

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No.88 OF 2017

ORDER:

Aggrieved over the order dated 2.12.2016 in I.A. No.226 of 2016 in O.S. No.3 of 2014 on the file of Junior Civil Judge, Bichkunda, Nizamabad District, the petitioner herein, who is the 1st respondent in the said I.A. and the plaintiff in the suit, preferred the present Civil Revision Petition under Article 226 of the Constitution of India.

2. The request made by the defendant Nos.1 to 5 in the aforesaid suit in I.A. No.226 of 2016 was to appoint an Advocate-Commissioner to note down the physical features of the schedule property by exercise of power under Order 26 Rule 9 read with Section 151 of the Civil Procedure Code, 1908 (for short, 'the Code').

3. The said request was resisted to by the present petitioner/plaintiff by filing counter.

4. Heard Sri T. Sujana Kumar Reddy, the learned counsel for the petitioner and Sri P. Krishna Reddy, the learned counsel for respondents.

5. The trial Court, keeping in view, the contentions raised by both sides, opined that it would be essential to appoint advocate-commissioner to unravel the truth in the stand taken by the petitioners

and also the defendants in the main suit, thus allowed the petition by appointing advocate-commissioner fixing his fee at Rs.5,000/- payable to him directly and further directing to return the warrant by 12.12.2016.

6. Now, the short point that arises for consideration is, whether the order under challenge can be sustained?

7. In the affidavit filed by one of the petitioners/defendants, out of five defendants in I.A. No.226 of 2016, it is stated that the respondent/plaintiff took the stand that the suit schedule property is agricultural land, but their stand is that it is non-agricultural land and plotted area and that plea occasioned to file the said petition for appointment of advocate-commissioner to inspect all the relevant records of the parties and other neighbouring lands, fixing boundaries along with map shown in the schedule annexed to the plaint with the help of Mandal Surveyor or any skilled licensed surveyor and also to note down the physical features and to file a report whether any development erected tin shed by using cattle sheds in the suit schedule property are existing.

8. In his counter, the respondent/plaintiff mainly contended that the evidence of both sides was closed and when the suit was coming up for arguments, the petitioners/defendants having not filed any documents concerning the suit schedule property, only to drag on the

case filed the petition to collect evidence and, therefore, sought to dismiss the petition.

9. The trial Court referring to the contentions of both sides opined that in order to clear the mist crept in, it is essential to appoint advocate-commissioner, but to know the truth or otherwise in the matter and it would also be helpful to decide the case on merits and if the relief sought is not granted in favour of the petitioner, he would suffer irreparable loss and, on the other hand, no harm would cause to respondent and thereby allowed the petition.

10. A perusal of the finding recorded by the trial Court in ordering the petition appears to be wholly incorrect. The reason being the affidavit referred to in the above, would clearly indicate the intention of the petitioners in approaching the Court for such a relief that only to collect evidence and to use it to substantiate their case, which intricacy the trial Court completely lost sight of.

11. It would be appropriate to refer to the decisions rendered by a learned Single Judge of this Court in **Thalla Sulochana v. Thalla Issac**¹ and **K. Sambasiva Reddy v. Chilla Rama Rao**², relied on by the learned counsel for the petitioner. In **Thalla Sulochana** (1 supra), expression of this Court in paragraph-4 is thus:

“4. Under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short ‘the CPC’), the Court issues commissions *inter alia* for the purpose of elucidating any matter in

¹ 2012 (3) ALD 384

² 2016 (6) ALD 61

dispute. As noted above, while it is the case of respondent No.1 that the gift deed executed by his father was acted upon, the petitioner is relying upon the family settlement, on the strength of which she is, allegedly, in possession of a part of the suit schedule property. There is no dispute regarding the identity or the boundaries of the suit schedule property. Having regard to the nature of the respective pleadings of the parties, the dispute needs to be adjudicated with reference to the evidence to be produced by the parties. The law is well settled that an Advocate-Commissioner is not appointed for the purpose of gathering evidence in support of one of the parties. The purpose of the petitioner seeking appointment of Advocate-Commissioner is to lend support to her plea that the suit schedule property consists of different portions and that the petitioner is living in one such portion. In my opinion, this falls in the realm of evidence, which needs to be let in by the petitioner by independent evidence and not by obtaining report of the advocate-commissioner. In this view of the matter, I do not find any reason to interfere with the order under revision.”

