

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No.3953 of 2016

ORDER:

Assailing the order passed in I.A.No.315 of 2016 in O.S.No.104 of 2011 on the file of the Additional Senior Civil Judge, Chittoor, wherein application filed to summon Advocate Commissioner to be examined as a witness for proving the contents of his report was rejected, the present civil revision petition is filed under Article 227 of the Constitution of India.

2. The facts which led to filing of the present civil revision petition are as under:

The petitioner-plaintiff filed O.S.No.104 of 2011, seeking injunction restraining the defendants therein from in any way interfering with the petitioner-plaintiff's possession and enjoyment of the suit schedule property. Pending the said suit, I.A.No.305 of 2016 came to be filed to summon Advocate Commissioner by name Sri K. Nagendra Kumar to give evidence in respect of the report and sketch filed by him in O.S.No.502 of 2011. The contents of the affidavit filed in support of the said I.A., show that the plaintiff claims herself to be the absolute owner of the suit schedule property, which is in occupation of her mother. It is stated that the mother of the petitioner-plaintiff executed a will in her favour on 05.04.2004, bequeathing all the properties; since then the petitioner-plaintiff claims to be in possession of the property. The mother of the plaintiff is said to have developed the land by raising mango garden and also dug a borewell. It is further stated that when the respondents-defendants tried to interfere with the property, the present

suit came to be filed; after filing of the suit, the respondents-defendants, at the instigation of the Mandal Revenue Officer, G.D.Nellore, started making efforts to occupy the property and also destroyed the mango garden and borewell; this action led the petitioner-plaintiff to file O.S.No.502 of 2011 against the District Collector and Mandal Revenue Officer, G.D.Nellore. In the said suit, she filed I.A.No.629 of 2011 for appointment of an Advocate Commissioner to note down the physical features of the schedule property of that suit. The Court is said to have appointed one Sri K. Nagendra Kumar as Advocate Commissioner, who visited the site, noted the existing mango garden etc., and then filed his report along with the sketch. The averments in the affidavit filed in support of the I.A., also show that the said report of the Advocate Commissioner was marked in the present suit, i.e. O.S.No.104 of 2011. Since the report came to be marked subject to objections, it is alleged that examination of Advocate Commissioner is just and necessary.

3. Counter-affidavit came to be filed opposing the same. It is urged that since the subject matter in both the suits being different, there is no necessity to mark the report of the Advocate Commissioner in O.S.No.502 of 2011 in the present suit.

4. After considering the rival submissions made, the trial Court rejected the said application on the ground that defendants in O.S.No.104 of 2011 are not parties in O.S.No.502 of 2011 and since there is no notice to the defendants in O.S.No.104 of 2011, it may not be proper to examine the Advocate Commissioner. Challenging the same, the present civil revision petition came to be filed.

5. Learned counsel for the petitioner mainly submits that since the property in both the suits, i.e. O.S.No.104 of 2011 and O.S.No.502 of 2011, being one and the same, it would be just and necessary to examine the Advocate Commissioner for a just decision of the case. He further submits that since the report and the sketch of the Advocate Commissioner are already marked, no harm would be caused to the respondents-defendants if Advocate Commissioner is examined.

6. The same is strongly opposed by the learned counsel for the respondents-defendants, stating that proceedings of one case cannot be looked into in other case. He further submits that, if necessary, the learned counsel can ask for appointment of Advocate Commissioner in this case also for proving the defence sought to be raised.

7. The short question that arises for consideration in this case is whether the trial Court was right in rejecting the request of the petitioner-plaintiff in examining the Advocate Commissioner, when the report and sketch of the Advocate Commissioner are already marked. The normal rule is that the evidence should not be shut at the threshold unless the party had been negligent or non-diligent in transacting the litigation or where such evidence cannot be permitted at all in view of any prohibition. The issue which is now raised herein is no more *res integra* in view of the judgments of this Court in **M. Rama Naidu And Anr. V. B. Srinivasulu Naiduⁱ** and **Haridasyam Srinivasa Murthy vs M. Janardhan Reddy And Ors.ⁱⁱ**. In *Rama Naidu's Case* (1 supra), this Court, has held as under:

“The admissibility of a document as evidencing a transaction is different from admitting the document to

prove the contents thereof. So far as the admissibility of a document as evidence of a transaction is concerned, anybody who obtained the certified copy of the said document can produce the same for the purpose of showing the said transaction and the document is admissible for that purpose. But, if the party wants to prove the contents, they can be proved by the author of the document. Therefore, if the Commissioner is not examined, the document would not become inadmissible as contended by the learned Counsel but the probative value of the report would be very weak.”

8. In *Haridasyam Srinivasa Murthy's* case (2 supra) also, this Court was dealing with examination of Advocate Commissioner whose report was already marked. It was also a case where plaintiffs in both the suits were different. Dealing with the said aspect, a learned single Judge of this Court held as under:

“It is true that such report being part of the record can be gone into even without examination of such Commissioner but however, in a case of this nature whether in yet another suit though the 1st respondent-plaintiff was not a party to the said litigation, a Commissioner was appointed, it would be just and appropriate to permit such Commissioner to be examined for the limited purpose of explaining in relation to the report of the Commissioner already submitted by him. It is needless to say that the value to be given to such evidence may have to be appreciated at the appropriate stage. It is no doubt true that it is a suit filed for mere perpetual injunction, but incidentally, the other questions also may have to be gone into. In view of the fact that the said document was already marked, this Court is of the considered opinion that the learned Judge had not exercised the discretion properly in declining to summon and permit the petitioner to examine R. Venkateswar Rao,

Advocate Commissioner appointed in O.S. No. 1036 of 2000. In view of the same, the impugned order so far as it relates to declining summoning of Mr. R. Venkateswar Rao, the Advocate Commissioner is hereby set aside.”

9. In view of the judgments referred above, it is clear that the trial Court erred in rejecting the request of the petitioner-plaintiff. Hence, the impugned order insofar as refusing to summon the Advocate Commissioner to give evidence and filing of report and sketch filed in O.S.No.502 of 2011, is hereby set aside. However, the evidentiary value to such evidence may have to be appreciated at the appropriate stage. Since the property in both the suits is same and both the suits are filed seeking injunction against persons who are trying to encroach on to the property, one by private persons and other by Government officials, no prejudice would be caused if Advocate Commissioner is summoned to prove the contents of the report and sketch which are already marked.

10. Civil revision petition is accordingly allowed to the extent indicated above.

Miscellaneous petitions pending, if any, in this C.R.P., shall stand closed. No order as to costs.

C. PRAVEEN KUMAR, J

8th February, 2017
MRR

ⁱ 1993 (2) ALT 471

ⁱⁱ 2007 (3) ALT 6