

THE HON'BLE SRI JUSTICE M.GANGA RAO

C.R.P.NO.1526 OF 2013

ORDER:

This revision petition, under Article 227 of the Constitution of India, is filed being aggrieved by the order dated 06.02.2013 passed by the I Junior Civil Judge, City Civil Court, Secunderabad, in I.A.No.1001 of 2011 in O.S.No.276 of 2010 whereby the application filed by the respondents under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for brevity 'CPC') was allowed.

2. Originally, the suit is filed by the petitioner herein for perpetual injunction claiming that he is the absolute owner and possessor of plot bearing No.9 forming part of Sy.Nos.23/1, 23/2 and 24 admeasuring 267 square yards situated at Rasoolpura, Balamrai, Secunderabad, having purchased the same from Bharani Co-operative Housing Society Limited.

3. The respondents herein filed the above I.A under Order XXVI Rule 9 CPC seeking to appoint an Advocate Commissioner to inspect the suit schedule property so as to ascertain whether the suit schedule property forms part of Sy.No.22 at Rasoolpura Village, as claimed by the petitioner herein or Sy.Nos.23/1, 23/2 and 24 at Rasoolpura Village, as claimed by the respondents herein, with the assistance

of Revenue Surveyor and also contending that the petitioner was never in possession of the suit property and temples have been in existence at the site for the past several decades.

4. The revision petitioner filed a counter affidavit denying the contentions of the respondents herein before the Court below that the respondents are no way connected to any of the survey numbers; they have no right over the said property in any manner; injunction was granted against the respondents herein in I.A.No.326 of 2010 on 30-04-2011; as the said order became final, the same is binding on the respondents herein; there are no merits in the petition filed by the respondents and thus prayed to dismiss the I.A.

5. The trial court after hearing both counsel and after perusing the record while allowing the I.A, held in paragraph No.8, as under:-

“ 8. Perused the material on record. The suit has been filed by the respondent/plaintiff for perpetual injunction against the petitioner/defendant, claiming absolute ownership over the suit schedule. A perusal of the suit schedule property in the plaint shows, that the suit schedule property forms part of Survey Nos.23/1, 23/2 and 24. Whereas it is the contention of the petitioner/defendant that the suit schedule property forms part of Survey No.22, on which respondent/plaintiff has no right and the temples are in existence for the past several decades on that land. Order 26 R.9 CPC reads as follows:

“ in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, the court may

issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court.”

A perusal of the pleadings shows there is a serious dispute with regard to the location of suit schedule property and an issue also framed in this regard. In these circumstances, I feel it is just and necessary to appoint an Advocate Commissioner, for the purpose of adjudication of the matter in dispute. The point is answered accordingly.”

6. Aggrieved by the said order, the petitioner filed the present revision *inter alia* contending that the respondents are not claiming any title personally, but projecting as if it is part of site belonging to temple. However, no temple authorities have come forward to contest the matter and the suit is also not against temple. As such, allowing I.A and directing local inspection is unwarranted and impermissible under law.

7. To buttress the above contention, the learned counsel for the petitioner, relied on the judgment of this Court in *Penta Urmila and others vs. Karukola Kumaraswamy and others*⁽¹⁾, wherein in para-6 of the judgment held as under:-

“In a suit for permanent injunction, the vital and important issue is whether the plaintiffs are in possession of the suit schedule land and whether there was attempt by the defendant/s to interfere with such possession of plaintiffs. The burden is entirely on the plaintiffs to bring convincing and cogent evidence on record and for so doing, it is not

¹ 2005(2) ALD 130

permissible for them to invoke Order XXVI Rule 9, which is intended for different purpose. Further, if at this stage, Advocate Commissioner files a report, as directed the Appellate Court with the assistance of Mandal Surveyor it would certainly amount to introducing additional evidence which is ordinarily not permissible unless proper application is made under Order XLI Rule 27 satisfying the conditions therein ...”

8. Further, the learned counsel for the petitioner relied on another judgment of this Court in *Arredla Ram Reddy and others vs. Arredla Alivelamma*⁽²⁾, wherein in para.6 of that judgment it has been held as under:-

“It is true that appointment of Commissioners under Order 26 C.P.C., is not confined to any particular circumstances. Depending on the necessity in a suit, Commissioners can be appointed, even to note down the physical features. This, however would depend on the nature of relief claimed in the suit. When the physical features of the suit schedule property are of hardly of any relevance, in a suit for permanent injunction, the necessity to appoint a Commissioner does not arise. The resultant report is prone to be used as a material, to support the plea of possession etc. Such a course of action is impermissible in law.”

