

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2389 OF 2017

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, is filed challenging the order dated 27.03.2017 in I.A.No.11 of 2017 in O.S. No.281 of 2012 passed by the XI Junior Civil Judge, City Civil Court, Secunderabad, whereby dismissed the petition to appoint an Advocate-Commissioner for local inspection and to note down whether the petitioner is in possession or not, since it amounts to collection of evidence.

It is the case of the petitioner that she filed a suit for perpetual injunction contending that she is in possession and enjoyment of the property, having purchased the same by her father K.Pandurangam and after his death, the property was partitioned under a registered partition deed. Thus, the property is in actual possession and enjoyment of the petitioner, she sought permanent injunction alleging that the defendants in the main suit attempted to interfere with the possession and enjoyment of the property. Therefore, sought appointment of Commissioner to make local inspection to note down as to who is in possession of the property.

The 5th respondent alone filed counter denying the material allegations *interalia* contending that the Commissioner cannot be appointed to collect evidence, more particularly, to find out who is in possession of the suit property and prayed for dismissal of the petition.

- 2 -

Upon hearing argument of both the counsel, the trial court dismissed the petition concluding that the commissioner cannot be appointed for collection of such evidence.

Aggrieved by the order, the present revision petition is filed raising several contentions, mainly contending that declining to grant relief under Rule 9 of Order XXVI of CPC by exercising power under Section 75 of CPC by the trial court is illegal and when D.W.1 reported that has no objection to appoint Advocate-Commissioner, based on counter filed by the 5th respondent, the trial court ought not have dismissed the petition and till date the petitioner asserting that she is in possession and enjoyment of the property, but the trial court did not consider the same and committed an error in dismissing the petition.

During hearing, Sri Naresh Kumar Neemkar, learned counsel for the petitioner, while reiterating the contention urged before the trial court, drawn the attention of this court to **Velaga Narayana and others v. Bommakanti Srinivas and others¹** and **Shaik Mahammad Rafi v. Correspondent of Saint Francis Integrated English Medium School, Dommarapalem, Venkatagiri, SPSR Nellore District²** to contend that the commissioner can be appointed even on the application filed by the defendant to note down the physical features of the property.

At the stage of admission heard the counsel for the petitioner at length.

Section 75 of CPC conferred power on the court to appoint Advocate-Commissioner subject to certain limitations prescribed,

¹ 2014(3) ALD 605

² 2014(1) ALD 537

viz., to examine any person; to make a local investigation; to examine or adjust accounts; or 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; to perform any ministerial act.

Rule 9 of Order 26 of CPC permits the court to appoint an Advocate - Commissioner for local inspection, if 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 mesne profits or damages or annual net profits, etc.

But in the present case the petitioner sought for appointment of an Advocate-Commissioner to find out as to who is in possession of the property by local inspection. The petitioner filed a suit for injunction simplicitor, where the court is required to record its findings whether the petitioner herein is in possession and enjoyment of the property as on the date of filing the suit, whether there is an infringement or invasion of legal right of the petitioner. Therefore, it incumbent upon the petitioner to prove his lawful possession over the property as on the date of filing the suit by adducing independent and cogent evidence. But here though the respondent/ defendant denied the possession while claiming possession over the suit property, initial onus of proof on the petitioner/ plaintiff to establish her lawful possession as on the date of filing the suit by adducing independent evidence. But the petitioner wanted to take assistance of the Commissioner to

establish the factum of possession. The Commissioner is none other than the officer of the court. Therefore the petitioner wanted to take assistance of the court itself through the commissioner, circumventing the provisions of CPC to collect evidence as to the fact to be proved at the end of trial.

Therefore the relief claimed in the petition is nothing but collection of evidence which is not impermissible under law in view of the law declared by this Court in **Sagi Vijaya Ramachandra Raju v. Koppisetty Satyanarayana**³, **Bachu Narayana Rao v. Bachu Venkata Narasimha Rao**⁴, **Kanduri Sesha Reddy v. Golligundle Venkata Rami Reddy**⁵ and **Yenugonda Bal Reddy V. Manemma and Others**⁶. The trial court rightly concluded that the local inspection sought by the petitioner for appointment of the Advocate-Commissioner to find out as to who is in possession amounts to collection of evidence and it cannot be found fault.

The counsel for the petitioner drawn the attention of this court to a judgment of this Court in **Velaga Narayana and others v. Bommakanti Srinivas and others** (1st supra) wherein this court held that dispute can be completely and effectively resolved only by appointment of commissioner and also to the judgment of this Court in **Shaik Mahammad Rafi v. Correspondent of Saint Francis Integrated English Medium School, Dommarapalem, Venkatagiri, SPSR Nellore District** (2nd supra) this court held that commissioner can be appointed even on the application filed

³2009(5) ALD 459

⁴ 2010(5) ALD 83

⁵ 2006(1) ALD 372

⁶ 2011(2) ALD 472

- 5 -

by the defendant in a suit for identification, localisation, measurement etc., of the property in dispute.

Here in this case the principles laid down in the above two judgments have no application for the reason that there is no dispute with regard to the identity of the property, measurements or localisation, but the dispute as to who is in possession and enjoyment of the property, which can be decided only at the end of trial by the court and therefore the principles laid down in the above two judgments have no direct application to the present facts of the case. On the strength of the two judgments the order of the trial court cannot be reversed.

Hence, I find that the relief sought for by the petitioner is only for collection of evidence by appointing Advocate-Commissioner which is impermissible under law and thereby the trial court rightly dismissed the petition holding that it amounts to collection of evidence and the finding of the trial court is free from any legal infirmities, warranting interference of this court while exercising power under Article 227 of the Constitution of India. Hence, the revision petition deserves to be dismissed.

In the result, the civil revision petition is dismissed at the stage of admission itself. No costs.

Miscellaneous petitions, if any, pending in this civil revision petition is closed.

M.SATYANARAYANA MURTHY, J

02.06.2017
BV