

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CIVIL REVISION PETITION No.743 OF 2014

ORDER:

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dated 19.12.2013 passed in O.S.No.259 of 2005 on the file of the Court of the II Additional Junior Civil Judge, Tadepalligudem.

2. The predominant contention of the learned counsel for the petitioner is that the trial Court ought not to have appointed the advocate commissioner *suo motu* for the purpose of collection of evidence. He further submitted that the trial Court failed to consider the conduct of the respondent, who filed number of applications for appointment of the advocate commissioner.

3. *Per contra*, learned counsel for the respondent submitted that the Court can appoint an advocate commissioner *suo motu* in order to ascertain the factual aspects to adjudicate the issue involved in the suit effectively.

4. A perusal of the record reveals that the respondent filed O.S.No.259 of 2005 on the file of the Court of the II Additional Junior Civil Judge, Tadepalligudem, against the petitioner for recovery of possession of the plaint schedule property and also for mandatory injunction. While pending the suit, the respondent herein filed I.A.No.2235 of 2005 for appointment of advocate commissioner for inspection of the plaint schedule property and the trial Court allowed the said petition by appointing the advocate commissioner. Due to non-cooperation of the respondent, the

learned advocate commissioner returned the warrant on 08.08.2011. The respondent also filed I.A.No.292 of 2012 in O.S.No.259 of 2005 under Sections 75, 151 and Order XXVI Rule 9 of C.P.C. for appointment of advocate commissioner to measure the plaint schedule property. On 20.04.2012 the trial Court dismissed the said petition. For one reason or other, the respondent did not choose to challenge the order dated 20.04.2012 in I.A.No.292 of 2012. The respondent herein again filed I.A.No.1700 of 2013 in O.S.No.259 of 2005 for appointment of the advocate commissioner. After affording a reasonable opportunity to both parties, the trial Court dismissed the said petition on 26.07.2013. The respondent did not choose to challenge the order in I.A.No.1700 of 2013. On 19.12.2013 the trial Court *suo motu* appointed the advocate commissioner. Hence, the revision.

5. As rightly pointed out by the learned counsel for the respondent, the Court can appoint an advocate commissioner in view of Order XXVI Rule 9 of C.P.C. The respondent herein filed the suit for recovery of possession of the plaint schedule property and mandatory injunction. The pleadings itself clearly demonstrates that the respondent is not in possession of the property. The trial Court felt it necessary to appoint the advocate commissioner in order to ascertain whether the petitioner herein, who is the defendant, has encroached the plaint schedule property or not. There is no mention in the affidavit filed by the respondent in support of petition for appointment of advocate commissioner that the petitioner herein encroached the plaint schedule property. In such circumstances, the trial Court is not justified in appointing the advocate commissioner to ascertain whether the petitioner/

defendant encroached the plaint schedule property or not. It is a settled principle of law that an advocate commissioner cannot be appointed for the purpose of collection of the evidence. When the respondent/plaintiff himself is not interested to co-operate with the advocate commissioner appointed in I.A.No.2235 of 2005, where is the guarantee that he will co-operate with the advocate commissioner appointed by the Court *suo motu*. The findings recorded by the trial Court are not sustainable either on facts or in law.

6. Taking into consideration the facts and circumstances of the case, I am of the considered view that it is a fit case to allow the revision.

7. In the result, the Civil Revision Petition is allowed setting aside the *suo motu* order dated 19.12.2013 passed in O.S.No.259 of 2005 on the file of the Court of the II Additional Junior Civil Judge, Tadepalligudem, appointing the advocate commissioner. There shall be no order as to costs.

8. Consequently, Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

T.SUNIL CHOWDARY, J

Date: 17.02.2017
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