

THE HON' BLE DR. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION Nos.6290 OF 2017 and 1023 of 2016

COMMON ORDER:

C.R.P.No.6290 of 2017 is filed by the petitioner/plaintiff, aggrieved by the judgment dated 29.06.2017 in C.M.A.No.10 of 2016 passed by the I Additional Chief Judge, City Civil Court, Secunderabad.

2. C.R.P.No.1023 of 2016 is filed by the petitioner/defendant No.1, aggrieved by the order dated 18.01.2016 in I.A.No.232 of 2015 in I.A.No.46 of 2015 in O.S.No.42 of 2015 passed by the I Junior Civil Judge, City Civil Court, Secunderabad.

3. The revision petitioner in C.R.P.No.6290 of 2017 is the plaintiff in O.S.No.42 of 2015 on the file of the I Junior Civil Judge, City Civil Court, Secunderabad. The suit was maintained for bare injunction (prohibitory) in respect of the plaint schedule property against two defendants. Pending suit, there is an injunction application in I.A.No.46 of 2015 filed by the plaintiff and there was an ad-interim *ex parte* injunction. The defendants after service of notice in I.A.No.46 of 2015 appeared before the trial Court besides filing counters in opposing granting of *ex parte* ad-interim

injunction. The plaintiff filed I.A.No.232 of 2015 for appointment of an advocate commissioner. That petition was dismissed after contest mainly with observation of the provision of law quoted for that application is under Order 39 Rule 7 C.P.C. instead of Order 26 Rule 9 r/w Section 75 C.P.C. The plaintiff filed application in I.A.No.277 of 2015 for review of the order by contending that the main dismissal order for mere wrong quoting of provision is an error apparent on the face of the record and there is sufficient cause for the Court to review and the same was allowed on 15.07.2015 restoring the application for appoint of Commissioner covered by I.A.No.232 of 2015.

4. Against said restoration of the commissioner petition in I.A.No.232 of 2015 setting aside the earlier dismissal order dated 05.05.2015, the 1st defendant filed C.M.A.No.10 of 2016 invoking Order 43(1) Rule (w) C.P.C. Apart from it, the 1st defendant also maintained the other C.R.P.No.1023 of 2016. There was an observation by this Court keeping the said C.R.P. pending, on 07.12.2016, with a direction to the learned Additional Chief Judge, City Civil Court, Secunderabad, to dispose of C.M.A.No.10 of 2016, as result of the C.M.A. has since bearing on the fate of C.R.P.No.1023 of 2016 and that C.M.A. was allowed on 29.06.2017. In the said order, the

learned I Additional Chief Judge, City Civil Court observed at para-9 clause (vi) that the suit for perpetual injunction basically filed on the basis of possession and threat of dispossession. The contention of the parties as to possession and enjoyment over the property needs to be appreciated with reference to the evidence to be adduced at the time of hearing interlocutory application or during trial of the suit. The appointment of commissioner at the initial stage is prone to be treated as a step to gather evidence. Therefore, the Hon'ble Apex Courts on many occasions cautioned that the Courts shall discourage filing of petitions under Order 26 Rule 9 CPC in a suit for injunction at the initial stages and such applications cannot be treated as a matter of routine. With these observations, practically appeal was allowed. In fact, the review order in I.A.No.277 of 2015 is only for restoration of the commission petition in I.A.No.232 of 2015. There is no commissioner appointed by virtue of the review setting aside the earlier dismissal order. Whether that review is sustainable or not only is the subject matter of C.M.A., the lower appellate Court went further that as if a commissioner cannot be appointed in a suit for bare injunction, that too, at the initial stages and as if the Apex Courts held so many at time. Such finding is contrary to the very Division Bench judgment

of this Court in *Chalapati Veeranna v. Chalapati Venkatachalam*¹, where the Hon'ble Division Bench observed that even an *ex parte* advocate commissioner can be appointed and however before execution of the commission, the commissioner has to give notice to both parties including to the party to whom no notice served in the suit and the petition. Thus, these observations of the lower appellate Court in allowing C.M.A. are *per se* unsustainable.

5. So far as the correctness and legality of the order under review, which is the subject matter of the C.M.A. concerned, the lower appellate Court in the C.M.A. impugned order did not deal with as to review order is correct or not and how it is wrong to allow the C.M.A. In fact the dismissal of the application for mere wrong quoting of wrong provision of law *per se* unsustainable, as it is the duty of the Court to treat the application as filed under correct provision of law from the settled expressions of the Apex Court and also by this Court since long time. Once such is the case, practically there is nothing to sit in appeal against the review order for the lower appellate Court to allow the C.M.A. Thus, allowing of C.M.A. rather than dismissal, that too, with those observations which are uncalled is liable to be set aside and hence C.R.P.No.6290 of 2017 is allowed. The revision in C.R.P.No.1023 of 2016

¹ AIR 1959 AP 170

which is for the self same CMA order against the review is to be closed for no further orders necessary.

6. Accordingly, C.R.P.No.6290 of 2017 is allowed and the order dated 29.06.2017 in C.M.A.No.10 of 2016 passed by the I Additional Chief Judge, City Civil Court, Secunderabad, is set aside and the review order of the Junior Civil Judge dated 15.07.2015 in I.A.No.277 of 2015 by setting aside the dismissal order in I.A.No.232 of 2015 in restoring the I.A.No.232 of 2015 which is an application for appointment of advocate commissioner to decide on own merits is upheld, with a direction to the learned Junior Civil Judge to decide I.A.No.232 of 2015 on own merits and also with reference to the expressions of this Court including the latest one Bandi Samuel and another v. Medida Nageswara Rao².

Miscellaneous petitions pending consideration, if any, in this case shall stand closed in consequence. There shall be no order as to costs.

DR. B. SIVA SANKARA RAO, J

Date: 08.12.2017
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² CDJ 2016 APHC 619