9. The learned counsel for the petitioner also relied upon an unreported order passed by this Court on 29.06.2007 in C.R.P.No.5811 of 2005, and contended that the respondents have to prove their case and it is not for the

² 2004(5) ALD 388

petitioner to disprove the case of the respondents. In the unreported order relied by the petitioner i.e., in C.R.P.No.5811 of 2005, petitioners therein are the plaintiffs and their case was that some columns have been raised in the schedule property and they shall be removed. In those circumstances, this Court held that it is for the plaintiffs to prove their case but not for the defendants to disprove the same and further held that the Commissioner should not have been appointed in such a situation. Coming to the case on hand, the respondents, who are the defendants in the suit, filed I.A. for appointment of the Advocate Commissioner for identification of the suit schedule property with the help of Surveyor, but not the petitioner/plaintiff and, therefore, the facts of the present case are different from that of the facts of the case relied upon by the revision petitioner.

10. On the other hand, the learned counsel for the respondents submits that the suit schedule property forms part of Sy.No.22 in which the petitioner/plaintiff has no right and the temples are in existence for the past several decades in that land. Order XXVI Rule 9 envisages that in any suit, in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, then the Court may issue a commission

to such person as it thinks fit directing him to make such investigation and to report thereon to the Court and in those circumstances the trial court rightly allowed the I.A.1001 of 2001 and appointed the Advocate Commissioner to inspect the suit schedule property and ascertain whether the property forms part of Sy.No.22 or Sy.Nos.23/1, 23/2 and 24 situated at Rasoolpura, Balamrai, Secunderabad with the assistance of Revenue Surveyor and it could not be said that it amounts to collection of evidence in support of the parties in the suit and there is no illegality or irregularity in appointing the Advocate Commissioner.

11. In support of his contention the counsel for the respondents while relying on the judgments reported in *Donadulu Uma Devi vs. Girika Katamaiah @ Basaiah and others*⁽³⁾; *Mundladinne Gopal Reddy v. P.Ramachandra Reddy*⁽⁴⁾; and *Bandi Samuel and another v. Medida Nageswara Rao*⁽⁵⁾, contended that when there is a dispute with regard to the identification of the suit schedule lands, appointing an Advocate Commissioner cannot be said to be an attempt to gather evidence; when the dispute is with regard to identity of the lands and its location to elucidate the Court in dispute with regard to identity of the land, the Court has rightly

³ 2013(1) ALT 548

⁴ 2016(5) ALT 728

⁵ 2017(1) ALT 493

appointed an Advocate-Commissioner; the localization of the property in question is necessary for proper disposal of the injunction suit; a qualified surveyor can only properly demarcate the property in question and any amount of oral evidence in that behalf not sufficient when there is a dispute as to the identity of the property; and appointment of Advocate Commissioner for localization of the property even by taking necessary assistance from the qualified surveyor does not amount to collecting evidence. The counsel for the respondents further argued that there is no absolute bar for appointment of Commissioner in a suit for injunction under the provisions of Section 75 and Order XXVI Rule 9 CPC and also as per the law laid down by this Court in *Bandi Samuel* (5 *supra*).

12. Here, in this case the dispute is with regard to identity of the property and interference of the respondents. The Advocate Commissioner is appointed only to localize the suit schedule property and it would not amount to gathering of evidence in support of the parties to the suit. The Commissioner's report helps the Court in deciding the *lis* properly by considering the evidence on record in its proper perspective. The rights of the parties would not change in respect of the suit schedule property.

13. Having considered the rival contentions and judgments put forth by both the parties, I am of the considered view that the order passed by the trial Court in appointing the Advocate Commissioner to inspect the suit schedule property and to ascertain whether the property forms part of Sy.No.22 or Sy.Nos.23/1, 23/2 and 24 in Rasoolpura Village, with the assistance of Revenue Surveyor is not contrary to the provisions of Order XXVI Rule 9 CPC and, therefore, the revision petition deserves to be dismissed.

14. Accordingly, the Civil Revision Petition is dismissed. No costs. Miscellaneous petitions pending, if any, shall stand closed.

03.11.2017
TSNR



M.GANGA RAO, J