

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

CIVIL REVISION PETITION Nos.3974 and 3975 of 2014

COMMON ORDER:

Since the issues in the present revisions are interrelated and arise out of one suit and filed by one individual, this Court deems it appropriate to dispose of these two revisions by way of common order.

Heard Sri S. Lakshmi Kanth, learned counsel for the petitioner and Sri P.V. Narayana Rao, learned counsel for the respondents apart from perusing the material available before the Court.

Plaintiff is the revision petitioner in both the revisions. C.R.P.No.3974 of 2014 is filed against the order, dated

09-09-2014 passed by the learned Senior Civil Judge, Karimnagar, dismissing I.A.No.901 of 2013. C.R.P.No.3975 of 2014 is filed against the order, dated 09-09-2014 passed by the learned Senior Civil Judge, Karimnagar, dismissing I.A.No.902 of 2013.

The petitioner herein instituted O.S.No.44 of 2005 for perpetual injunction against the respondents herein on the file of the Court of the Senior Civil Judge, Karimnagar. Initially, defendant Nos.4 and 5 filed I.A.No.1084 of 2006 under the provisions of Order 26 Rule 9 of the Code of Civil Procedure, seeking appointment of Commissioner. The said I.A.No.1084 of 2006 was allowed by the learned Senior Civil Judge and subsequently the learned Commissioner submitted his report on 17-10-2006. After considering the objections filed by the plaintiff the said report was accepted by the learned Senior Civil Judge, on 27-06-2007. Now, in the year 2013 the plaintiff/petitioner herein filed the present applications namely I.A.Nos.901 and 902 of 2013. I.A.No.901 of 2013 was filed under Section 151 of the Code of Civil Procedure praying the Court below to set aside the survey report filed by the Advocate Commissioner on 17-10-2006. I.A.No.902 of 2013 was filed under the provisions of Order 26 Rule 9 of the

Code of Civil Procedure seeking appointment of Commissioner for the purpose of measuring the suit land and to submit a report. The respondents herein resisted the said applications by way of filing counters.

The learned Senior Civil Judge, Karimnagar District by virtue of orders, dated 09-09-2014, dismissed the said applications filed by the plaintiff/petitioner herein. The said orders passed by the learned Senior Civil Judge, Karimnagar District are under challenge in the present revisions filed under Article 227 of the Constitution of India.

It is contended by the learned counsel for the plaintiff/ petitioner herein that the orders under revision are erroneous, contrary to law and are opposed to the very spirit and object of provisions of Order 26 Rule 9 of the Code of Civil Procedure. It is further contended by the learned counsel that the Court below did not properly consider the averments in the affidavits filed in support of the applications and had the same been considered from proper perspective the orders impugned would not have emanated. It is nextly contended by the learned counsel that the report, dated 17-10-2006 submitted by the Advocate Commissioner earlier is contrary to law as the learned Advocate Commissioner conducted the survey in absence of the learned counsel for the petitioner. It is also the submission of the learned counsel for the petitioner that a memo, dated 09-09-2006 was filed by the petitioner's counsel before the Advocate Commissioner, informing that he was not well and requested to fix some other day for survey and the same was not considered by the learned Advocate Commissioner. It is also submitted by the learned counsel for the petitioner that the survey and measurement of the suit land was not undertaken with the help of Tippans and other related records to identify the suit lands. It is further argued that the learned Senior Civil Judge, erroneously accepted the report, dated 17-10-2006 on 27-06-2007.

On the contrary, it is submitted by the learned counsel for the respondents that the orders under revision are in conformity with the provisions of Order 26 Rule 9 of the Code of Civil Procedure and there is no illegality nor any jurisdictional error in the orders passed by the Court below. It is nextly

contended that the applications filed by the petitioner are hopelessly barred by limitation and are not maintainable. It is further submitted by the learned counsel for the respondents that in view of the provisions of Order 26 Rule 10 of the Code of Civil Procedure the present applications are not maintainable. It is also contended that having maintained unexplained silence for a period of seven (7) years after the Commissioner's report was accepted, now it is not open for the petitioner herein to raise objections on the Commissioner's report once again.

In support of his submissions and contentions learned counsel for the respondents placed reliance on the following citations:

- i. *1999 (5) ALD 33*
- ii. *AIR 1995 MADRAS 274*
- iii. *2007 (1) Supreme Court Journal, 305*

In the above background, now the issues that emerge for consideration of this Court are:

- 1. *Whether the orders under revisions are in conformity with the provisions of Order 26 Rule 9 of the Code of Civil Procedure?*
- 2. *Whether the impugned orders warrant any interference of this Court under Article 227 of the Constitution of India?*

