

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.5344 of 2016

ORDER:

Heard both sides at length and perused the material on record.

The impugned order of the lower Court particularly at Para 9 in dismissing the application saying despite ample opportunity to file earlier, filed the application belatedly, is unsustainable per se for there is no set period of limitation or specification by any provision as to when a commissioner appointment can be sought either exparte at the beginning itself or even before the commencement of trial or at the end of trial as it all depends upon facts and circumstances of each case and also depending upon the necessity and scope of the Commission to appoint Commissioner with warrant to execute within the four corners of lis to be answered.

The very wording of Section 75 read with Order XXVI Rule 9 CPC is very clear of the investigation contemplated is for purpose of elucidating the matters in controversy. That is the reason why the Commission appointment either for noting the existing physical features or for survey and demarcation are unique in itself which help to reduce much oral evidence and this special type of evidence besides shorten the length and life to the litigation, cannot be substituted by other evidence at times.

Having regard to the above, once there is a dispute in opposing the suit claim by the rival defendants some claiming as owners and others claiming for right of passage saying the passage is in existence since decades past for their ingress and aggress

with access to the road and in plaint schedule one of the boundary also shown as the public road, it is necessary to demarcate the properties of the plaintiff and other rival claiming defendants including to demarcate the so called existing road where the commissioner will note physical features of the existing passage or road.

Accordingly and in the result, the revision is disposed of while setting aside the impugned order of the lower Court, however without reopening, but by giving liberty to the revision petitioner/defendant No.1 to file fresh application for the purpose indicated above and after hearing to appoint advocate commissioner for noting physical features and for demarcation of the suit site with reference to the revenue records and title deeds if any with survey assistance and at the expenses of the 1st defendant, including to answer any work memo of both parties within the scope to execute warrant and for early report.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 30.12.2016
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