

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.1932 of 2017

ORDER :

Heard both sides at length and perused the grounds urged in the revision and the impugned order of the lower Court appointing Advocate Commissioner in I.A.No.130 of 2017, dated 31.03.2017, under Order XXVI Rule 9 C.P.C. on the application to note the existing physical features with the help of photographer and videographer in saying that is not collection of evidence but disprove the case of the respondent/plaintiff in saying plaintiff during her cross-examination by defendant stated that after so-called purchase of the property from the father of the defendant in the year 2007 she also planted some trees. The contest of the defendant in the suit for bare injunction is that the so-called vendor, no other than the father of defendant, was suffering from mental ill-ness and not in sound and disposing state of mind to execute any sale deed and the so-called sale deed is fraudulent one, no title passed and no possession delivered. Once such is the crux, so-called existence of the coconut trees and tamarind trees in the property of more 40 years, is irrelevant for purpose of deciding the suit as even with such any aged trees or of different aged tress, the only thing to consider is under the so-called sale deed of 2007, the property was sold by the father of the defendant to the plaintiff and delivered possession. The concept of possession is from the recitals in the sale deed with reference to, at best making a round over the property expressing the animus of taking possession.

Even if at all there is anything inadvertently or rightly deposed by any witness of subsequently planted some trees and in existence or not, that is not the criteria to decide the main lis in the suit as to the so-called sale and delivery of possession is true or not, and consequently the claim by plaintiff for possession or in seeking permanent prohibitory injunction is sustainable or not. Once such is the matter in controversy and for the purpose of elucidating such matter in dispute if at all any investigation is required, where the Court feels it deem necessary, the Court can appoint an Advocate Commissioner from the very wording of Order XXVI Rule 9 read with Section 75 C.P.C. However, strangely from the so-called cross-examination of PW.1 in her saying as if she planted all the trees or some trees, and she has no objection to appoint an advocate commissioner, for the suggestion and for filing of the application and from no objection, the lower Court appointed the Commissioner is beyond the scope of the very wording of Order XXVI Rule 9 C.P.C. What is the scope of Order XXVI rule 9 read with Section 75 C.P.C. is laid down by this Court in **Bandi Samuel & another v. Medida Nageswara Rao**¹.

2. No doubt, the counsel for the revision respondent referred para 9 of the order of the lower Court referring to 2006 (1) ALD 760 of S.Singa Reddy (died) and others v. K.Ramachandra Reddy, where on the factual matrix it observed that “Shutting out the evidence which a party is entitled to place before the Court to substantiate his case,

¹ CDJ 2016 APHC 619

definitely decides the right of the party adversely against him and in this view, the order passed by the Court below in dismissing petition for appointment of an Advocate Commissioner where the opposed party in his cross-examination categorically stated that he has no objection for appointment of Commissioner, is not tenable.” It is no doubt a head note reproduced without facts and what is the principle laid down therein. However, even there is any stray observation in any judgment it is not a binding precedent on this Court in deciding the revision, when the law is very clear on this aspect.

3. Having regard to the above, the order appointing a Advocate Commissioner in this case, that too, in one way saying not for collecting of evidence, though collecting evidence is not prohibited but for fishing out information by any oral enquiry, in without understanding the scope as to even any investigation for the purpose of elucidating the matter in controversy is definitely a collection of evidence to reduce much oral evidence if at all at best. Thus under the guise of elucidating the matter in controversy, what is prohibited is fishing out information by conducting of any oral enquiry by the Commissioner as to who are in possession and what acts done by whom, etc., Thus, the impugned order of the lower Court requires reconsideration as appointing a Commissioner for the purpose of ascertaining as to a witness speaks truth or not in his evidence to refer with physical features on land from Commissioners report, unless the suit rival pleadings involves the real controversy to resolve by

elucidating the matters in controversy to decide from physical features any acts of possession with reference to other evidence. However, it will not prevent the trial Court in future after completion of the evidence for the purpose of elucidating any matter in controversy if required within the meaning of Order XXVI Rule 9 CPC, to appoint a Commissioner on the request of anybody or on its own to direct at the expenses of any or both of the parties.

4. Accordingly and with these observations, the civil revision petition is disposed off by setting aside the order of the lower court and by remanding the matter to the lower Court to consider and decide afresh.

Miscellaneous petitions pending, if any, shall stand closed. No order as to costs.

21st November 2017.

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Dr. B. SIVA SANKARA RAO, J