

HON' BLE Dr. JUSTICE B. SIVA SANKARA RAO

Civil Revision Petition No.1622 of 2017

ORDER

The revision petitioner is the plaintiff in O.S.No.294 of 2009. This is a suit for permanent prohibitory injunction and permanent mandatory injunction sought for by the plaintiff against the 4 defendants including the 2nd defendant-Municipality represented by its Commissioner of Cheerala and the other defendants are private individuals and neighbours to the plaintiff. In the plaint, it is described as POQR portion, the so called land with a width of 9feet with the claim out of same nearly 4½ feet, shown as MNO is under encroachment of the defendants 1,3 and 4. The defendants disputed the same. Undisputedly there is a document dated 20.11.1996 showing about the easementary rights on the particular land which is a document between the defendants and his family members. In the very petition for appointment of an Advocate-Commissioner, plaintiff mentioned that there is a gift deed, dt.31.07.2009 in which also the land is described. The plaintiff has to submit the document to the Court if at all to rely. Undisputedly Municipality-2nd defendant formed cement road. On the written request of the dwellers of the area from the Municipal resolution. Once such is the case, the very request by dwellers given to the Municipality and the Municipal resolution and the records show the particulars of the road with its width.

2. Having regard to the above, the lessen oral evidence and unnecessary life to the litigation, the trial Court should have appointed an Advocate-Commissioner with reference to the documents of both the parties and the municipal records rather than dismissal in simply saying the application filed at the fag end and it is nothing but collecting of information. In fact, the very reading of Section 75 and Order XXVI Rule 9 CPC, are very clear regarding the purpose of elucidating the matter in controversy, the Court may appoint an Advocate-Commissioner for investigation of any fact. Investigation of fact leads to collecting of evidence. Collecting of evidence is thus not prohibited. In fact, that is not properly noticed by the lower Court, as what is prohibited is the fishing out of information by collecting oral evidence other than noting existing physical features and measurements which are unique in its own that could not be secured otherwise but by Commission for local inspection, demarcation and measurement with reference to the records as also held by this Court in *Bandi Samuel Vs. Medida nageswara Rao*¹.

3. Having regard to the above, the dismissal order of the lower Court is since unsustainable, the revision is allowed by setting aside the dismissal order of the lower Court dt.09.02.2017 in I.A.No.1994 of 2016 in O.S.No.294 of 2009 by allowing the petition directing the trial Court to appoint Advocate-

¹ (2017) 1 ALT 493

Commissioner with warrant by fixing his fee payable by the plaintiff, with no liability of the defendants. Both the parties are entitled to give their work memos for the Advocate-Commissioner to execute the warrant with assistance of the Municipal Towning Surveyor. The Advocate-Commissioner shall identify the property with reference to the Municipal record of the area in which the land is situate and road is formed and also with reference to the documents of both sides to correlate and its demarcation by measurement of the properties of both sides is necessary.

4. Consequently, miscellaneous petitions, if any, pending in this revision shall stand closed.

Date:18.12.2017
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Dr. B. SIVA SANKARA RAO, J

