

THE HON'BLE SRI JUSTICE A. V. SESA SAI

CIVIL REVISION PETITION No.4064 OF 2014

ORDER:

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Plaintiff in O.S.No.38 of 2004 on the file of the Court of the Senior Civil Judge, Karimnagar, is the petitioner in the present revision, filed under Article 227 of the Constitution of India. This revision calls in question the order, dated 12.09.2014, passed by the said Court, dismissing I.A.No.988 of 2013 filed by the plaintiff/petitioner herein under the provisions of Order XXVI Rule 9 C.P.C. for appointment of advocate commissioner for recording physical features and boundaries of the property of the plaintiff and the defendants as per the documents with the assistance of a Mandal Surveyor.

Heard M.W.R. Jayakar, learned counsel for the petitioner, and Sri N. Satyanarayana, learned counsel for the respondents, apart from perusing the material available before the Court.

Petitioner herein instituted O.S.No.38 of 2004 against the respondents herein for mandatory injunction to dismantle the constructions and for a direction to respondents 1 and 2 to hand over the vacant possession of 280 sq. yards of land. Earlier before the commencement of trial, the petitioner herein filed I.A.No.1875 of 2007 seeking identical relief before the Court below. The learned Senior Civil Judge dismissed the said application on 07.11.2008. The Court below, while dismissing the said application, observed that it would be open for the petitioner to file similar application after adducing the evidence by relying upon a judgment of this Court in ***Koduru Sesa Reddy v. Gottigundala Venkata Rami Reddy***^[1]. Now subsequently after closure of the plaintiff's evidence and when the matter was posted for further evidence of the defendants, the plaintiff/petitioner herein filed I.A.No.988 of 2013 seeking

appointment of an advocate commissioner under Order XXVI Rule 9 C.P.C. Resisting and opposing the said application, the respondents herein filed a counter. The learned Senior Civil Judge by way of an order, dated 12.09.2014, dismissed the same. Calling in question the legal substantiality of the said order, the present revision came to be filed by the plaintiff/petitioner.

It is contended by the learned counsel for the petitioner that the order impugned in the present revision is erroneous, contrary to law and opposed to the very spirit and object of the provisions of Order XXVI Rule 9 C.P.C. Learned counsel further submits that in order to have finality for the issue in the suit, appointment of advocate commissioner is very much necessary. It is further contended that had the contents of the affidavit filed in support of the application been considered in proper perspective, the order impugned would not have emanated. It is further submitted that the Court below grossly erred in considering the principles laid down by this Court in ***Velaga Narayana v. Bommakanti Srinivas***^[2].

On the contrary, it is vehemently contended by the learned counsel for the respondents that the order passed by the Court below is strictly inconformity with the provisions of Order XXVI Rule 9 C.P.C. and there is no illegality nor any jurisdictional error in the order impugned and as such interference by this Court under Article 227 of the Constitution of India is not warranted. It is further contended that the collection of evidence under the guise of asking for appointment of advocate commissioner is impermissible as per the settled proposition of law.

In the above background, now the issue that emerges for consideration of this Court is, whether the order passed by the Court below, which is impugned in the present revision, is sustainable and tenable or whether the same requires any correction by this Court

under Article 227 of the Constitution of India?

A perusal of the material available before this Court discloses that the suit in the instant case is one for mandatory injunction for removal of the alleged illegal constructions said to have been made by the defendants and for a direction to hand over the possession of the schedule land to them. It is the categorical pleading of the plaintiff in the plaint at paragraph

No.4 that the defendants father, by name, Narsimha Chary is the southern side land owner and he also constructed a house in his own land and taking advantage of the absence of the plaintiff at Karimnagar, with *mala fide* intention, defendants 1 and 2 illegally occupied the land between the land of the plaintiff towards southern side and the house of the father of the defendants and raised construction in the red marked portions shown in the sketch map and when the plaintiff came to Karimnagar in February, 2002, he observed the illegal constructions made by defendants 1 and 2 and on that question, the defendants requested time to remove the illegal constructions, but the defendants failed to keep up their promise. On the contrary, it is the categorical pleading of the defendants in their written statement that the father of the defendants purchased the land towards southern side of the suit without road. The said written statement also denies the allegation of illegally occupying the suit land of the plaintiff and construction of the house in red colour portion taking advantage of the absence of the plaintiff.

A perusal of the order passed by the Court below clearly and categorically discloses that the Court below refused the request of the petitioner herein broadly on two grounds. One is that the application is a belated one and the second one is that the parties adduced the evidence also. There is absolutely no dispute with regard to the fact that earlier an identical application in I.A.No.1875 of 2005 was filed before the Court below for similar relief and the learned Senior Civil

Judge by way of an order, dated 07.11.2008, dismissed the said application, while keeping it open to the petitioner to renew her request after adducing the evidence. Now after conclusion of the plaintiff's evidence, she filed the present application renewing her request for appointment of advocate commissioner. But the learned Judge in the impugned order held that since both the parties adduced their evidence and as the application was filed at a belated stage, the appointment of advocate commissioner is impermissible. The said reason, in the considered opinion of this Court, is highly unjustified. Another significant aspect, which needs mention in this connection is that the learned counsel for the petitioner placed reliance on the judgment of this Court in **Velaga Narayana's** case

(2 supra), wherein this Court held that the purpose and object of local investigation under Rule 9 C.P.C. is to have evidence from the spot itself to have a correct and proper understanding of the dispute between the parties and the local investigation report of the Commissioner enables the Court to make correct assessment of evidence on record. In the said judgment, this Court held that where there exists a dispute regarding suit property, the Court has to necessarily issue a commission with the assistance of a surveyor, otherwise, it would be highly difficult for the Court to completely and effectively resolve the dispute and issuing such commission would not amount to collection of evidence and the Commission for the said purpose can be issued prior to or after the parties let in their evidence.

A perusal of the order impugned shows that the learned Judge, except referring to the said judgment, did not consider the effect of the said judgment on the facts and circumstances of the present case and in other words, the learned Judge did not properly consider the principles laid down in the said judgment.

In view of the pleadings in the plaint and the written statement and taking into consideration the facts and circumstances of the case

and having regard to the principle laid down in the above referred judgment, this Court is of the considered opinion that the Court below went wrong in refusing to consider the request of the petitioner herein for appointment of advocate commissioner as sought for.

For the aforesaid reasons, this Civil Revision Petition is allowed and the order, dated 12.09.2014, passed by the Court below in I.A.No.988 of 2013, is set aside. Consequently the Court below is directed to appoint an advocate commissioner as sought by the petitioner herein. There shall be no order as to costs.

The Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

A. V. SESA SAI, J

06.02.2015

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[\[1\]](#) 2006 (1) ALD 372

[\[2\]](#) 2014 (4) ALT 152