

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.4796 OF 2015

ORDER:

This civil revision petition is filed under Section 115 of C.P.C questioning the order in E.A.No.244 of 2015 in E.A.No.281 of 2014 in E.P.No.52 of 2013 in O.S.No.411 of 2004 dated 03.09.2015 passed by the Additional Senior Civil Judge, Tirupati, declining to appoint Advocate Commissioner to identify E.P. Schedule Property.

The respondents filed E.P.No.52 of 2013 in O.S.No.411 of 2004 for delivery of possession of the property based on the decree passed by the Court. The petitioner herein filed a petition under Order 21 Rule 97, 101 r/w Section 47 C.P.C, restraining the first respondent/decreed holder from dispossessing or obstructing the delivery of possession of the petition schedule property, contending that he is the owner of the **schedule** property and by showing wrong boundaries, the D.Hr/respondent is about to deliver and such delivery was resisted by this petitioner by filing petition under Order 21 Rule 97, 101 C.P.C, claiming title of the property.

As there is a dispute regarding identification of property, the petitioner sought appointment of Advocate Commissioner by filing an application under Section 151 C.P.C. But, the Court below dismissed the application on the ground that, at this stage, Advocate Commissioner cannot be appointed to identify the property, as it amounts to collection of evidence. This order is now challenged before this Court on the ground that, identification of the property is necessary to decide the real controversy between

the parties and therefore, for such purpose, an Advocate Commissioner has to be appointed. But, the Court below did not consider the specific contention. Apart from that, specific measurements were not mentioned in the schedule annexed to the E.P and decree schedule and in such case, it is difficult to identify the property and to substantiate his contention, learned counsel for the petitioner sought for appointment of Advocate Commissioner, but the Court below did not consider this contention in proper perspective and committed an error.

During hearing, learned counsel for the petitioner contended that, as there is a dispute regarding identification of the property, except by appointing an Advocate Commissioner, no other mode is available to identify the same. But, the court below did not consider the request on erroneous appreciation that it amounts to collection of evidence and prayed to set-aside the order.

Learned counsel for the respondents supported the order of the Trial Court in all respects, while contending that an Advocate Commissioner was appointed earlier and Commissioner's report was marked as Ex.A-4 before the Trial Court, that is sufficient to identify the property and at this stage, this petition cannot be ordered.

The petitioner is a third party to the suit and resisting the delivery of possession of the property on the ground that, the schedule annexed to the plaint is bereft of details like measurements of four boundaries, while claiming that he is the owner of the property. The Commissioner can be appointed only under Order 26 Rule 9 C.P.C for specific purpose to elucidate. As

there is a specific provision for appointment of Advocate Commissioner i.e. Order 26 Rule 9 & Section 75 C.P.C, Court cannot exercise its inherent jurisdiction under Section 151 C.P.C. Thus, the petition under Section 151 C.P.C for appointment of Advocate Commissioner is not maintainable. Moreover, such power can be exercised only to elucidate certain facts. But filing a petition to identify the property when the property is described specifically in the schedule annexed to the plaint would amount to collection of evidence.

The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 inter alia for elucidating any matter in dispute.

Appointment of Commissioner in terms of part III i.e. matter “Incidental proceedings” of CPC is provided by Section 75 of the Code. It is provided therein that subject to such conditions and limitations as may be prescribed, the Court may issue a commission –

- a) To examine any person;
- b) To make a local investigation;
- c) To examine or adjust accounts; or
- d) To make a partition;
- e) To hold a scientific, technical, or expert investigation;

- f) To conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;
- g) To perform any ministerial act.”

In **Sarala Jain and others v. Sangu Gangadhar**¹, this Court held that appointing advocate commissioner by the trial Court for the purpose of demarcating scheduled property and fix boundary stones to the property of the respondent amounts to granting pre-trial decree as it satisfies part of the reliefs claimed in the suit. In such case, commissioner cannot be appointed for the said purpose. Further, it was held that to appoint commissioner, Court has to keep in mind the following.

- 1) Total pleadings of both parties;
- 2) Relief claimed in suit;
- 3) Appointment of advocate commissioner for specific purpose at interlocutory stage shall not amount to grant pre-trial decree; and
- 4) Necessity to appoint advocate commissioner to decide real controversy between parties.

In **Krishnamurthy, T.K. vs. Tamil Nadu Water and Drainage Board**², learned single Judge of Madras High Court held that Advocate Commissioner should not be appointed to gather evidence to prove the case of parties, since the parties should prove their case by letting in legally acceptable evidence to prove their case by letting in legally acceptable evidence and the report of the

¹ 2016(3)ALT132

² 2006 (5) CTC 178

Commissioner can only aid the Court in evaluating the evidence to come to just conclusion.

Thus, Advocate-Commissioner cannot be used for fact finding purposes and as such the order passed by the Court below is not sustainable under law.

In **Devadoss vs. A. Duraisingh**³, learned single Judge of Madras High Court held that Advocate Commissioner cannot be used for fact finding purposes and as such the order passed by the Court below is not sustainable under law. It is always open to the decree-holder to examine the concerned persons as witnesses and prove as to how and in what manner they got the cable connection relating to the suit.

In **M.P. Appulu vs A. Fatima Zohra and another**⁴ learned single Judge of Madras High Court held that there are circumstances in which it is only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the building could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable rights of the parties. It may so happen when a landlord high handedly starts pulling down a portion of the main building the tenant would be greatly interested in securing a Commissioner appointed forthwith. If the right of tenant to have access to staircase is obstructed, he is most interested in seeking appointment of Commissioner and secure immediate relief for restoring amenities which is assured to him under Section 17 of

³ 2002 (3) CTC 748

⁴ 1982 (2) MLJ 340

the Act". It was also held that if application for appointment of Commissioner is not properly understood and appreciated and resulted in dismissal of the application to hold that an appeal would not lie, which would result in taking away the affected party's right, which is enshrined in the Act itself.

Therefore, in view of the law declared by various Courts in the judgments referred supra, an Advocate Commissioner cannot be appointed to collect evidence in a pending suit. But, here, in this case, the petitioner sought for appointment of an Advocate Commissioner for identification of the property in dispute. Since, the petitioner himself is claiming certain property within the boundaries specified, the question of identification is irrelevant and if, for any reason, the Court concludes that the property covered by the decree is totally different from the property being claimed, the Court can pass appropriate order, subject to recording satisfaction based on legally acceptable evidence.

Thus, the order passed by the Court below does not suffer from any illegality or legal infirmity, warranting interference of this Court under Section 115 C.P.C. Therefore, I find no ground to reverse the order in E.A.No.244 of 2015 in E.A.No.281 of 2014 in E.P.No.52 of 2013 in O.S.No.411 of 2004 dated 03.09.2015 passed by the Additional Senior Civil Judge, Tirupati and the civil revision petition is liable to be dismissed.

However, the petitioner is entitled to raise all his contentions in E.P.No.52 of 2013 in O.S.No.411 of 2004 and in the petition filed under Order 21 Rule 97, 101 r/w Section 47 C.P.C.

In the result, the civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:30.01.2018

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