

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.4879 of 2016

ORDER:

The Civil Revision Petition is filed aggrieved by the order dated 13.06.2016 in I.A.No.286 of 2015 in O.S.No.1194 of 2013 passed by the VII Senior Civil Judge, City Civil Court, Hyderabad.

2. The above said suit is filed by the sole plaintiff against four defendants for the relief of declaration that plaintiff got equal rights over the common space and compound wall surrounding the block at TRT No.310 of Industrial Housing Colony, Vidyanagar, Hyderabad, saying defendants 1 and 2 got TRT No.309 and defendants 3 and 4 viz., Labour Department and Municipal Department are not even chosen to remove, thereby they are to be directed to cause remove the unauthorized construction made by defendants 1 and 2 in the common area, which is nothing but the appurtenant site to the four flats covered by the block for the construction making by defendants is without the consent or permission of other flat owners, who are occupiers; besides consequential mandatory injunction supra, further to grant prohibitory injunction not to make further constructions.

3. Pending the suit, an application in I.A.No.286 of 2015 under Order XXVI Rule 9 of the Code of Civil Procedure (for short 'C.P.C.') was filed for appointment of an advocate commissioner to make local investigation to ascertain construction works going on and completed in the common land by the defendant Nos.1 and 2 violating the plaintiff's right and interest over the common land. Counter filed by the defendant Nos.1 and 2 opposing the same. After hearing both sides, the Court below vide its order dated 13.06.2016 allowed the said I.A. appointing the advocate commissioner for noting down the existing construction and further construction. Impugning the same, defendant Nos.1 and 2 maintained the revision.

4. The contentions of the learned counsel for the petitioners are that the lower Court erred in not referring the grounds raised by defendants 1 and 2 in opposing the application, which is prejudice to their rights; that advocate commissioner cannot be appointed to collect evidence; that advocate commissioner is not entitled to make enquiry of alleged constructions raised if any in any common land, which is subject matter of trial in the suit and thereby there is no even any prima facie document to say alleged construction by the defendants 1 and 2 is in the common land apart from

mandatory injunction relief already asked for removal of the alleged illegal constructions taken up by them and no purpose would be served in appointment of advocate commissioner but for under that guise to drag on the matter. Hence to set aside the impugned order passed by the lower Court.

5. The learned counsel for the revision petitioners/ defendants 1 and 2 reiterated the same in the course of hearing.

6. Whereas, it is the submission of the learned counsel for the plaintiff as revision 1st respondent that order of the lower Court holds good and there is nothing to interfere with the order passed by the Court below.

7. Heard and perused the material on record.

8. It is pursuant to which the advocate commissioner was appointed by the impugned order of the lower Court dated 13.06.2016 with observations particularly from para No.6 of the impugned order that as per the claim of the petitioner/plaintiff, he is owner of TRT No.310 and defendants 1 and 2 purchased TRT No.309 recently and taken up construction in the open land within the compound wall with the consent of the petitioner, if they are right to do so, they could have been with the consent of all the house owners as the said vacant land (appurtenant land) for all the four

tenements is still undivided and common for the four tenements, however with no right the defendants are high handedly proceeding to construct sheds and rooms infringing the right of the plaintiff and others, thereby advocate commissioner to be appointed to localize and ascertain the unauthorized constructions made by the defendants in the open land. Same was opposed by defendants 1 and 2. By referring to few expressions on the scope of appointment of a commissioner and to note down the physical features as an enabling provision from paras 7 and 8 of the impugned order of the lower Court, it observes that from the allegation of defendants 1 and 2 are taking up the unauthorized construction in the open land in which the plaintiff and three others have equal rights and without their consent, advocate commissioner is to be appointed to make local investigation to ascertain the alleged construction works including as to whether the alleged constructions have been completed in the common land by defendants 1 and 2 and accordingly petition is allowed by appointing Sri D.Ranga Rao Naidu, advocate to make local investigation to ascertain construction works that are being going on and whether the same has been completed in the common land in the suit schedule property by defendants 1 and 2.

9. The very wording of Section 75 C.P.C. is subject to such conditions and limitations as may be prescribed, the Court may issue the commission particularly from the clause (b) to make a local investigation. It is to say what is the contest in the revision as well as counter opposing the commissioner appointment of investigation is not contemplated is not correct, as the very provision enables the investigation. Further coming to Order XXVI Rule 9 CPC, the very wording is very clear in this regard in its speaking that in any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, and thus the investigation contemplated by these provisions supra is for purpose of elucidating any matter in dispute.

10. Now it is to consider whether the commission is within the scope of elucidating any matter in dispute or not. The suit claim is that for the tenements, there is a common appurtenant site and TRT No.309 and defendants 1 and 2 which they purchased from previous owner is at ground floor and of the plaintiff at first floor, leave about other two. At the cost of repetition from the very contention in the suit that the appurtenant site is not meant for TRT No.309 only, but for common to all the four tenements and any construction to be

made by the defendants 1 and 2 is only with consent if at all given by all others and not otherwise and the construction taking up is illegal in the common appurtenant site without consent, thereby same is required to be removed by the defendants 1 and 2 or the Court has to cause remove at expense of the defendants 3 and 4 in seeking the second relief of mandatory injunction from the first relief of declaration and also for other relief of prohibitory injunction not to make further construction. Thus, there is no localization of any site with any disputed identity involved herein but for to decide within the four walls of the site appurtenant is, whether exclusively meant for ground floor of TRT No.309 or common for all the four tenements. When that is the issue to be decided and the only thing to be considered is whether any construction activity taken up by the defendants by the time of suit and subsequently even despite the written statement contest of they are not going to make any further, for that once advocate commissioner is appointed to note down the existing constructions and its age, it is not at all fishing of information from the local investigation to ascertain, but to secure an unique evidence to use in the lis, which avoids much oral evidence in this regard. Once such is the scope, there is nothing for this Court to sit against in revision to set aside the

order but for to say the commission has to act within the scope of the warrant to note down the existence and age of construction of what is apparent and not to examine any person and secure any oral evidence as to who made the construction and when etc., for those are the matters to be decided from other evidence to be adduced by the parties.

11. Accordingly, the Civil Revision petition is disposed of. No order as to costs.

12. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

Dr. B. SIVA SANKARA RAO, J

Date:04.01.2017
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