

HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CIVIL REVISION PETITION No.4518 OF 2017

ORDER:

This Civil Revision Petition is arising out of the order dated 21.08.2017 passed in E.P. No.1 of 2013 in O.S. No.36 of 2004 by the Junior Civil Judge, Bhainsa, Adilabad District.

2) The revision petitioners herein are the defendants (judgment debtors) and respondent is the plaintiff (decree holder). The respondent has originally filed a suit in O.S. No.36 of 2004 stating that he was the owner and possessor of entire suit land of an extent of Ac.7.39 gts in S.No.235/a, situated at Bhainsa Village & Mandal, Adilabad District. The revision petitioners are the adjoining land owners of the suit land on eastern and southern side of the respondent's land. There was a common ridge running from East West separating the Sy.No.235 into two, the northern portion being that of plaintiff and the southern portion as that of defendants. The defendants are also owners of another land in Sy.Nos.196 and 197, which are on the eastern side of the plaintiff's land.

3) The trial Court, on consideration of the pleadings, evidence and their documents, placing reliance on the report of advocate commissioner, has decreed the suit partly, holding issue No.1 in favour of plaintiff, that he is entitled for Ac.0.23 gts of land, which is found excessive in the possession of defendants, and held issue No.2 also in favour of plaintiff that the action of defendants 1 and 2 in diverting the water from its natural flows and causing

damage to the property of the plaintiff is highly illegal and shall be dispensed forthwith.

4) In pursuance of the decree, the plaintiff has filed an execution petition in E.P. No.1 of 2013 seeking execution of the decree in respect of issue No.1 for delivery of possession of Ac.0.23 gts of land found in possession of the defendants.

5) The Executing Court passed orders in Execution Petition directing the bailiff of the executing Court to put the petitioner in possession of land to an extent of Ac.0.23 gts in S.No.235/a as per the sketch map annexed to the advocate commissioner's report with the assistance of Mandal surveyor or Deputy Inspector of Survey and Land Records, Nirmal and posted the matter for report, to 31.08.2017.

6) Aggrieved by the orders passed in E.P. No.1 of 2013, the Judgment Debtors 1 and 2, who are defendants to the suit, had preferred this revision petition on 01.09.2017.

7) Heard arguments of learned counsel for revision petitioners and also learned counsel for respondent.

8) Learned counsel for petitioners mainly submitted that the judgment passed by the trial Court in O.S. No.36 of 2004 is a nullity in view of the fact that the trial Court has passed the decree without proper evidence before it. It is argued that the report of the advocate commissioner, cannot be considered, as the commissioner cannot be appointed for collection of evidence either for plaintiff or for the defendants. It is further argued that the

plaintiff has to prove his case by producing his evidence. In the instant case, the trial Court has appointed an advocate commissioner and purely basing on his report, the suit was decreed without considering the evidence of PWs.1 and 2. It is further the evidence of PWs.1 and 2, which clearly reveals that they do not know the extent of the encroachment of land by the defendant No.6. therefore, it is contended that the trial Court placing reliance on the report of the Commissioner is not sustainable, order is liable to be set-aside.

9) Learned counsel for respondent submitted that the trial Court has appointed the advocate commissioner to inspect the schedule premises in the presence of both the parties, and submit his report. The petitioners/defendants have not filed any objections with regard to the report of commissioner in the suit. The trial Court has based its findings on the evidence of PWs.1 and 2, and the commissioner's report and decreed the suit in favour of the plaintiff. The defendants have not filed any appeal challenging the judgment of the trial Court and the findings in the suit became final. Thereafter, at the stage of execution proceedings, the defendants cannot seek to consider the merits of the suit with regard to the findings of the trial Court. It is further submitted that during pendency of revision petition, the possession of property was delivered to the plaintiff to an extent of Ac.0-23 gts in S.No.235/a, as it was found in the possession of defendants. It is further contended that the defendants cannot raise a plea to consider the merits of the suit in this revision petition, as the scope of revision under Article 227 of Constitution is very limited.

In view of not filing any appeal against the decree passed by the trial Court, and not raising any objection against the report of the commissioner, as such they cannot take any plea in the execution petition challenging the maintainability of the decree as it amounts to going beyond the decree. It is further submitted that the scope of the civil revision petition is very limited, the defendants cannot seek the relief of setting aside the decree, which has become final, as it was not challenged by way of an appeal, as it is also barred by limitation.

10) Admittedly, the defendants have not preferred any appeal against the judgment passed by the trial Court, raising their objections with regard to the report of the advocate commissioner in respect of the measurement of the land. Therefore, the defendants cannot raise these pleas in this execution petition, more over the scope of the revision is limited to the extent of orders passed in execution petition.

11) Learned counsel for petitioners placing reliance on ***Batchu Narayana Rao vs. Batchu Venkata Narasimha Rao***¹ ***Sarala Jain and others vs. Sangu Gangadhar and others***², ***KMA Wahab and 5 others vs Eswaran and another***³ and ***Brakewel Automotive Components (India) Pvt. Ltd., vs P.R.Selvam Alagappan***⁴, submitted that the Court cannot appoint an advocate commissioner for collection of evidence either for plaintiff or for the defendants.

¹ 2010 (5) ALD 83

² 2016 (3) ALD 197

³ 2007 Law Suit (Madras) 2597

⁴ 2017 (4) ALD 29 (SC)

12) In the instant case, the Commissioner was appointed by the Court at the instance of the plaintiff for measuring the lands for determination of rights of the parties over the land in dispute. Basing on the report of the Commissioner, the trial Court decreed the suit. Relying on the above decisions, learned counsel for the petitioners contended that the decree passed by the trial Court becomes nullity as the trial Court based its findings on the report of the commissioner.

13) Learned counsel for the petitioners further submitted that delivery of possession is not in accordance with law, as the boundaries of Ac.0.23 gts of land, has not been set out in the order passed by the executing Court, and therefore, the order is liable to be set-aside.

14) Learned counsel for respondent has referred to the orders passed by the executing Court and submitted that the executing Court has dealt with the issue in a detailed manner and therefore, the order does not require any interference. The commissioner was appointed to note down the physical features and measure the land of petition schedule property and find out whether the defendants were in exclusive possession, and it revealed that judgment debtor is in exclusive possession of Ac.0-23 guntas of land.

15) It is obvious that the decree has not been challenged by way of an appeal, and the challenge is against the order in the E.P. This Court cannot go beyond the decree, at this stage of execution, as the decree has already been executed during

pendency of revision, and the possession has already been delivered. The fact of delivery of possession also has not been disputed by the learned counsel for the petitioners.

16) The trial Court appointed an advocate commissioner to determine the rights of the parties in the land. The trial Court in order to resolve the dispute finally has appointed a commissioner to find out excess land and its possessors. The appointment of advocate commissioner is discretionary in nature. The purpose of elucidating facts in respect of any matter in dispute where the circumstances reveals it expedient in the interest of justice to do so, a commissioner can be appointed by a Court.

17) However, in view of the facts and circumstances of this case and in the light of the submissions made by the learned counsel for respondent, since it is a fact that scope of revision petition is very limited, the Court cannot go beyond the decree at this stage and on the other hand, it is submitted that possession has already been delivered to the Decree Holder and therefore no orders can be passed in the civil revision petition.

18) With these observations, this Civil Revision Petition is dismissed. Consequently, Miscellaneous petitions, if any pending in this Petition, shall stand closed.

09.11.2017.
knl

GUDISEVA SHYAM PRASAD, J