

CIVIL REVISION PETITION No. 1197 OF 2016

ORDER:

This petition is filed under Article 227 of the Constitution of India challenging the order dated 03-02-2016 passed in I.A.No. 941 of 2015 in O.S.No. 270 of 2012 on the file of the Court of Principal Junior Civil Judge, Nizamabad (for short, 'the trial Court').

The petitioner filed suit O.S.No. 270 of 2012 for mandatory injunction for removal of illegal construction of the respondent over the petitioner's wall and deliver vacant possession of the open site measuring 1.6' width and 39.6' length towards southern side of the petitioner's house on various grounds. The respondent filed written statement setting up right over the wall in dispute.

During pendency of the suit, the petitioner filed I.A.No. 941 of 2015 under Order XXVI Rule 9 of the Code of Civil Procedure (for short, 'C.P.C.') to appoint advocate commissioner, to make local investigation and to note down physical features of schedule property to find out whether the construction made by the respondent is as per the sanctioned plan or whether he has encroached upon the common passage left by both the petitioner and the respondent between their houses and the extent of encroachment made by the respondent, alleging that the petitioner is owner of open plot bearing No. Mpl.No. 9-6-520/1, Ward No. 9, Block No. 6, admeasuring 101.74 square yards situated at Burudugalli, Gajulpet, Nizamabad, obtained permission and constructed a house. While constructing the house, he left 1'.6" width and 39'.6" length of site towards southern side to access the land for repairing and colour wash of the house. During the month of April, 2012, the respondent occupied and encroached the said site of 1'.6" width and 39'.6" length, constructed a wall on southern side and laid R.C.C. slab over the house. Therefore, the petitioner sought for appointment of advocate commissioner for the above purpose.

The respondent filed counter affidavit denying material allegations contending that the petition is not maintainable at the belated stage when the suit came up for argument and, therefore, prayed for dismissal of the same.

The trial Court, after hearing argument of both parties, dismissed the petition on the ground of delay and also on the ground that commissioner cannot be appointed to collect evidence.

Aggrieved by the order and decretal order passed by the trial Court, the present revision is filed under Article 227 of the Constitution of India on

various grounds mainly contending that dismissal of the petition by the trial Court on the ground of delay is against the principles of law and that appointment of advocate commissioner to note down physical features does not amount to collection of evidence but the trial Court dismissed the petition on these two grounds, which is illegal, and, therefore, prayed to set aside the same appointing advocate commissioner for the said purpose.

Before admitting the revision petition, notice was ordered to the respondent and the same was served but none put up appearance.

At the stage of admission, learned counsel for the petitioner would contend that dismissal of the petition on the ground of delay and on the ground that appointment of advocate commissioner amounts to collection of evidence is illegal and placed reliance on **Jajula Koteswar Rao Vs. Ravulapalli Masthan Rao**^[1]; **G.L.Purushotham and others Vs. Y.Nagaraju and another**^[2]; **Jammi Venkata Krishna Rao and others Vs. Jammi Venkata Hanuma Ravindranath**^[3] and **J.Satyasri Rambabu Vs. A.Anasuya and another**^[4].

Considering the contentions of leaned counsel for the petitioner and perusing the order under challenger, the point that arises for consideration is:

"Whether delay is a ground to appoint advocate commissioner to note physical features, if not, whether noting down physical features by advocate commissioner amounts to collection of evidence to deny appointment of advocate commissioner, if so, whether the order under challenge is liable to be set aside?"

In Re. Point:

Admittedly, the suit is filed for mandatory injunction to remove the alleged illegal construction raised on the wall of the petitioner and for recovery of possession. It is the case of the petitioner that he left 1'.6" width and 39'.6" length of site on southern side so as to have access for repairs and colour wash of his house but the respondent denied the same contending that the wall belongs to him. The trial Court framed issues, recorded evidence of both parties and at the stage of argument, the petitioner filed the present petition for appointment of advocate commissioner for the above purpose. Learned counsel for the petitioner, contending that delay in filing application is not a ground to deny relief, placed reliance on **G.L.Purushotham** (2nd *supra*). The above judgment relates to a re-direction to be issued to commissioner to re-visit the site in dispute to note down physical features again. Therefore, the principle laid down therein is of no assistance to the petitioner. However, delay is not a ground to deny relief of appointment of advocate commissioner under Order XXVI Rule 9 C.P.C.

since Section 75 C.P.C. says that the Court may issue a commission, subject to such conditions and limitations as may be prescribed, to examine any person; to make a local investigation; to examine or adjust accounts; to make a partition; to hold a scientific, technical, or expert investigation; to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit and to perform any ministerial act. Order XXVI Rule 9 C.P.C. says that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mense profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. Thus, during pendency of the suit, at any time, commissioner can be appointed. Therefore, there is no embargo on the powers of the Court to appoint advocate commissioner at belated stage and it is settled law that commissioner can be appointed even at a belated stage. Hence, the reason assigned by the trial Court for dismissal of the petition on the ground of delay is illegal and against the principles of law.