12. In **K. Sambasiva Reddy** (2 supra), while observing that the burden rests on the plaintiff, appointment of Commissioner for localizing the property does not arise where identity of property is not in dispute, the learned Single Judge of this Court in paragraph-5 held thus:

“5. Under Order XXVI Rule 9 of the Code of Civil Procedure, 1908, the main purpose of appointing an Advocate Commissioner is to elucidate any matter in dispute. It does not appear from the pleadings of the parties that the identity of the property is in dispute and therefore the question of localizing the property does not arise. It is therefore wholly unnecessary for the petitioner to seek appointment of an Advocate Commissioner. Being the plaintiff, the burden is on him to prove his case by producing required evidence and he cannot seek to rely upon the help of an Advocate Commissioner for this purpose. Unless he has material in his possession to show that he has title over the suit schedule property, he should not have filed the suit at all. If, for any reason, the petitioner wants to establish the identity of the property with reference to the boundaries mentioned in the documents on ground, he is always entitled to seek survey of the property by approaching the survey officials on his own, and produce the survey reports and examine the surveyor concerned as his witness. Instead of following this procedure, the petitioner appeared to have devised a shortcut method of filing the application for appointment of an Advocate Commissioner. This, in my opinion, surely is not the purpose for which the Advocate Commissioner is appointed.”

13. Thus, it is clear that for the purpose of gathering evidence in support of one of the parties, no advocate-commissioner can be appointed.

14. The relief in the suit is to grant perpetual injunction over the suit schedule property delineated clearly in the schedule, and, therefore, the entire burden rests on the petitioner/plaintiff to prove his possession over the suit schedule property and incidentally title even. In fact, no onus is cast on the respondents/defendants unless the petitioner/plaintiff discharges the burden rests on him, in which case onus shifts to the respondents/defendants.

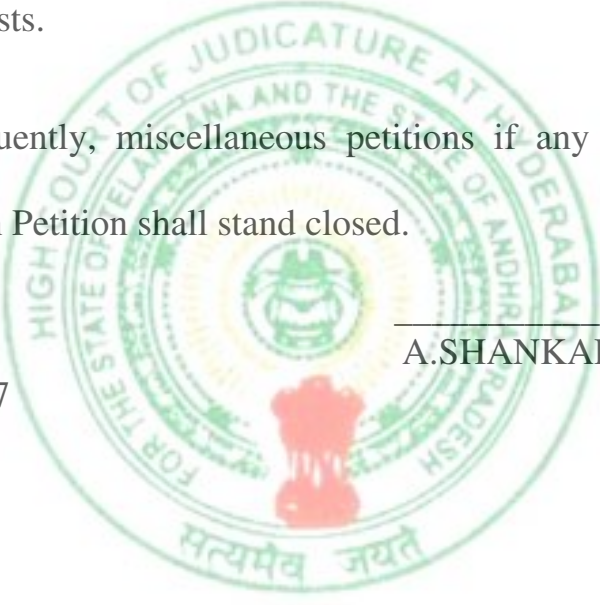
15. Yet another reason is that after the closure of evidence on both sides, when the suit was coming up for arguments, application of this nature seeking relief ought not to have entertained by the trial Court and ought to have analysed the nature of the relief sought for. The respondents/defendants are not just seeking appointment of advocate-commissioner to note down the physical features, but their request is to inspect all the relevant records of the parties and other neighbouring lands, fixing boundaries along with map with the help of Mandal Surveyor or any skilled licensed surveyor and also to report whether any developed erected tin shed by using cattle sheds in the suit schedule property has been in existence. Thus, the relief definitely indicates the intention of the respondents/defendants. That being only to collect evidence and utilize the same to substantiate their stand, now, they came forward with such an application when

the suit was coming up for arguments. The trial Judge, somehow, entrapped under misconception, without giving due regard in detecting the intention of the petitioners/defendants in making such an application at the stage of arguments. Hence, the finding recorded by the learned Junior Civil Judge suffers from legal infirmity and, therefore, the order under challenge is liable to be set aside and, accordingly, set aside.

16. Civil Revision Petition is, accordingly, allowed. There shall be no order as costs.

Consequently, miscellaneous petitions if any pending in the Civil Revision Petition shall stand closed.

Dt. 31.03.2017
gbs

A.SHANKAR NARAYANA