

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No.2813 OF 2016

ORDER :

Aggrieved by an order dated 28.03.2016 passed in I.A. No.289 of 2016 in O.S. No.366 of 2014 on the file of the I Additional Junior Civil Judge, Tirupati, dismissing the petition filed under Order XXVI Rule 9 read with Section 151 of the Code of Civil Procedure for appointment of an Advocate-Commissioner to note down the existing physical features and extents, measurements of the plaint schedule property as well as the written statement property, the present Revision is filed under Article 227 of the Constitution of India.

2. The facts in issue are as under :

The petitioner/plaintiff filed O.S. No.366 of 2015 before the I Additional Junior Civil Judge' Court, Tirupati, seeking permanent injunction restraining the defendants, their men, agents, servants, relatives etc., from interfering with the plaintiff's peaceful possession and enjoyment over the plaint schedule property in any manner whatsoever. It is the case of the petitioner that without having any right, title over the plaint schedule property created sham, nominal and collusive documents dated 10.10.2008 and 05.09.2014 with non-existing measurements and contents. It is alleged that the first defendant executed a nominal document infavour of the second defendant and no boundaries were mentioend in the written

statement. It is his case that the defendants were never in possession and enjoyment of the plaint schedule property as well as the written statement schedule property and as such it is necessary to appoint an Advocate-Commissioner to demonstrate the said fact before the Court. According to the averments in the application the plaint schedule property is different to that of the schedule property mentioned in the written statement. The same is opposed by the defendants by filing their counter to the I.A., stating that the plaintiff has no right, title and possession over the suit schedule property and that he is trying to interfere with the peaceful possession and enjoyment of the properties shown in the written statement schedule. It is urged that the present application is filed only to gather evidence and nothing more and he cannot rely on the weakness or laches of the defendants and that the petition is filed at a belated stage. After considering the rival arguments, the trial court dismissed the said application. Challenging the same, the present Revision is filed.

3. Heard the learned counsel for the petitioner. In spite of service of notice on the respondents on 16.08.2016 there is no representation on their behalf.

4. As seen from the record, the suit is filed for permanent injunction restraining the defendants and their men from interfering with the peaceful possession and enjoyment of suit schedule property.

The suit is of the year 2014 and the issues were framed in the month of April, 2015. On 16.02.2016 the chief affidavit of P.W.1 was filed and Exs.A-1 to A-8 were marked. On 14.03.2016 P.W.1 was cross-examined elaborately and it was posted for further evidence on behalf of the plaintiff. At that point of time, the plaintiff filed the application for appointment of Commissioner to note down the physical features and for measurements of the suit schedule property and written statement schedule properties. The trial court dismissed the application holding that it is not necessary to appoint an Advocate-Commissioner after a long lapse of time as the matter is of the year 2014 and it is an identified case moreover it is a case of senior citizens. It was further held that the petitioner kept quiet for all these days and after completion of his evidence has come up with this application at a belated stage.

5. The issue whether appointment of an Advocate-Commissioner for noting down the physical features of the property and for demarking of the land can be made when there is a dispute with regard to the same, came up for consideration before this Court in **Varala Ramachandra Reddy v. Mekala Yadi Reddy and others**¹. After considering the judgments of this Court in **Parepally Satyanarayana's case**²; **Bongu Ramulu's case**³ and also the judgment

¹ (2010(4)ALD 198)

² 2008(1) ALD 461

³ 1998(3) ALD 657

of the Apex Court in **Haryana Wakf Board v. Shanti Sarup and others**⁴, a learned single Judge of this Court held as under :

"12. A Commissioner cannot be appointed to find out as to who is in possession of the property. But he can be appointed to make local investigation to ascertain the facts or other material which are found in the property and to make a report in regard to that matter to the Court. The order of the lower Court was directing the Commissioner to make local inspection of the suit premises, to break open the lock provided that the petitioner is in occupation of the premises and to note down the physical features. The Commissioner filed a report mentioning that the property was identified in the presence of both the parties and he broke open the lock and entered the suit premises and found some articles and furniture in the premises and noted the physical features. The Commissioner did not mention that the suit premises was handed over to the plaintiff. Unless he breaks open the lock, he will not be in a position to know the physical features of the mulgi from outside.

13. After going through the entire material, I am convinced that the lower Court did not pass any orders on the basis of the report of the Commissioner. The Commissioner's report does not disclose any facts other than those admitted by the first defendant in the additional written statement. The petitioner requested this Court to set aside the order of the lower Court by directing recalling of warrant. But, since the warrant was already executed and report was filed and the report does not contain any material as to who was in possession of the property except observing the physical features and the articles present in the mulgi. The lower Court passed the impugned order before the service of notice on the first defendant. The Court can pass appropriate orders in the interest of justice ex parte before service of notice and it is a fundamental principle that the Court should not pass any order in the absence of the opposite party when once the notice is served and party is on record. In the light of the above circumstances, I do not find any grounds to set aside the order passed by the lower Court.

⁴ (2008 AIR SCW 6500)

What is observed in the above referred case is that the Court has power to appoint a Commissioner for local inspection of the suit premises even in injunction suit and even ex parte before service of notice on opposite party in the interest of justice."

6. In **Jayalakshmi Constructions, Hyderabad and another v. Nawab Behboob Ali Khan and others**⁵, this court while dealing with an application filed for appointment of an Advocate Commissioner in a suit for perpetual injunction and where the matter in dispute requires further elucidation, held that the Commissioner can be appointed under Order XXVI Rule 9 of C.P.C. However, it has been held that appointment of an Advocate Commissioner either under Order XXVI Rule 9 C.P.C. or under Order XXXIX Rule 1 of C.P.C., is not admissible for collecting evidence.

7. In the instant case, the material on record does not anywhere indicate that the petitioner/plaintiff sought appointment of Advocate-Commissioner for collecting evidence. It appears from the record, the property referred to in the plaint and the property referred to in the written statement are not the same. In view of the said dispute, it would be just and proper to appoint an Advocate-Commissioner to note down the existing physical features and extents, measurements of the plaint schedule property by taking the assistance of the qualified Surveyor.

⁵ (2006(2) ALD 363)

8. Accordingly, the Civil Revision Petition is allowed setting aside the order dated 28.03.2016 passed in I.A. No.289 of 2016 in O.S. No.366 of 2014 on the file of the I Additional Junior Civil Judge, Tirupati. Consequently, I.A.No.289 of 2016 in O.S.No.366 of 2014 stands allowed. The trial court shall appoint a Commissioner to note down the existing physical features and extents, measurements of the plaint schedule property as well as the written statement property with the assistance of the qualified Surveyor. There shall be no order as to costs. As a sequel to it, miscellaneous petitions pending if any, in the C.R.P. shall stand closed.

Dt: 16.09.2016
GM



C.PRAVEEN KUMAR,J