sri M. Jagannatha Sarma, learned counsel, argued that in the plaintiffs' suit for an injunction, the anxiety of the defendants to seek appointment of an Advocate Commissioner was inexplicable as it was his clients who stood at peril if they did not adduce sufficient evidence to support their suit claim. He contended that the approach of the trial Court in opining that the dispute was as to the identification of the defendants' property was wholly erroneous in law and completely opposed to the tenets of jurisprudence.

On the other hand, Sri C.A.R. Seshagiri Rao, learned counsel, contended that no prejudice would be caused to the plaintiffs by the appointment of an Advocate Commissioner to undertake the survey as directed and that it would facilitate the adjudication of the suit dispute. He relied on case law to support his contention.

In ***P.PEDDA SAIDAI AH V/s. T.PADMAVATHI***^[1], a learned Judge of this Court permitted appointment of an Advocate Commissioner at the behest of the defendants in the suit. However, that was a case involving a boundary dispute in a suit for declaration of title along with injunction and the only reason the trial Court refused such appointment was because the application had not been pressed for four years. Opining that the boundary dispute could be effectively settled by way of a survey, this Court permitted the appointment of the Advocate Commissioner. This case was therefore completely different on facts from the case on hand. The *ratio* thereof necessarily has to be applied taking into consideration the independent facts of each individual case. This Court is therefore of the opinion that this judgment is of no avail to the defendants.

In ***DONADULU UMA DEVI V/s. GIRIKA KATAMAIAH @ BASAIAH***^[2], a learned Judge of this Court laid down the principle that when there is a dispute or issue with regard to identity of the property in litigation, it would be necessary to appoint a Commissioner for localizing it and that such an exercise would not amount to collecting evidence. Again, this judgment has no application to the case on hand as there is no dispute with regard to identity of the suit schedule property which was purchased by the plaintiffs under a registered document. It is for them to prove their possession over the same for succeeding in the suit and their suit cannot be treated as an instrument by the defendants to resolve the issue as to the identification of their own property. This judgment is therefore wholly inapplicable to the present case.

In ***T.VENKAT RAMDEV V/s. G.ARJUN REDDY***^[3], the same learned Judge who had decided ***DONADULU UMA DEVI***², again reiterated that localizing the extent of land in dispute with the support of a qualified surveyor would settle the controversy in a suit for perpetual injunction. Again, this was a case involving identity of property unlike the case on hand. The judgment therefore does not advance the case of the defendants.

In **SHAIK MAHAMMAD RAFI V/s. CORRESPONDENT OF SAINT FRANCIS INTEGRATED ENGLISH MEDIUM SCHOOL, DOMMARAPALEM, VENKATAGIRI, SPSR NELLORE DISTRICT**^[4], a

learned Judge of this Court opined that in appropriate cases a defendant may also make an application for appointment of a Commissioner and that the Court would permit the same if it helps it in deciding the question in controversy relating to identification, location, measurements, etc. of the property in dispute. It is no doubt true that there is no bar to the defendants in a suit seeking appointment of a Commissioner. However, each case would have to depend upon its own individual facts and there can be no general proposition that in every suit, the defendant(s), as a matter of right, can seek appointment of an Advocate Commissioner. In the present case, the defendants' earlier endeavour to seek appointment of an Advocate Commissioner came to naught when their I.A. was dismissed on merits and attained finality. The appointment of the Advocate Commissioner under the present Order is for the purpose of identifying the defendants' property which is wholly uncalled for in a suit filed by the plaintiffs for a perpetual injunction. The decision relied upon is therefore of no assistance.

In **VELAGA NARAYANA V/s. BOMMAKANTI SRINIVAS**^[5], a learned Judge of this Court held that where there exists a dispute regarding the identity of the property, appointment of a Commissioner for localizing the disputed land with the assistance of a surveyor was not impermissible. This general proposition is again of no avail to the defendants in this case, given the factual circumstances and the apparent misdirected reason for which the appointment of the Advocate Commissioner has been permitted by the trial Court. This judgment is therefore of no application.

As stated *supra*, each case must be dealt with on the strength of its own facts. It is an admitted fact that the defendants earlier attempted to have an Advocate Commissioner appointed and failed. They allowed the said order to attain finality. Having done so, they came forward with

an identical plea and this time, the trial Court accepted the same. However, as pointed out earlier, the reason which weighed with the trial Court for permitting the appointment of the Advocate Commissioner is peculiar to say the least. The trial Court was of the opinion that the crux of the dispute was as to the identification of the property of the defendants! This question did not fall for consideration at all in a suit for perpetual injunction filed by the plaintiffs in respect of the property allegedly in their possession. It was for them to adduce independent and cogent evidence in support of their plea of possession over the suit schedule property and identification of the defendants' property was wholly irrelevant. The trial Court therefore completely misdirected itself in permitting the appointment of an Advocate Commissioner for the purpose of identifying the defendants' property!

The order under revision is therefore set aside and the CRP is allowed. Pending miscellaneous petitions shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR,J

6TH MARCH, 2015

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[\[1\]](#) 1997(5) ALT 818

[\[2\]](#) 2013(1) ALT 548

[\[3\]](#) 2013(3) ALT 236

[\[4\]](#) 2014(1) ALD 537

[\[5\]](#) 2014(4) ALT 152