

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 6264 of 2016

ORDER:

1) Aggrieved by the order, dated 21.11.2016, passed in I.A.No.905 of 2016 in O.S.No.151 of 2011 on the file of the Principal Junior Civil Judge, Puttur, wherein an application filed under Order XXVI Rule 9 read with Section 151 of C.P.C., to appoint an advocate-commissioner, was dismissed, the petitioner, who is defendant No.5 in O.S.No.151 of 2011, filed the present Civil Revision Petition.

2) The facts in issue are as under:

Respondent Nos.1 to 5 filed O.S.No.151 of 2011 seeking permanent injunction restraining the defendants, their men, agents, servants, relatives or anybody on their behalf, from entering into the plaint schedule property and in any way disturbing the plaintiff's peaceful possession and enjoyment over the suit schedule property. A written statement came to be filed by defendant No.5 denying the averments made in the plaint. Pending the said suit, defendant No.5 filed an I.A. under Order XXVI Rule 9 of C.P.C. seeking appointment of an advocate-commissioner to inspect the plaint schedule property with the help of Mandal Surveyor, locate the plaint schedule property, demarcation of the land in Sy.Nos. 205/ 2D and 205/ 1 and file a fresh report. A counter came to be filed by the plaintiffs opposing the same. After considering the rival submissions made,

the trial Court rejected the said application. Aggrieved by the said order, the present revision came to be filed.

3) The petitioner, who is defendant No.5, filed an affidavit in support of the said petition, stating that the plaintiff herein filed a suit by showing northern boundary of the plaint schedule property as road, but which fact is incorrect. According to him, a road is situated in Sy.No.205/ 1 of Tirumandayam Village and in between the road and land in Sy.No.205/ 2D, there is a land admeasuring Ac.1.03 cents in Sy.No.205/ 1 belonging to the family of the defendants. It is alleged that the plaintiffs created documents of partition deed to knock away the property belonging to them. The averments in the affidavit also show that earlier plaintiffs filed I.A.No.820 of 2011 seeking appointment of an advocate-commissioner to note down the physical features of the plaint schedule property. The advocate-commissioner visited the suit locality and conducted survey on 02.11.2011 without giving any notice to defendant No.5. It is urged that as inspection of the plaint schedule property can only be done with the help and assistance of the Mandal Surveyor, which was not done on earlier occasion, appointment of an advocate-commissioner to note down the physical features with the help of Surveyor is just and necessary.

4) A counter came to be filed opposing the same. One of the main grounds urged by the learned counsel for the plaintiffs is that the advocate-commissioner, who was earlier appointed,

conducted survey after serving notice to defendant No.3, who was at his house and thereafter a report came to be filed before the Court. It is urged that in spite of giving number of opportunities, none of the defendants filed any objections to the said report and the I.A. came to be closed on 09.04.2012. It is urged that without filing any objections to the earlier report and without setting aside the report, it may not be proper for the Court to direct the very same advocate to re-visit the suit schedule property. Even otherwise, on merits, it is stated that these issues can be looked into basing on the evidence available and that the advocate-commissioner's report cannot be made the sole basis to decide the issue.

5) The un-disputed facts which emerge out from the record are that earlier the plaintiffs filed I.A.No.820 of 2011 seeking appointment of an advocate-commissioner to note down the physical features of the plaint schedule property including the boundaries. Pursuant thereto, an advocate-commissioner visited the spot, inspected the locality and filed his report on 16.12.2011. It is to be noted that number of opportunities were given to the defendants to file objections to the said commissioner's report but none of them raised any objections. As such the trial Court closed the said I.A. on 09.04.2012. Long thereafter ie. nearly after four years and when the case is at the advance stage of trial, the present I.A. came to be filed seeking appointment of same advocate-commissioner to revisit the schedule property and take note of physical features with the help of Mandal Surveyor.

6) From the material on record, it is clear that no objections were raised to the report submitted by the advocate-commissioner and the said report has not been challenged till today.

7) The question now would be whether the present application seeking appointment of a second advocate-commissioner can be entertained long after the acceptance of first commissioner's report.