The main contention of learned counsel for the petitioner is that the respondent encroached his site left on southern side to an extent of 1'.6" width and 39'.6" length. In such case, it is for the petitioner to establish his independent case by adducing positive evidence. In para No. 6 of the affidavit, the petitioner assigned a specific reason, while narrating the other circumstances like reasons for filing of suit *etc.*, which is extracted hereunder:

"I state that it is just and necessary to appoint an Advocate Commissioner to find out the real problem between the parties to the suit as otherwise the very purpose of filing this suit will be defeated and irreparable loss and damage will be caused, which can not be compensated afterwards. If Commission is appointed no prejudice will be caused to the respondent/defendant and I am ready to bear the expenses of Advocate Commissioner."

The reason assigned by the petitioner in the affidavit is not sufficient to appoint advocate commissioner since he has not made out any specific case for appointment of advocate commissioner. Merely because appointment of advocate commissioner would not cause any prejudice to the respondent, commissioner cannot be appointed.

Learned counsel for the petitioner relied on **Jajula Koteswar Rao** (1st *supra*) and **Jammi Venkata Krishna Rao and others** (3rd *supra*), wherein this Court consistently held that advocate commissioner can be appointed to note down physical features of schedule property and it does not amount to collection of evidence. There is no quarrel about the law

declared by this Court and, in fact, the physical features are not in dispute. The petitioner himself admitted that the respondent constructed a wall allegedly encroaching into his southern side site in an extent of 1'6" width and 39'6" length. Even if commissioner is appointed, that would not serve any purpose to establish the positive case of the petitioner.

One of the contentions of learned counsel for the petitioner is that when there is a dispute regarding ownership of site, commissioner can be appointed but that is not the reason assigned in the affidavit of the petitioner.

According to Section 75 and Order XXVI Rule 9 C.P.C., Court has discretion to appoint advocate commissioner and the discretion has to be exercised in a judicious and sound manner but not whimsically. Before appointing commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. In the present case, the petitioner claimed relief of mandatory injunction in the suit while requesting for delivery of property. Therefore, the real dispute is only with regard to removal of wall allegedly constructed by the respondent. The wall on southern side is a fixed boundary. Hence, there is no clear dispute regarding demarcation of schedule property. In **Mohd. Mehtab Khan and others Vs. Khushnuma Ibrahim and others**^[5], the Apex Court held as follows:

"Given the ground realities of the situation, it is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the Courts is neither feasible nor practicable. Court, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the Courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any strait-jacket formula or any precise laid down norms. Courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the Court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible."

The main contention of learned counsel for the petitioner is that appointment of advocate commissioner to make local investigation does not amount to collection of evidence. However, the said contention though supported by the law declared by the Apex Court, in the absence of any specific reason for appointment of advocate commissioner, commissioner cannot be appointed.

The power of revision under Article 227 of the Constitution of India is supervisory in nature and this Court can interfere with the orders passed by subordinate Courts or tribunals only when subordinate Courts or tribunals failed to exercise jurisdiction or where exceeded their jurisdiction or exercised jurisdiction illegally or irregularly conferred on them. Time and again, the scope of Article 227 of the Constitution of India came up for consideration before the Apex Court and the Apex Court laid down certain principles. It is well settled that High Court can exercise supervisory jurisdiction under Article 227 of the Constitution of India to keep subordinate Courts or tribunals within the boundaries of their jurisdiction. The Apex Court, in ***State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and others***^[6], examined the power of High Court to interfere with orders of subordinate Courts or Tribunals in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. In the light of the law laid down by the Apex Court, it is abundantly clear that this Court can exercise only its jurisdiction in exceptional circumstances which is supervisory in nature. Therefore, unless there is an illegal exercise of jurisdiction by the trial Court, this Court can not interfere with the order under challenge otherwise this Court cannot exercise power though the order is wrong.

Keeping in mind the scope of Article 227 of the Constitution of India, it is difficult for me to interfere with the order passed by the trial Court though it is erroneous or wrong since the trial Court acted within its jurisdiction. Therefore, I am unable to exercise discretion to interfere with the order passed by the trial Court exercising power under Article 227 of the Constitution of India as I find no ground to interfere with the order passed by the trial Court. Accordingly, the point is answered.

In the result, the civil revision petition is dismissed at the stage of admission. Pending miscellaneous petitions in this revision, if any, shall stand dismissed in consequence. No order as to costs.

Date: 01-04-2016.
MURTHY, J.

JSK

M.SATYANARAYANA

^[1] 2015 (6) ALD 483

^[2] 2015 (5) ALD 460

[\[3\]](#) 2015 (5) ALD 429

[\[4\]](#) 2005 (6) ALD 389

[\[5\]](#) 2013 (3) ALD 64 (SC)

[\[6\]](#) (2003) 6 SCC 641