

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

CIVIL REVISION PETITION No.4913 of 2014

ORDER:

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the Order dt.07-11-2014 in I.A.No.450 of 2014 in O.S.No.150 of 2014 of the Senior Civil Judge, Hindupur.

2. The petitioner herein is defendant in the suit. The said suit was filed by respondent for a perpetual injunction restraining the petitioner from interfering with her peaceful possession and enjoyment of the suit schedule properties.

3. In the plaint, the respondent contended that petitioner is her daughter; that the plaint schedule property was gifted to respondent by her husband on 22-08-2008; and that her husband had executed another gift deed in favour of petitioner towards 'pasupu kumkuma' for extent of Ac.0.25 cents in the same survey number. It is further contended that the petitioner was not satisfied with the property gifted to her and started demanding the respondent for the share of respondent also and when respondent refused to give it, the petitioner threatened to dispossess the respondent.

4. The respondent also filed I.A.No.450 of 2014

under Order XXVI Rule 9 CPC to appoint an Advocate-Commissioner to survey the plaint schedule property with the assistance of Mandal Surveyor to minimize the oral evidence. In the said application, the respondent contended that the petitioner is trying to encroach upon her property on the basis of gift deed executed in her faovur and it is necessary to survey the property of petitioner and respondent and to fix boundary stones with the assistance of Mandal Sruveyor.

5. Although opportunity was given to petitioner to file counter affidavit by the Court below on 15-10-2014 and the matter was listed on 21-10-2014, and counsel entered appearance for petitioner on 21-10-2014, no counter affidavit was filed by petitioner by 07-11-2014, the next date of hearing. Therefore, the petitioner was called absent and set exparte in the I.A., and Advocate-Commissioner was appointed by the Court below to visit the suit schedule property, receive the work memos from both sides, and take the assistance of Mandal Surveyor in noting the physical features of the suit schedule property.

6. Challenging the same, this Revision is filed.

7. The learned counsel for petitioner would contend that without waiting for counter affidavit of petitioner, the Court below, only after one adjournment, set the petitioner exparte and passed the impugned order, and that the

petitioner has been denied opportunity to contest the said I.A. He also contended that appointment of Advocate-Commissioner, in the facts and circumstances of the case, amounts to collection of evidence and this is not permissible.

8. I am not inclined to agree with the said submission for the reason that opportunity was given to petitioner to file counter affidavit but that opportunity was not availed of and there was no representation on behalf of petitioner before the Court below on 07-11-2014. As the Advocate for petitioner had filed vakalat on 21-10-2014 itself and the matter was posted to 07-11-2014, nothing prevented the petitioner from getting prepared a counter affidavit in the intervening 15 days and filing it in on 07-11-2014. Even if counter affidavit could not be filed, the petitioner or her counsel should have taken the trouble to go to the Court and request the Court for further time. The petitioner cannot blame the Court for deciding the I.A. *ex parte* since the petitioner has not chosen to go to the Court. Although the learned counsel for petitioner sought to contend that the counsel for petitioner was unwell, no affidavit of the counsel was placed on record and even if the counsel was unwell, nothing prevented the petitioner from attending the Court on that day.

9. As regards the other contention that in the facts and circumstances of the case, Advocate-Commissioner's appointment cannot be sustained as it amounts to collection of evidence, I am of the opinion that the dispute in the suit being whether the petitioner is in possession of the extent gifted to her by her father or more, such a dispute can only be decided by appointment of an Advocate-Commissioner and no amount of oral evidence would establish the said fact. This Court in **Badana Mutyalu and another Vs. Palli Appala Raju**^[1] has also taken a similar view after considering the relevant case law on the point.

10. I therefore do not find any error in the order passed by the Court below warranting interference by this Court in exercise of its Revisional jurisdiction under Article 227 of the Constitution of India. Therefore, the Revision fails and is dismissed accordingly. No costs.

11. As a sequel, all miscellaneous petitions shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 20-01-2015

VSV

^[1] 2013(5) ALD 376