

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.1738 OF 2016

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India challenging the order dated 03.3.2016 in I.A. No.67 of 2016 in O.S. No.432 of 2015 on the file of the Court of XI Junior Civil Judge, City Civil Court, Secunderabad.

2. The facts leading to filing of the present civil revision petition are as follows: The respondents filed O.S. No.432 of 2015 against the petitioner for perpetual injunction in respect of an extent of 818 Sq.yards in survey No.74/10 of East Marredpally Village. During the pendency of the suit, the respondents filed I.A. No.67 of 2016 under Order XXVI Rule 9 read with Section 151 of CPC seeking *“to appoint an advocate commissioner for local investigation and to note down the physical features of the present suit schedule property ...”*. The petitioner filed counter opposing the appointment of advocate commissioner. The trial Court, after affording reasonable opportunity to both parties, allowed the I.A. Aggrieved by the said order, the present revision is filed.

3. The contention of learned counsel for the petitioner is three fold: (1) it is not possible for the advocate commissioner to identify the suit schedule property as he is not an expert in surveying the land, (2) there is no dispute with regard to the

identity of the property, therefore the appointment of advocate commissioner does not arise, and (3) in this type of cases, appointment of advocate commissioner amounts to collection of evidence, which is impermissible under law. ***Per contra***, learned counsel for the respondents submitted that in order to determine the rights of the parties, it is just and necessary to appoint advocate commissioner. He further submitted that appointment of advocate commissioner is no way cause prejudice to the petitioner. He also submitted that there are no grounds to interfere with the order passed by the trial court.

4. It is the case of the respondents that one Dildar Ali Khan owned an extent of Acs.9.20 guntas of land in survey No.74/10 of East Marredpally Village. Dildar Ali Khan executed a gift deed dated 06.12.1969 bequeathing the property in favour of his nephew by name Baban Abdul Khader. The respondents purchased the suit schedule property viz., 818 Sq.yards in survey No.74/10 of East Marredpally Village from Baban Abdul Khader, his son and daughters under a registered sale deed dated 16.5.1994.

5. It is the case of the petitioner that one Rita Devi purchased plot Nos.29, 30 and 32A in survey No.74/9 of East Marredpally Village from Seva Mandal Society under a registered sale deed dated 10.1.1990. She sold plot Nos.29 and 30 in an extent of 794 Sq.yards to Satyabhama Tibrewal

and Mala Tibrewal, from whom the petitioner purchased 794 Sq.yards in survey No.74/9 under registered sale deed dated 15.3.2013. The petitioner filed O.S. No.133 of 2015 on the file of the Court of III Senior Civil Judge, City Civil Court, Secunderabad against the respondents in respect of an extent of 794 Sq.yards in survey No.74/9 of East Marredpally Village. The petitioner filed I.A. No.379 of 2015 seeking temporary injunction against the respondents and the same was allowed on 22.6.2015. The respondents filed I.A. No.103 of 2015 in O.S. No.432 of 2015 seeking interim injunction but the trial court ordered urgent notice.

6. The petitioner is claiming an extent of 794 Sq.yards in survey No.74/9 of East Marredpally Village whereas the respondents are claiming an extent of 818 Sq.yards in survey No.75/10 of East Marredpally Village. It is not in dispute that there is an interim injunction in favour of the petitioner in O.S. No.133 of 2015 in respect of an extent of 794 Sq.yards in survey No.74/9 of East Marredpally Village. There is no injunction in favour of the respondents in O.S. No.432 of 2015 in respect of an extent of 818 Sq.yards in survey No.74/19 of East Marredpally Village.

7. Whether the suit schedule property i.e., 818 Sq.yards is situated in survey 74/10 or not is the core issue involved in the present suit i.e., O.S.No.432 of 2015. In order to grant perpetual injunction, the respondents have to establish that

they have been in possession and enjoyment of 818 Sq.yards in survey No.74/10 as on the date of filing of the suit. This court is unable to understand what purpose will be served by appointing advocate commissioner for local inspection.

8. At the time of arguments, learned counsel for the respondents submitted that the advocate commissioner was appointed in order to ascertain whether the suit schedule property is in O.S. No.432 of 2015 is situated in survey No.74/10 as well as to measure the suit schedule property. It is not possible for the advocate commissioner to ascertain whether the suit schedule property is situated in survey No.74/10 or not without the help of a qualified surveyor. For the reasons best known, in I.A. No.67 of 2016 the respondents did not seek a direction to the commissioner to localise the suit schedule property "*with the assistance of a qualified surveyor*". In such circumstances, appointment of advocate commissioner for local inspection is only a futile exercise.

9. The other purpose, for which the appointment of advocate commissioner is sought for, is to note the physical features and take the photographs of the property. Even if the advocate commissioner has noted down the physical features and has taken the photographs of the suit schedule property, it would not be helpful to the trial court, in any

manner whatsoever, to decide the issue whether the suit schedule property is situated in survey No.74/10 or not.

10. The learned counsel for the petitioner, while submitting that in a suit for perpetual injunction before commencement of trial advocate commissioner cannot be appointed, relied upon paragraph Nos.3 and 4 of the judgment in **A.Gopal Reddy v R.Subramanyam Reddy**¹, which read as follows:

3. The suit filed by the petitioner is the one for the relief of perpetual injunction. The only question that assumes significance in that suit is whether the plaintiff is in possession and enjoyment of the schedule property. The burden squarely rests upon the petitioner to prove the possession. The appointment of commissioners to note the physical features or to undertake other related activities in a suit for injunction is a rarity. The reason is that the plaintiff cannot be permitted to gather evidence to prove his possession and he has to satisfy the Court through oral and documentary evidence. When that is the law on the subject, the appointment of commissioners at the instance of the defendant in such suits is a still rare phenomenon. At any rate, the occasion to appoint an advocate-commissioner would arise, if only the trial of the suit is in progress and a typical question, which needs the examination by a commissioner arises. The appointment of a commissioner cannot be made at the threshold. Such an effort would be treated as a measure to gather evidence.

4. Admittedly, in the instant case, the trial is yet to commence and it is only for the petitioner herein to prove his possession. In case, the 1st respondent is of the view that the boundaries mentioned about the suit schedule are not correct or that the case presented by the petitioner is not true, he can take the relevant plea in the written statement and not only cross-examine the petitioner and the other witnesses examined by him but also adduce his own evidence. The appointment of a commissioner that too for noting the physical features at this stage is a pure step aimed at gathering of evidence.

As per the principle enunciated in the case cited supra, advocate commissioner for noting the physical features

¹ 2013 (4) ALD 347

cannot be appointed, before commencement of trial. Admittedly, the present suit is coming up for framing of issues. In a suit for perpetual injunction, the plaintiff has to prove that he is in possession and enjoyment of the suit schedule property as on the date of filing of the suit. Merely because no prejudice would be caused to the petitioner, by itself is not a valid ground for appointment of advocate commissioner. All these aspects were not considered by the trial court before appointment of advocate commissioner.

11. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the view that the impugned order suffers from illegality, warranting interference of this Court under Article 227 of the Constitution of India.

12. Accordingly, the civil revision petition is allowed, setting aside the order dated 03.3.2016 in I.A. No.67 of 2016. Consequently, I.A. No.67 of 2016 in O.S. No.432 of 2015 on the file of the Court of XI Junior Civil Judge, City Civil Court, Secunderabad is dismissed. Miscellaneous petitions, if any pending in this civil revision petition, shall stand closed.

T.SUNIL CHOWDARY, J.

Date: .3.2017
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