

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION No.4250 of 2017

ORDER:

This civil revision petition under Article 227 of the Constitution arises out of the order dated 07.03.2017 passed by the learned Principal Junior Civil Judge, Medchal, Ranga Reddy District, in I.A.No.1085 of 2016 in O.S.No.293 of 2009. The said I.A. was filed by the petitioner herein, being the plaintiff in the suit, under Order 26 Rule 9 CPC to appoint an Advocate Commissioner to note down the physical features of the suit schedule property, including the existence or non-existence of the landline telephone service connection bearing ID No.040-23080568 allegedly issued by the BSNL, Hyderabad Telecommunications, and the electricity service connection bearing Consumer Service No.080309967 allegedly issued by the Central Power Distribution Company Limited of Andhra Pradesh. By the order under revision, the Court below dismissed the I.A.

Parties shall hereinafter be referred to as arrayed in the suit.

O.S.No.293 of 2009 was filed by the plaintiff for a perpetual injunction restraining the defendants from interfering with her peaceful possession and enjoyment over the suit schedule property. The first defendant examined himself as D.W.1 and marked Exs.B1 to B48 to deny the suit claim. Exs.B4, B6, B7, B11 to B15, B18, B19, B22 to B24, B27 and B28 were telephone bills pertaining to the telephone service connection bearing ID No.040-23080568 issued by the BSNL, Hyderabad Telecommunications, while Exs.B8, B9, B12, B16, B17, B20, B21, B25, B26, B29 to B34, B36 to B38, B40 and B42 to B48 were electricity charges payment receipts pertaining to Consumer Service No.080309967 issued by the Central Power Distribution Company Limited of Andhra Pradesh. The plaintiff claimed that these electricity and telephone service connections

were not in existence at the suit schedule property and that the first defendant, taking advantage of the fact that he was an employee of the BSNL, had fabricated this documentary evidence. It was on this ground that the plaintiff sought appointment of an Advocate Commissioner to verify this aspect. The defendants opposed the plea, claiming that appointment of an Advocate Commissioner for the subject purpose would amount to gathering of evidence.

Perusal of the order under revision reflects that the Court below considered as to whether appointment of an Advocate Commissioner was necessary at a stage when the evidence had concluded in the suit. Opining that existence of the subject telephone and electricity service connections could be ascertained by giving a requisition to the concerned authorities, the Court below held that appointment of an Advocate Commissioner would amount to gathering of evidence, which is impermissible in law. Holding so, the Court below dismissed the I.A.

Sri Pushadapu Subba Rao, learned counsel for the plaintiff, would point out that the telephone and current bills in question were not filed by the first defendant along with the written statement and it was only in the year 2016 that the same were brought on record. Further, he would point out that the first defendant, deposing as D.W.1, admitted before the Court that the house number and plot number of the suit schedule property were not even mentioned in Exs.B25, B26, B29 to B34, B36 to B38, B40 and B42 to B48.

Exs.B25, B26, B29 to B34, B36 to B38, B40 and B42 to B48 were some of the current bills produced by the first defendant. If details, such as house number and plot number of the property, were mentioned in the earlier current bills, there is no reason as to why they would not find mention in these later bills. It is also an admitted fact that the first

defendant is an employee of the BSNL. As existence of the subject telephone and electricity service connections at the suit schedule property, as claimed by the first defendant, can be easily ascertained through appointment of an Advocate Commissioner, this Court is of the opinion that the reasoning of the Court below that the same should be ascertained by way of a requisition to the concerned authorities cannot be accepted.

Sri Jagathsen Reddy, learned counsel representing Sri Buchi Babu, learned counsel for the defendants, would state that permitting the appointment of an Advocate Commissioner at this stage would amount to gathering of evidence. He would place reliance on the decisions of the Madras High Court in *K.M.A. Wahab v. Eswaran*¹ and *Jagadeswari v. Kandasamy*².

In *K.M.A. Wahab v. Eswaran*¹, it was observed that the Court may appoint a Commissioner in a suit where it deems a local investigation to be requisite for the purpose of elucidating any matter in dispute but, in so far as the factum of possession is concerned, the Court should alone gather evidence through the parties and it cannot entrust the said matter to an Advocate Commissioner. In *Jagadeswari v. Kandasamy*², the Madras High Court observed that in a suit for permanent injunction, the vital and important issue is whether the plaintiffs are in possession of the suit schedule property and whether there is any attempt by the defendant to interfere with such possession and the burden in this regard would be entirely on the plaintiffs to bring convincing and cogent evidence on record and for so doing, it is not permissible for them to invoke Order 26 Rule 9 CPC, which is intended for a different purpose.

¹ 2007 LawSuit (Mad) 2597

² 2014 LawSuit (Mad) 2261

Apart from the fact that the aforesaid judgments have only persuasive value, they have no application to the case on hand. It is not the intention of the plaintiff to seek a commission under Order 26 Rule 9 CPC to ascertain her possession over the suit property. On the other hand, the claim of the first defendant before the Court below was that they were in possession and in proof thereof, he relied upon the telephone and electricity bills produced by him. As the plaintiff raised sufficient grounds to doubt the veracity of such bills and the very existence of the subject telephone and electricity connections, this was a fit case for appointment of an Advocate Commissioner to ascertain their existence.

On the above analysis, this civil revision petition is allowed setting aside the order under revision. The matter is remitted to the Court below for appointment of an Advocate Commissioner to ascertain the details in terms of the prayer of the plaintiff in the subject I.A. This exercise shall be completed expeditiously as the suit is stated to have crossed the stage of evidence.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

JUSTICE SANJAY KUMAR

24th November, 2017
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