

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CIVIL REVISION PETITION No.1061 of 2015

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order, dated 31.10.2014, in I.A.No.203 of 2013 in O.S.No.57 of 2013 on the file of II Additional Junior Civil Judge at Warangal.

2. The contention of the learned counsel for the petitioner is threefold, which is as under:

(i) that the trial Court has failed to consider that the petitioner filed the suit in respect of survey No.21 and not survey No.22;

(ii) that the trial Court, having dismissed the counter claim petition filed by the respondents, ought not to have appointed the Advocate Commissioner; and

(iii) that the Advocate Commissioner cannot be appointed for collection of evidence.

3. Per contra, the learned counsel for the respondents has submitted that the Advocate Commissioner's report may help the Court to adjudicate the issue involved in the suit effectively. He has further submitted that there is no illegality or irregularity in the order of the trial Court warranting interference of this Court.

4. A perusal of the record reveals that the petitioner herein filed O.S.No.57 of 2013 on the file of II Additional Junior Civil Judge at Warangal, against the respondents herein in respect of suit schedule property to an extent of 340 sq.yds. in survey No.21 of Bheemaram Village, Hasanparthy Mandal, Warangal District, seeking perpetual

injunction. The respondents filed written statement denying the claim of the petitioner. Pending the suit, the petitioner filed I.A.No.100 of 2013 under Order XXXIX Rules 1 and 2 C.P.C. seeking *ad interim* injunction against the respondents in respect of the suit schedule property. As a counter claim, the respondents filed I.A.No.851 of 2013 against the petitioner in respect of the property situated in survey No.22. The trial Court, after affording reasonable opportunity to both the parties, granted interim injunction in favour of the petitioner, by allowing I.A.No.100 of 2013 and dismissing I.A.No.851 of 2013, *vide* its common order, dated 03.06.2014.

5. While things stood thus, the respondents filed I.A.No.203 of 2013 under Order XXVI Rule 9 C.P.C. seeking appointment of an Advocate Commissioner to localize the disputed land in survey Nos.21 and 22 and also to fix the boundaries thereof. Basing on the material available on record, the trial Court allowed this petition. Hence, the revision.

6. The point that arises for consideration in this revision is whether the trial Court is justified in allowing I.A.No.203 of 2013 for appointment of Advocate Commissioner?

7. It is needless to say that the plaintiff has to establish that he has been in possession and enjoyment of the suit schedule property, much less as on the date of filing of the suit, in order to seek the relief of perpetual injunction. The Court cannot grant the relief of perpetual injunction in favour of the plaintiff basing on the laches and lacunaes on the part of the defendants. In the present case, the petitioner/plaintiff has to establish that he has been in possession and enjoyment of property to an extent of 340 sq.yds. in survey No.21 of Bheemaram Village as on

the date of filing of the suit. It is the case of the respondents/defendants that they owned land in survey No.22 of the same village. The trial Court, while passing orders in I.A.Nos.100 and 851 of 2013 made the following observation in para 11 of its order, dated 03.06.2014, as under:

“Moreover as per Ex.P15 document, it can be seen that they had sold 411 sq. yards in excess, when they are said to be in possession of 1767 sq. yards only.”

The trial Court further made the following observations in para 13 of the said order, as under:

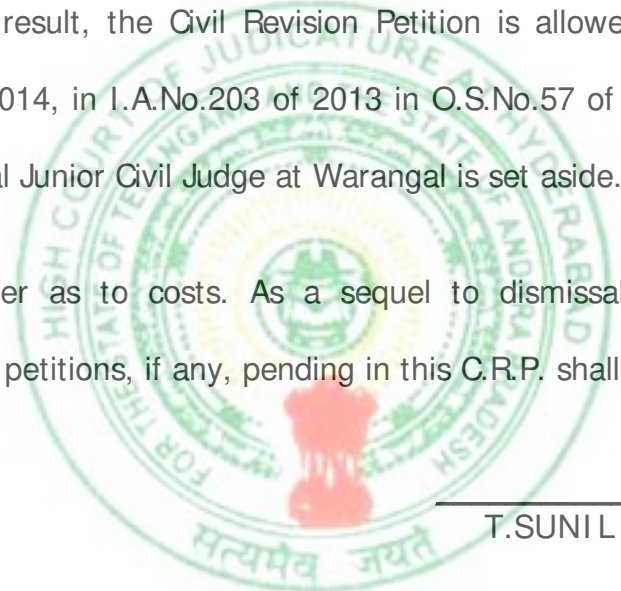
“Even according to the respondents herein they do not have any claim over the landed property situated in Sy.No.21. The document filed by the petitioner shows that he had purchased the suit property i.e., an extent of 340 sq. yards situated in Sy.No.21 and he had obtained construction permission from grampanchayath Office, Palivelpula.”

8. A perusal of the above observations clearly indicates that the petitioner is claiming property in survey No.21, whereas the respondents are claiming property in survey No.22. A perusal of trial Court order clearly reveals that there is no dispute with regard to the identity of the suit schedule property. When there is no dispute with regard to the identity of the suit schedule property, Advocate Commissioner cannot be appointed. The trial Court also made an observation that the Advocate Commissioner's report enables the Court to make correct assessment of evidence on record. This clearly indicates that the trial Court appointed the Advocate Commissioner for collection of evidence in the pre-trial stage, which is impermissible in law. A perusal of para 9 of the order under revision reveals that the trial Court directed the Advocate Commissioner to measure the property in survey Nos.21 and 22 with the help of the Assistant Surveyor. As observed earlier, survey No.22 is not

the subject matter of the suit, in such circumstances, appointment of Advocate Commissioner to measure the land in the said survey number i.e., survey No.22 is not at all necessary. The trial Court allowed I.A.No.203 of 2013 on assumptions and presumptions, without taking into consideration the scope and nature of the suit. If the order of the trial Court is allowed to stand, certainly it would amount to miscarriage of justice. Having regard to the facts and circumstances of the case, it is a fit case to exercise jurisdiction under Article 227 of the Constitution of India to set aside the order under revision.

9. In the result, the Civil Revision Petition is allowed. The order, dated 31.10.2014, in I.A.No.203 of 2013 in O.S.No.57 of 2013 on the file of II Additional Junior Civil Judge at Warangal is set aside.

10. No order as to costs. As a sequel to dismissal of the C.R.P., miscellaneous petitions, if any, pending in this C.R.P. shall stand closed.



T.SUNIL CHOWDARY, J

13th April, 2017
GHN