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

C.R.P.No.2328 OF 2014

O R D E R :

Heard Sri J.Sreenivasa Rao, learned counsel for the petitioner and Sri N.Hari Prasad, learned counsel for the respondents and perused the material available on record.

Plaintiff in O.S.No.9 of 2013 on the file of the Court of the III Additional District 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 17.06.2014 passed by the said Court, allowing I.A.No.159 of 2013 filed by the respondents under the provisions of Order 26 Rule 9 of the Code of Civil Procedure (for short 'CPC").

The circumstances leading to filing of the present revision are as under:

The petitioner instituted O.S.No.9 of 2013 before the III Additional District, Karimnagar for permanent injunction and also for damages. The suit schedule property is an extent of Ac.O.04 guntas situated in Survey No.522 of Kurikyala Village of Gangadhara Mandal. The respondents/defendants filed written statement, resisting the suit. Along with the said suit, petitioner/plaintiff filed I.A.No.48 of 2013 under the provisions of Order XXXIX Rules 1 and 2, seeking interim injunction. Injunction was initially granted on 21.12.2013 and subsequently, the same was modified as *status quo* on 17.06.2014. Pending the said injunction application, the respondents/defendants filed I.A.No.159 of 2013 under Order 26 Rule 9 CPC, seeking appointment of commissioner

to find out whether the suit land is in Survey No.522 or in Survey No.528/1 of Kurikyala Village of Gangadhara Mandal. The petitioner/plaintiff filed counter affidavit, resisting the said application. Learned III Additional District Judge, by way of an order dated 17.06.2014, allowed the said application, appointing an Advocate Commissioner to localize the suit property.

Aggrieved by the said order passed by the learned District Judge, the present revision has been filed.

It is contended by the learned counsel for the petitioner/plaintiff that the order under challenge is erroneous, contrary to law and is opposed to the provisions of Order 26 Rule 9 CPC. It is further submitted by the learned counsel that the Court below did not properly consider the averments in the counter affidavit filed by the petitioner. It is nextly contended that as the respondents have no land in Survey No.522, the appointment of commissioner for localization is neither warranted nor justified.

On the contrary, it is vehemently contended by the learned counsel for the respondents/defendants that the order passed by the learned III Additional District Judge is in accordance with Order 26 Rule 9 CPC and in view of the dispute with regard to the identity of property the localization of the property is very much required and the Court below is justified in appointing the advocate commissioner and there can be a quietus for the entire issue if the Commissioner is appointed. It is further submitted that even in the injunction suits there can be appointment of advocate commissioner for the purpose of resolving the issue.

In the above back drop, now the issue that emerges for consideration is whether the order passed by the Court below which

is impugned in the present revision is sustainable and tenable?

There is absolutely no dispute with regard to the reality that the petitioner instituted the suit, seeking the relief of permanent injunction in respect of the suit schedule property and also for direction to the respondents/defendants to pay a sum of Rs.6,50,000/- towards damages. There is also no dispute with regard to the fact that initially the Court below granted injunction in I.A.No.48 of 2013 and after filing counter by the respondents/defendants, the Court below modified the said order as *status quo* on 17.06.2014. Pending injunction application, the respondents/defendants filed I.A.No.159 of 2013. In the affidavit filed in support of the interlocutory application, the respondents/defendants stated that the subject land in reality is in Survey No.528/1, Kurikyala Village of Gangadhara Mandal, Karimnagar District and the said land does not belong to the petitioner/plaintiff. The respondents/defendants also stated that the petitioner/plaintiff has no right or interest in the suit land in Survey No.528/1.

The material available on record further discloses that the petitioner/plaintiff filed counter affidavit, contending, *inter alia*, that the respondents/defendants have no land in Survey No.522 and that they have only Ac.0.08 ½ guntas out of which they have sold Ac.0.04 guntas to third parties on 02.02.2013 by way of registered sale deed bearing document No.225 of 2013 and still they are in possession of Ac.0.04 ½ guntas of land. The plaintiff further submitted in the counter affidavit that from the very documents filed by the defendants, it is clear that they have no land in Survey No.522 and even Survey No.528/1 they are having 138 sq. yards of land as per pahani patrikas for the year 2006-07 and 2007-08 and

thus, the claim of the defendants is a palpable lie. The plaintiff further stated that as per the latest pahani patrikas, it is clear that the defendants are having only 138 sq. yards of land in Survey No.528/1. The said counter affidavit also avers that the documents relied upon by the defendants prove the claim of the plaintiff. The plaintiff further stated in the counter affidavit that the possession certificate issued by the Tahsildar, Gangadhara Mandal shows that the plaintiff is only having Ac.0.04 Guntas of land in Survey No.522. The plaintiff further stated that the defendants have no land in Survey No.522 and is having only 138 sq. yards in Survey No.528/1 as per the document produced by them and that they cannot seek appointment of advocate commissioner.

A perusal of the order under challenge in the present revision manifestly discloses that the learned III Additional District Judge did not consider the averments in the counter affidavit filed by the petitioner/plaintiff. In the considered opinion of this Court, the said non consideration of the counter averments and the contentions raised therein is fatal. Learned III Additional District Judge went wrong in not considering the said averments of the counter affidavit. Therefore, this Court is inclined to remand the matter for fresh consideration of the issue by the Court below after giving notice and opportunity to all the stake holders.

For the above said reasons, without expressing any opinion on the merits, civil revision petition is allowed, setting aside the order dated 17.06.2014 passed by the learned III Additional District Judge, Karimnagar in I.A.No.159 of 2013 in O.S.No.9 of 2013 and the matter is remanded for fresh consideration in accordance with law without being influenced by any one of the observations made either in the impugned order or in the present order. No costs.

Pending miscellaneous petitions in this Revision Petition, if any, shall stand dismissed in consequence.

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A.V.SESHA SAI, J

04.02.2015
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DATE: 04.02.2015

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