8) Learned counsel for the petitioner placed reliance on the judgments of this Court in *G.L.Purusotham and others v. Y.Nagaraju and another*¹ and *Seepally Thirupathi and others v. Repelli Mallikarjun and another*² to show that there is nothing wrong in appointing the second advocate-commissioner.

9) Insofar as the first case is concerned, initially an advocate-commissioner was appointed to note down the physical features of the property and filed his report. Six months thereafter another application was filed seeking appointment of the same advocate-commissioner to direct him to inspect the property with the help of Mandal Surveyor, locate it and file a fresh report. The Court below dismissed the said I.A. holding that there was no necessity to appoint an advocate-commissioner since at the time of inspection of the suit locality by the Advocate-Commissioner appointed by it earlier, both parties were present and no one disputed about the identification of the suit property. Challenging

¹ (2015) 5 ALT 286

² (2006) 4 ALT 23

the same, a revision came to be filed before this Court. Relying on various authorities on the subject, a learned Single Judge of this Court held that the Court below was not correct in holding that there was no necessity for a revisit of the Court Commissioner and if really there is necessity to appoint a Court Commissioner, it will do so if only when the evidence on record leaves something to be explained further and accordingly, allowed the revision. The judgment does not anywhere indicate as to whether the first advocate-commissioner's report was challenged or whether it was *set aside*.

10) In *Seepally Thirupathi case (2 supra)*, a learned Single Judge of this Court after considering the judgments of the Apex Court and also the provisions of C.P.C. held as under:

“In the peculiar facts and circumstances, this Court is of the considered opinion that in the event of the petitioners being in want of certain clarifications, the proper course would be to move the Court to re-entrust the warrant to the selfsame Commissioner for the purpose of obtaining such clarifications if any, in the peculiar facts and circumstances, especially in the light of the fact that this localization of the survey numbers would assume crucial importance in a suit of this nature.”

11) Situation on hand appears to be different. It is a case where the first advocate-commissioner submitted his report in the month of December, 2011. Defendant No.3, who is known to defendant No.5, was served with a notice. No objections have

been raised to the said report and the trial went on. The petitioner, who is defendant No.5, got examined himself as DW.1. Even Dws.2 to 4 were examined on behalf of the defendants. Further it is not the case of the petitioner that the report of earlier commissioner was in complete or that he has not conducted the inspection as per the warrant issued.

12) In identical circumstances, a learned Single Judge of this Court in *Kushal Rao v. Shyam Rao and another*³ after considering the provision of law and the authorities on the subject observed as under:

“It is only when the report of the first Commissioner is unsatisfactory and the Court is dissatisfied with his proceedings, a second Commissioner could be appointed under the provisions of Order XXVI Rule 10 (3) of C.P.C. If a second Commissioner is appointed either by rejecting the report of the first Commissioner or without that, the legal effect is that the report of the first Commissioner may be wiped out in law. But in view of the implications of Order XXVI Rule 10 (2) of the Code, such a report and the evidence recorded by the Commissioner would be evidence in that case, which has to be taken into consideration while deciding the matter in issue by the Court and, therefore, as a routine, if a second commissioner is appointed, it has got serious consequences fraught with danger to the ultimate justice. Thus such a procedure of appointing second commissioner or more than one commissioner for the same purpose is said to be improper and illegal.

³ (1997) 1 ALT 93

If a portion of the commission work was not fulfilled by the commissioner for any reason, it is possible to direct the very same Commissioner to complete the work with further materials and the co-operation of the parties and their advocates. Even assuming that the report of the first commissioner is not complete, the Court could still consider whether the evidence on record through the report of the Commissioner was adequate or inadequate to decide the controversies between the parties in regard to the assessment of mesne profits.”

13) In view of the judgment of this Court in Kushal Rao case (3 supra), it is clear the appointment of a second advocate-commissioner cannot be ordered automatically and it can be done only when the report of the first commissioner is either questioned or when the said report is *set aside*. Further, in the instant case the present application came to be filed four years after acceptance of the first commissioner’s report. Hence, I am of the view that the order under challenge warrants no interference.

14) Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs.

15) Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

15.03.2017
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