The information available before this Court manifestly discloses that the petitioner herein instituted the present suit in the year 2005 for the relief of perpetual injunction against the respondents herein. There is also no dispute with regard to the reality that earlier defendant Nos.4 and 5 filed I.A.No.1084 of 2006 in the present suit under the provisions of Order 26 Rule 9 of the Code of Civil Procedure, seeking appointment of Advocate Commissioner. There is also no dispute with regard to the fact that the learned Advocate Commissioner with the help of Mandal Surveyor conducted survey and submitted a report on 17-10-2006. There is also no controversy with regard to the fact that for the said

report objections were submitted by the plaintiff and after considering the said objections the Court below accepted the Commissioner's report on 27-06-2007. It is noteworthy that the said acceptance of the Commissioner's report by the learned Senior Civil Judge was never assailed by the plaintiff earlier. As rightly pointed out by the learned counsel for the respondents, after maintaining unexplained silence for a period of seven (7) years, the petitioner herein filed the present applications obviously seeking reopening of the entire issue. It is the submission of the learned counsel for the respondents herein that the present applications are not maintainable under the provisions of Order 26 Rule 9 of the Code of Civil Procedure in view of the law laid down in the judgments referred to supra and in view of the provisions of Order 26 Rule 10 of the Code of Civil Procedure.

Order 26 of the Code of Civil Procedure deals with "Commissions". Rule 9 of the Order 26 of the Code of Civil Procedure empowers and authorizes the Civil Court to issue Commission for investigation and submission of report for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits.

Rule 10 of Order 26 of the Code of Civil Procedure reads as under:

"10. Procedure of Commissioner.- (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the court.

(2) Report and depositions to be evidence in suit—The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the court or, with the permission of the court, any of the parties to the suit may examine the Commissioner personally in open court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Commissioner may be examined in person—Where the court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."

While dealing with the provisions of Order 26 Rule 10 (3) of the Code of Civil

Procedure this Court in case of **M. Chenna Venkata Reddy And Others vs A.P. Housing Board, Gruhakalpa, Hyderabad and others**, it is held in paragraph No.7 as under:

“7. It is on the basis of sub-rule (3) of Rule 10 to Order 26, CPC, objections to the Commissioner's report are considered, and the Court has to pass an order as to whether it is satisfied with the proceedings of the Commissioner or not. The question of issuing a Second Commission is also based on the satisfaction entered by Court. The settled principle of law that until the Court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further inquiry, much less the scrapping of the earlier report as a whole and appoint a fresh commission. The power in this behalf is circumscribed by the principles under Order 26, Rule 10(3), CPC. The power has to be exercised only after the Court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry. At any rate, the Court has no jurisdiction to issue a second commission when it has not only not expressed any dissatisfaction about the work of the first Commissioner but has refused to set aside his report.”

While dealing with the provisions of Order 26 Rule 9 of the Code of Civil Procedure in case of **Gopalakrishnan vs P. Shanmugam**, the Hon'ble Madras High Court while reiterating the earlier view laid down by the Courts held that a Court cannot issue a second Commissioner, mechanically for mere asking without setting aside the earlier report and even if the Court chooses to re-issue the Commission, sufficient and proper reasons have to be recorded and that an indiscreet and indiscriminate exercise of power, in this regard is likely to affect even a fair trial of the suit or the proceedings. Madras High Court further held that mechanical and indiscriminate appointment of more than one Commission, merely because the Court thinks the other party to the proceedings may not be prejudiced or that the expenses for the commissions are going to be borne by the applicant for the purpose would create an unhealthy practice of not only more than one report on records, but also would lead to the vice of a person or party to the proceedings not being satisfied with the Commissioner's report seeking for the appointment of successive Commissioners till he is able to get a report of his choice.

In the instant case, there is absolutely no controversy with regard to the reality

that the petitioner herein allowed the earlier orders of the learned Senior Civil Judge accepting the report of the Commissioner to attain finality. In this context, it may be appropriate to refer to the judgment of the Hon'ble Apex Court in case of **Chhabil Das vs Pappu**. In the said judgment the Hon'ble Apex Court at paragraph Nos.7 and 13 held as under:

"7. The said order having not been questioned, indisputably, attained finality.

13. It is now well-known that the principle of res judicata also applies in different stages of the same proceedings. {See [Bhanu Kumar Jain vs. Archana Kumar & Anr.](#) [(2005) 1 SCC 787] and [Ishwar Dutt vs. Land Acquisition Collector & Anr.](#) [(2005) 7 SCC 190].}"

While dismissing the present applications, the learned Senior Civil Judge, obviously took into consideration of all these aspects and refused to entertain the applications filed by the petitioner herein. In the considered opinion of this Court there is neither perversity nor any jurisdictional error in the orders passed by the Court below as such the orders impugned do not warrant any interference of this Court. It is well settled principle of law that unless the orders impugned suffer from patent perversity and jurisdictional error, the invocation of jurisdiction of this Court under Article 227 of the Constitution of India is impermissible.

For the aforesaid reasons and having regard to the principles laid down in the above-referred judgments, these Civil Revision Petitions are dismissed. There shall be no order as to costs.

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

A.V. SESA SAI, J

March 31, 2015

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

CIVIL REVISION PETITION Nos.3974 and 3975 of 2014

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March 31, 2015

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