

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.5100 OF 2017

O R D E R

The petitioner is the first defendant in O.S.No.96 of 2017 on the file of the learned Principal Junior Civil Judge, Cyberabad at Medchal. He filed this revision under Article 227 of the Constitution aggrieved by the order dated 01.09.2017 passed by the trial Court in I.A.No.651 of 2017 in O.S.No.96 of 2017. The said I.A. was filed by the first respondent herein, being the plaintiff in the suit, under Order 26 Rule 9 CPC for appointment of an Advocate-Commissioner to note down the physical features and to take measurements with the help of officials of the Gram Panchayat, Bowrampet Village, the second respondent herein, and to measure the total common pathway and the illegal encroachment by the first defendant. By the order under revision, the trial Court allowed the IA and appointed an Advocate-Commissioner to note down the physical features; to measure the pathway in between the houses of the plaintiff and the first defendant; and to note down the construction, if any, by the first defendant encroaching upon the pathway and obstructing the passage. The Advocate-Commissioner was permitted to take the assistance of the officials of the Gram Panchayat.

Heard Sri Pottigari Sridhar Reddy, learned counsel for the petitioner-first defendant, and Sri C.Shanmukha Rao, learned counsel on caveat for the first respondent-plaintiff.

Sri Pottigari Sridhar Reddy, learned counsel, would contend that the trial Court failed to note that the plaintiff was only gathering evidence by seeking appointment of an Advocate-Commissioner and therefore, the order under revision is liable to be set aside.

Per contra, Sri C.Shanmukha Rao, learned counsel, would submit that every case would have to turn upon its own facts and no hard and fast rule was laid down to the effect that by appointment of a commission, a party is invariably gathering evidence.

This Court finds merit in the submission of Sri C.Shanmukha Rao, learned counsel. In matters of this nature, there can be no straitjacket principle applicable across the board and every case would have to be adjudged on its own individual facts. The affidavit filed in support of the subject IA reflects that the plaintiff and the first defendant are neighbours. There appears to be a strip of land in between their houses which the plaintiff claims to be a common pathway, while the first defendant asserts title over the same. Despite an order of *status quo* passed by the trial Court, it appears that the first defendant continued with construction activity thereby causing obstruction to the alleged common pathway. Contempt proceedings in this regard are pending before the trial Court. The trial Court took note of the fact that the plaintiff's contention was that the first defendant was proceeding with the construction, blocking the alleged pathway and therefore, appointment of a commission to note down the physical features and also the construction made by the first defendant over the alleged pathway would be useful for adjudicating the issues arising in the suit. Taking note of precedential law to the effect that there is no bar on appointment of an Advocate-Commissioner in a bare suit for injunction, the trial Court felt that it was in the interest of justice to appoint an Advocate-Commissioner in the case on hand to know whether there is any pathway in existence and if so, the construction made over the same by the first defendant. The I.A. was accordingly allowed.

In **BANDI SAMUEL V/s. MEDIDA NAGESWARA RAO¹**, a learned Judge of this Court observed to the effect that the object of Order 26 Rule 9 CPC is not to permit a party to collect evidence but an Advocate-Commissioner can be appointed thereunder for 'elucidating any matter in dispute'. Elaborating on the phrase 'elucidating any matter in dispute', it was observed that when the claim for an injunction is based on the plea that there is only one way to the plaintiff's house and that he is being prevented by the defendant from using it, any amount of usual evidence in this regard may not help the Court to render a correct finding and in such a situation, appointment of an Advocate-Commissioner would definitely fall within the ambit of 'elucidating a matter in dispute'.

As that is the nature of the plea advanced by the plaintiff in the case on hand, the appointment of an Advocate-Commissioner by the trial Court is fully justified. This Court therefore finds no ground to interfere with the order under revision.

The civil revision petition is devoid of merit and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

20th OCTOBER, 2017

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¹ 2017 (1) ALD 582