

HON'BLE SRI JUSTICE G. SHYAM PRASAD

CIVIL REVISION PETITION No. 4028 OF 2016

ORDER:

1. This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by the petitioners assailing the order, dated 30.03.2016, passed in Interlocutory Application No.359 of 2015 in O.S. No.326 of 2014 on the file of the Court of Principal Junior Civil Judge, Vizianagaram (For short, 'the trial Court') .

2. The revision petitioners herein are the defendants and the respondent herein is the plaintiff in the suit in O.S.No.326 of 2014. Respondent-plaintiff filed the suit for permanent injunction to restrain the petitioners-defendants and their men from interfering with his peaceful possession and enjoyment of the suit schedule property.

3. In O.S. No.326 of 2014, the revision petitioners have filed the instant Application, under Order XXVI Rule 9 of C.P.C., for appointment of an Advocate Commissioner, to note down the physical features of the suit schedule property. The said application was dismissed by the trial Court mainly on the ground that the suit was coming up for framing of issues and the other Application, filed under Order XXXIX Rule 1 of C.P.C., was coming up for enquiry but none of the parties have exhibited their documents or advanced their arguments in the Application filed under Order XXXIX Rule 1 of C.P.C., the instant Application, for appointment of Advocate Commissioner, was not maintainable, at that stage.

4. Aggrieved thereby, this Civil Revision Petition has been preferred on the ground that the trial Court has erred in coming to the conclusion that, at the stage of framing of issues, the Application filed for appointment of Commissioner is not maintainable.

5. Smt. M. Bhaskara Lakshmi, learned senior counsel for the petitioners, submitted that the observation of the trial Court in this regard is erroneous. The appointment of Advocate Commissioner in this case is very essential for the purpose of proving that the respondent-plaintiff has never been in possession and enjoyment of the plaint schedule property, at any point of time, and that the plaint schedule property is not his ancestral property and that he has not cultivated the schedule land, as it is not fit for cultivation, and there are cattle sheds, wood heaps, palmyrah trees and other varieties of trees, which belong to the family of the petitioners and there is a water pool towards south-east corner in the Survey No.157/5 and there are also some shrubs and bushes. If an Advocate Commissioner is appointed, to note down the physical features of the plaint schedule property, it would be convenient to arrive at a just conclusion, for the assistance of the Court, to know who was at fault and whether the respondent has come to the Court with clean hands or not.

6. Sri G. Rama Gopal, learned counsel for the respondent-plaintiff, advanced similar arguments which were advanced before the trial Court and argued that the trial Court refused to appoint the Advocate Commissioner only on the ground that appointment of Commissioner was not required at that stage, as the suit was coming up for framing of issues, and hearing arguments in the Application filed under Order XXXIX Rule 1 of C.P.C.

7. The points that arise for consideration in this matter are:

- 1) Whether the Advocate Commissioner can be appointed to note down the physical features of the suit schedule property?

- 2) Whether the order of the trial Court is suffering with any error or illegality in dismissing the Interlocutory Application for appointment of Advocate Commissioner, for the purpose of noting down the physical features of the suit schedule property?
- 3) To what relief?

8. **POINT Nos.1 TO 3:** All the points since connected go together. The Civil Revision Petition is arising out of the order passed in an Interlocutory Application filed in the suit for appointment of an Advocate Commissioner. The said Application was dismissed by the trial Court firstly on the ground that it was filed after framing of issues in the suit and secondly on the ground that an Advocate Commissioner cannot be appointed for collection of evidence.

9. Learned counsel for the revision petitioners mainly submits that appointment of Advocate Commissioner in this case is only required to note down the physical features of the schedule property, which would assist the Court, for arriving at a just and reasonable conclusion about the possession of the respondent-plaintiff over the suit schedule property. In support of the same, reliance was placed on a decision of this Court in **N. Savitramma Vs. B. Changa Reddy**¹, wherein it was laid down in Para 16 as to when an Advocate Commissioner can be appointed. It reads as follows:

“16. The question as to when a Commissioner could be appointed should be within the wide discretion of the trial Court, but it cannot be said that no commissioner could be appointed before the issues are framed or the evidence is led. Decided cases which are binding on me, hold that a Commissioner could be appointed even *ex parte*. Therefore, I dissent from the above

¹ 1988 (1) ALT 353

said judgment of Lakshminarayana Reddy and follow the Division Bench decisions of the Court. The contention of the learned counsel for the respondent cannot, therefore, be accepted.”

10. In view of the decision referred supra, it is obvious that the Advocate Commissioner can be appointed, at any stage, even after the issues are framed. I concur with the argument of learned counsel for the petitioners to hold that finding of the trial Court on this ground is incorrect, as per Order XXVI Rule 9A of C.P.C., Commissioner can be appointed at any stage of the suit for arriving at a just decision of the suit.

11. Learned counsel for the petitioners placed reliance on another decision of this Court in **Jammai Venkata Krishna Rao Vs. Jammi Venkata Hanuma Ravindranath**² to contend that an Advocate Commissioner can be appointed to note down the physical features of the schedule property. In the instant case, the decision cited supra is not applicable for the reason that there is no dispute with regard to the identity of the subject matter of the suit schedule property.

12. Admittedly, the respondent-plaintiff had filed a suit for permanent injunction against the revision petitioners-defendants. The *prima-facie* case, balance of convenience and irreparable loss are the considerations for grant of permanent injunction. The burden heavily lies on the respondent-plaintiff to prove his case. The revision petitioners being the defendants can defend their case by recording their own evidence to prove that they are in possession of the property and has got *prima-facie* case. The petitioners-defendants can prove these things only after the respondent-plaintiff adduces his evidence and discharges his burden.

13. Strangely, the revision petitioners-defendants are seeking for appointment of an Advocate Commissioner to note down the physical

² 2015 (5) ALD 429

features of the schedule property to prove that the schedule property is not a cultivable land and it is not fit for cultivation. Admittedly, there is no dispute with regard to the identity of the property. The dispute is only with regard to the possession of the property. Hence, the Advocate Commissioner cannot be appointed to collect evidence in favour of the revision petitioners-defendants. The revision petitioners-defendants have to prove their case by adducing their evidence in support of the contention that they are in possession of the property but cannot collect evidence with the help of an Advocate Commissioner. Therefore, appointment of an Advocate Commissioner in this case is not necessary. The trial Court has properly appreciated the facts of the case and had arrived at a just conclusion and rightly dismissed the application on the second ground that an Advocate Commissioner cannot be appointed for collecting evidence, in view of the facts and circumstances of the case.

14. When there is no dispute with regard to the identity of the property, the revision petitioners-defendants have to produce their oral and documentary evidence to prove their contention but cannot rely solely on the inspection report of an Advocate Commissioner. Therefore, there are no valid grounds for appointment of an Advocate Commissioner in this case. The Civil Revision Petition fails and, is, accordingly dismissed. No order as to costs.

15. As a sequel, miscellaneous petitions, if any, pending in this Civil Revision Petition, shall stand dismissed as infructuous.

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Date: 28.10.2016.
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G. SHYAM PRASAD, J

HON'BLE SRI JUSTICE G. SHYAM PRASAD

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