

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2918 of 2016

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India is filed by the revision petitioner/defendant No.1 challenging the Order Dt. 04.05.2016 in I.A.No.265 of 2016 in I.A.No.105 of 2016 in O.S.No.408 of 2016 on the file of IV Junior Civil Judge, City Civil Court, Hyderabad, appointing an advocate commissioner to note down the physical features of the schedule property to find out whether respondent No.1 allegedly raised any illegal construction in the lane.

2. The Petitioner herein is the defendant No.1 before the trial Court and that the plaintiff/respondent No.1 herein filed suit for perpetual injunction restraining defendant No.1, his men, agents and representatives etc., from making any construction in the 'A and B' schedule property i.e., encroachment in the lane making illegal construction without obtaining necessary permission from the concerned authorities and for mandatory injunction directing defendant No.2 to take steps not to allow defendant No.1 from making or proceeding with future illegal construction in the schedule property.

3. Defendant No.1 filed Written statement denying the very existence of lane adjacent to 'A and B' schedule property shown in the schedule annexed to the plaint. During pendency of the suit, the plaintiff/petitioner filed a petition for grant of temporary injunction under Order 39 Rules 1 and 2 and in the same petition, the plaintiff/petitioner filed another application under Order 26 Rule 9 CPC to appoint an advocate commissioner to note down the physical features, more particularly, to find out whether defendant No.1 raised any construction in the schedule property.

4. Defendant No.1 filed Counter denying material allegations mainly contending that no such lane was in existence and thereby the question of appointment of advocate commissioner does not arise.

5. The trial Court after hearing both the counsel passed Order dt. 4.05.2016 appointing Sri Sameer, as Advocate commissioner for the aforesaid purpose, fixing his fee at Rs.2000/- payable by the petitioner, directly.

6. The present revision is filed raising several contentions, mainly contended that filing an interlocutory application in another interlocutory application is impermissible and that appointment of an advocate commissioner to note down the physical features amounts

to collection of evidence and prayed to set aside the Docket Order dt. 4.05.2016 in I.A.No.265 of 2016 in I.A.No.105 of 2016 in O.S.No.408 of 2016 .

7. During hearing, learned counsel for revision petitioner mainly contended that passing an order appointing advocate commissioner in a petition filed under Order 39 Rules 1 and 2 of CPC is illegal and that apart when the petitioner himself contending that no lane is in existence at any time, appointing advocate commissioner to note down the physical features of the alleged lane, amounts to collection of evidence and therefore, the Order of the trial Court is illegal and prayed to set aside the same.

8. Whereas Sri C.M.R.Velu, learned counsel for respondent No.1/plaintiff would contend that advocate commissioner can be appointed even in a petition filed under Order 39 Rules 1 and 2 of CPC and relied on the judgments of Apex court reported in ECE Industries Limited v. S.P.Real Estate Developers Private Limited¹ and in Mallikarjuna Srinivasa Gupta v. K. Sheshirekha² regarding powers of this Court under Article 228 of Constitution of India and on the strength of law declared in

¹ 2009 LS (SC) 1400

² 2006 (4) ALT 162

the above two judgments, he totally supported the Order under challenge.

9. The suit is admittedly filed by the respondent No.1 for grant of perpetual injunction and for mandatory injunction restraining defendant No.1 from raising any construction in the lane and also to issue a direction to defendant No.2 to remove the construction, if any, made in the schedule property, without obtaining prior permission from the municipal authorities. Whereas the revision petitioner contended that no lane was in existence. When the revision petitioner is contending that no lane is in existence, it is for the respondent No.1/plaintiff to establish the existence of lane by adducing evidence and the Court has to record a finding at the final disposal of the suit and if a commissioner is appointed at this stage, more particularly, directing him to note down the physical features of the construction, if any, raised in the lane, amounts to arriving at a conclusion at this stage about the existence of the lane itself and noting down the physical features of the construction, if any, raised would directly amounts to collection of evidence and it cannot be permitted.

10. The learned counsel for respondent No.1 would draw the attention of this Court to a judgment reported in ECE Real Estate's case (1 supra) to contend that a

commissioner can be appointed even in a petition filed under Order 39 Rules 1 and 2 and in the facts of the above, the Apex Court while ordering *status quo* to be maintained by both the parties, appointed an Advocate Commissioner to note down the stage of constructions, if any, so as to avoid unnecessary complications. In the peculiar circumstances of the case, the Commissioner was appointed. But, in Mallikarjuna Srinivasa Gupta's case (2 supra), this Court while holding that the power of the judicial review under Article 227 of the Constitution is wider than one conferred on the High Court by Article 226 of the Constitution of India and the power of superintendence of the High Court is not subject to some technicalities of procedure or traditional fetters, which are to be found in certiorari jurisdiction. Therefore, this Court, on technical grounds of filing an application under Order 26 Rule 9 of CPC in a petition filed under Order 39 Rules 1 and 2 of CPC, the Order cannot be set aside by exercising power of superintendence under Article 227 of the Constitution of India.

11. As seen from the Order under challenge, the Commissioner was appointed to note down the physical features in the lane, which is in dispute, and it has to be determined the existence of lane at the end of the trial in the suit. Before deciding the legality about appointing of

advocate commissioner for the aforesaid purpose, I would like to advert to the powers of this Court to interfere with the Order under challenge or not. The power of this Court under Revision under Article 227 of the Constitution of India is supervisory in nature and this Court can interfere with the orders passed by the Subordinate Courts or Tribunals only when they failed to exercise jurisdiction or where exceeded their jurisdiction or exercised their jurisdiction illegally or irregularly conferred on them.

