

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

CIVIL REVISION PETITION No.1536 of 2017

ORDER:

The Order in I.A.No.740 of 2016 in O.S.No.123 of 2011, filed under Order XXVI Rule 9 of C.P.C. seeking to appoint an Advocate Commissioner to note down the physical features of the plaint schedule property, is challenged before this Court.

2) It is the case of the petitioner that he has entered into an agreement of sale with the respondent for purchase of certain property. Thereafter, on coming to be aware of the defect in title and also pendency of a writ petition in relation to the said property, petitioner has rescinded the contract of sale and sought refund of the advance money paid. On refusal of the respondent to refund the advance money paid, the suit for recovery of advance money of Rs.18,00,000/- was filed. The suit is at the stage of recording of evidence. In the process of examination of defendant, D.W.1, in the cross-examination asserted that the suit schedule property is in tact even as on date. It is the contention of the petitioner that even as on date there are no plots in the Sy.No.1833 and the same is an agricultural land. To disprove the stand taken by the respondent-defendant in evidence, it is just and necessary to note down the physical features of the suit schedule property. The I.A.No.740 of 2016 in O.S.No.123 of 2011 was resisted by the defendant/respondent. On consideration of the material on record the Court below dismissed the said I.A. finding that the I.A. is filed at belated stage and further allowing the same only would amount to permitting gathering of evidence, which is impermissible under law.

3) Learned counsel for the petitioner, Sri Sumanth, while reiterating the contents of the affidavit, filed in support of the revision petition, placed reliance on the judgments in **A.Nagarajan v A.Madhanakumar¹; Varala Ramachandra Reddy v Mekala Yadi Reddy and Others²; Shaik Zareena kasam v patan Sadab Khan and others³; Mallikarjuna Srinivasa Gupta v K. Sheshirekha⁴ and K. Dayanand and another v P. Sampath Kumar⁵**. The sum and substance of the argument is that there is no impediment on the court to appoint an Advocate Commissioner even at the stage of trial or at the stage of recording the evidence as long as the same is helpful in deciding the dispute in issue. He would also further submit that appointment of Advocate Commissioner would cause no prejudice to the respondent and would only help the Court to come to a just decision. Further, learned counsel for the petitioner by placing reliance on the judgments cited above would submit that there is no hard and fast rule that Advocate Commissioner shall not be appointed for the purpose of noting physical features of the property.

4) On the other hand learned counsel for the respondent-defendant submits that the plea taken by the respondent in the written statement is that suit is barred by limitation and also further it is the failure on the part of the petitioner-plaintiff to adhere to his part of contract by paying the balance sale consideration, resultant of which forfeiture of the amount paid as advance, which is one of the essential conditions of the agreement. In the light of the nature of defence pleaded, it is wholly

¹ 1996 LawSuit (mad) 19

² 2010 (4) ALD `198

³ 2011 (4) ALD 231

⁴ 2006 (3) ALD 362

⁵ 2015 (2) LAD 319

unnecessary to appoint an Advocate Commissioner as there is no dispute of the nature which is present in the cases cited by the petitioner. Learned counsel for the respondent also supports the impugned order stating that the court below has rightly held that allowing of the Advocate Commissioner to note down the physical features would only amount to gathering of evidence, which is impermissible as settled by various judgments of the Hon'ble Supreme Court.

5) Having considered the respective submissions, the following questions are required to be considered by this Court:

- i) Whether the order made by the Court below in refusing to appoint the Advocate Commissioner is valid? and
- ii) Whether there is any error in calling for interference in exercise of the powers of this court under Article 227 of the Constitution of India?

6) It may be noted that the suit is of the year 2011 and the written statement was filed on 05.09.2011; issues were framed on 14.09.2011 and the matter has been coming up for trial from 2012 onwards, there are several adjournments between 2011 and 2014. The Chief Affidavit of P.W.1 was filed on 15.07.2014 and the plaintiff's side evidence was closed on 18.08.2015. Chief Affidavit of D.W.1 was filed on 16.12.2015 and on 13.04.2016 evidence of D.W.1 was eschewed as he was absent. However, on petition, D.W.1 was permitted to adduce evidence and his evidence was closed on 02.12.2016 and the matter was posted to 06.12.2016 for arguments. At that stage, I.A.No.740 of 2016 was filed on 15.12.2016 seeking appointment of Advocate Commissioner to note down the physical features of the plaint schedule property. It

may be noted that the evidence of both the plaintiff as well as the defendant side has already been completed. In other words, the right to adduce evidence has already closed for both sides. There is also no petition filed seeking to adduce further evidence. It may also be noted that the plaintiff's evidence was closed as far back as on 18.08.2015. On account of the stand taken by the D.W.1 in his evidence, the relief, which the petitioner seeks in I.A.No.740 of 2016 at this stage is to bring new evidence on his behalf by noting down the physical features of the schedule property for the purpose of establishing that there exists no house plots in the schedule property. In other words, as rightly opined by the learned V Additional District Judge, Nellore, appointment of Advocate Commissioner is only for the purpose of gathering evidence, which is impermissible in law. It may also be noted that in the very application filed by the petitioner seeking for appointment of Advocate Commissioner for noting down the physical features, it was stated that on account of the stand taken by the D.W.1 in his evidence and to disprove his evidence it had become necessary for the petitioner to file an application for appointment of and Advocate Commissioner. This is nothing but gathering of evidence, which is impermissible under law.

7) So far as the judgments cited by the learned counsel for the petitioner are concerned, in each of the judgments the facts of the particular cases are different and after taking into consideration of the necessity and the purposes for which the Advocate Commissioner was sought to be appointed a view was taken one way or the other. A perusal of the judgments cited disclose in most of the cases the dispute was in relation to either

identification of the property or with respect to the demarcation of boundary disputes and the main relief in the said suits are in relation to property *per se* unlike in the present case, where the dispute is in relation to rescinding an agreement of sale, based on which the refund of advance money is sought. In the present case, there is no dispute with regard to property, *per se*. Whether the petitioner-plaintiff is entitled for refund of the advance amount and whether there is a breach on the part of the defendant is a matter not connected with the property and the same would have to be decided on the specific terms of the agreement and alleged breach of the same. In the circumstances, this Court has no hesitation to reject the contentions raised by the learned counsel for the petitioner.

8) Accordingly, the Civil Revision Petition is dismissed. Consequently, miscellaneous petition pending, if any, shall stand dismissed. There shall be no order as to costs.

Date:21.07.2017
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CHALLA KODANDA RAM, J.