

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2727 OF 2014

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, is filed challenging the order dated 05.08.2014 in I.A. No.189 of 2014 in O.S. No.394 of 2009 passed by the I Additional Junior Civil Judge, Visakhapatnam, dismissing the petition filed under Rule 9 of Order XXVI of the Code of Civil Procedure, 1908 (for short 'CPC').

The first respondent herein filed the suit for injunction simplicitor, wherein the petitioner herein is the first defendant.

The petitioner herein filed I.A. No.419 of 2012 under Rule 9 of Order XXVI of CPC to appoint Advocate - Commissioner raising several contentions. The said petition was dismissed and the matter was carried to this court in C.R.P. No.6366 of 2012. This court, while deciding the revision petition, observed that when there is a question of identity of the property, it is certainly necessary to take steps for the identification of the property. Therefore, opportunity has to be given to the first defendant to file a petition for appointment of an Advocate-Commissioner to get the property surveyed with the help of a qualified surveyor, otherwise the suit cannot be disposed of effectively. Basing on such observation, the petitioner filed an application in I.A. No.139 of 2013 under Rule 9 of Order XXVI of CPC for appointment of an Advocate-Commissioner to note down the physical features. By order dated 06.05.2013 the learned I Additional Junior Civil Judge appointed Mr.S.Arun Dev as an Advocate-Commissioner. However,

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the Advocate-Commissioner returned the warrant unexecuted on 02.05.2014 assigning his personal reasons. Thereafter the petitioner filed an application in I.A. No.189 of 2014, which was dismissed by order dated 05.08.2014 on the ground that there are latches on the part of the petitioner to get the warrant executed by the Advocate-Commissioner and that appointment of an Advocate-Commissioner is not necessary. If, for any reason localisation of the property is necessary, the court can appoint Advocate-Commissioner suo-motto.

Aggrieved by the same, the present civil revision petition is filed raising several contentions mainly contending that though the Advocate-Commissioner was appointed vide orders dated 06.05.2013 in I.A. No.139 of 2013, the Commissioner returned the warrant unexecuted, on 02.05.2014, hence he filed the present I.A. No.189 of 2014 to appoint Advocate-Commissioner, the same was dismissed by the trial court, it is an error apparent on the face of the record. Therefore the petitioner sought to set aside the order dated 05.08.2014 in I.A. No.189 of 2014 appointing the Advocate - Commissioner.

During hearing, Sri A.S.C. Bose, learned counsel for the petitioner, would contend that when the Commissioner was appointed on 06.05.2013 in I.A. No.139 of 2013 for specific purpose, the warrant was unexecuted by the Commissioner assigning his personal reasons, denial of appointment of the Commissioner for the same purpose, on the ground of delay and latches etc., is an error and it is difficult for the petitioner to establish his claim over the suit property, as there is any amount

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of dispute regarding identification of the property and its boundaries.

Sri Chavali Ramanand, learned counsel for the first respondent, supported the order under challenge in all respects, while contending that the petitioner did not take any steps prior to return of the warrant, to get the warrant executed by the Advocate-Commissioner, and filed the present petition without seeking re-entrustment of the warrant to the same Advocate or any other Advocate. Therefore the Advocate-Commissioner cannot be appointed by the trial court. The order passed by the trial court does not suffer from any legal infirmity, warranting interference of this court and requested this court to dismiss the petition.

Undisputedly, the petitioner filed an application in I.A. No.419 of 2012 under Rule 9 of Order XXVI of CPC, which was ended in dismissal. The said order was under challenge in CRP No.6366 of 2012, wherein this court made clear observation that when there is a question of identity of the property, it is certainly necessary to take steps for the identification of the property. Therefore, opportunity has to be given to the first defendant to file a petition for appointment of an Advocate-Commissioner and to get the property surveyed with the help of a qualified surveyor, otherwise the suit cannot be disposed of effectively. In pursuance of the observation, the trial court appointed Mr.S.Arundev, as Advocate-Commissioner to localise the disputed properties with the help of qualified Mandal Surveyor of MRO office provided by the petitioner and note down the correct survey number of the disputed property along with its boundaries, fixing his fee at

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Rs.2,000/-. But the Commissioner filed a Memo, dated 01.05.2014 informing that due to panchayat elections in the year 2013 the revenue officials were not available and later on, due to the agitations for united Andhra Pradesh some time was consumed, later on, when he tried to contact the revenue officials he was informed that they were engaged in election work. Therefore, he was unable to execute warrant due to his personal difficulty and as such returned the warrant unexecuted. Thus the reasons mentioned in the Memo for return of the warrant unexecuted was due to engagement of revenue officials in election duties in the year 2013 and other election work, not on account of latches on the part of the petitioner. Therefore, latches attributed to the petitioner for his failure to get the warrant executed by the Commissioner is not a ground in view of specific reasons made in the Memo by the Advocate-Commissioner.

The other ground raised by the counsel for the first respondent is that when the trial is reached final stage, the court cannot appoint Advocate-Commissioner.

In fact, Mr.S.Arun Dev was already appointed as Advocate - Commissioner for specific purpose. Merely because there is a variation in the relief claimed in the petition filed under Rule 9 of Order XXVI of CPC, the court can appoint the Advocate-Commissioner irrespective of the stage of the suit for the simple reason that the Commissioner was already appointed for that purpose. But he returned the warrant unexecuted expressing his difficulty in executing the warrant on account of non-cooperation of revenue officials. Therefore, the alleged latches attributed to the

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petitioner are irrelevant and it is not a ground to deny the appointment of Advocate-Commissioner at this stage.

The Commissioner can be appointed by exercising power under Section 75 of CPC read with Rule 9 of Order XXVI of CPC for the purpose of localisation of the property etc., and such power has to be exercised with due care and caution.

In the present case, the trial court already appointed Mr.S.Arun Dev as commissioner for specific purpose, but he returned the warrant unexecuted. In such circumstances, the question of re-entrustment of warrant for the same purpose does not arise.

Taking into consideration the facts and circumstances of the case, I have no hesitation to hold that the trial court on flimsy grounds attributed laches to the petitioner dismissed the petition, which is *prima facie* wrong. Mr.S.Arundev was appointed as Commissioner on 06.05.2013 and he returned the warrant on 02.05.2014 which is almost after lapse of eleven months 25 days. Therefore, laches attributed to the petitioner by the trial court would not come in the way of denial of relief under Rule 9 of Order XXVI of CPC. At this stage, the trial court is not expected to conclude that appointment of Advocate-Commissioner is not necessary to note down the physical features since the Commissioner was already appointed for the same purpose. Therefore, the reasons recorded by the trial court to deny the relief claimed in I.A. No.189 of 2014 filed under Rule 9 of Order XXVI of CPC are erroneous on the face of record. Therefore, the order is liable to be set aside.

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In the result, the civil revision petition is allowed, setting aside the order dated 05.08.2014 in I.A. No.189 of 2014 in O.S. No.394 of 2009 passed by the I Additional Junior Civil Judge, Visakhapatnam, while directing the learned I Additional Junior Civil Judge to appoint any other Advocate as Commissioner to localise the disputed property along with its boundaries with the help of qualified Mandal Surveyor of MRO office, as directed in warrant dated 06.05.2013 within a month from the date of receipt of a copy of this order, and directing the Commissioner to return the warrant executed within two months thereafter. No costs.

Miscellaneous petitions, if any, pending in this civil revision petition is closed.

02.06.2017
BV

M.SATYANARAYANA MURTHY, J