12. Time and again, the scope of Article 227 of the Constitution of India came up for consideration before the Apex Court in several cases and the Apex Court laid down certain principles. It is well settled law 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 v. Navjot Sandhu @ Afshan Guru and others*³ and *Sarala Jain and Others v. Sangu Gangadhar and Others*⁴, examined the power of High Court to interfere with the Orders of subordinate courts or Tribunals in exercise of its supervisory jurisdiction under Article 227 of the Constitution

³ 2003 6 SCC 641,

⁴ 2016 (3) ALT 132

of India. In the light of the law laid down by the Apex Court, it is abundantly clear that this Court can exercise its jurisdiction only in exceptional circumstances which is supervisory in nature. Therefore, if the Court finds that there is an illegal exercise of jurisdiction by the trial Court, this Court can interfere with the Order under challenge, otherwise, this Court cannot exercise power though the Order is wrong.

13. Keeping in mind the scope of power of this Court under Article 227 of the Constitution of India, it is necessary to decide the real controversy between the parties. According to Section 75 and Order XXVI of CPC, the Court has discretion to appoint a commissioner, but the discretion has to be exercised in a judicious and sound manner and not whimsically. Before appointing Commissioner, Court shall examine pleadings, relief claimed and real controversy between the parties.

14. In the present case, the very existence of lane is in dispute and unless the existence of lane is established, a commissioner cannot be appointed to note down the physical features of the construction, if any, raised by the defendant No.1/revision petitioner. If such Order is accepted, it amounts to deciding the existence of lane itself, which is disputed by the revision petitioner.

15. In the petition filed under Order 29 Rule 9 of CPC, the petitioner sought for appointment of advocate commissioner to note down the physical features of the schedule property and the same was ordered and such direction directly destroyed the plea raised by the defendant No.1 in the written Statement. In similar circumstances, in Mohammad Mehtab Khan and others v. Khushnuma Ibrahim and others⁵, the Apex Court held that

“ 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”.

⁵ 2013(3) ALD 64(SC),

16. In another judgment reported in Haryana Walf Board and others v. Shanti Sarup and others⁶, the Apex Court held that

“Admittedly, in this case, an application was filed under Order 26 rule 9 of CPC which was rejected by the trial Court, but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC. The appellate Court found that the trial Court did not taken into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per para 3 of the plaint”.

17. In view of the law declared by the Apex Court, it is clear that when an issue is the subject matter of the main suit in particular, such issue cannot be decided at the interlocutory stage, while exercising power under Order 26 Rule 9 of CPC or passing any injunction under Order 39 Rules 1 and 2, which are incidental to the main proceedings.

18. It is apposite to extract the operative portion of the Order:

“ On Perusal of the record, it reveals that there is a construction made by respondent No.1 and note down the physical features of the schedule property of alleged property, whether there is a illegal construction was constructed by respondent No.1 or not. In the result, this Petition is allowed. Therefore, the Court is appointing an Advocate Commissioner Sri Sameer, to note down the physical features of the suit schedule property. The advocate commissioner fee is fixed for Rs.2000/- which is payable by the petitioner herein. The advocate

⁶ (2008) 8 SCC 671

commissioner is directed to take photographs of the disputed property and file report on 06.06.2016”.

19. The disputed property is a lane allegedly and unless the existence of lane is accepted by the Court, which is an issue to be decided after full fledged trial, the commissioner cannot be appointed. Even otherwise, appointment of an advocate commissioner for such relief regarding raising of construction would amount to collection of evidence, which is impermissible under law.

20. While considering an application filed under Order 26 Rule 9 of CPC, the Court shall examine the pleadings, relief claimed and real controversy between the parties and that appointment of an Advocate Commissioner in an interlocutory application filed under Order 26 Rule 9 of CPC shall amount to grant of relief at pre-trial stage and decides the issue involved in the suit, which is a subject matter of the trial. In the present facts and circumstances of the case, the very existence of the lane, in which, the petitioner allegedly raised constructions is the subject matter of the main suit. The issue involved in the main suit is to be decided at the end of the trial. In such a case, appointment of an Advocate Commissioner, at this stage, in a petition filed under Order 26 Rule 9 of CPC, in another application filed for grant of temporary injunction, is erroneous. The principle laid down in ECS Industries Limited's case,

referred to supra, has no direct application to the present facts of the case and similarly, the other judgment another of this Court in Mallikarjuna Srinivas Gupta's case, referred supra, has no application to the present facts of the case, in view of the Apex Court judgment in State, through Special Cell's case, referred supra.

21. Since the powers of this Court are wider under Article 227 of the Constitution of India, as the trial Court illegally exercised its jurisdiction in appointing an Advocate Commissioner the Court can interfere. Hence, the Order under challenge in I.A.No.265 of 2016 is hereby set aside and it is left open to the Revision Petitioner to renew the same request at appropriate stage, if advised.

22. Accordingly, this Civil Revision Petition is allowed. No costs.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 31-08-2016.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY



C.R.P. No.2918 of 2016

Dt. 31-08-2016

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