

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CIVIL REVISION PETITION No.3068 of 2014

ORDER:

This civil revision petition is filed questioning the order that is passed in I.A.No.170 of 2014 in O.S.No.1832 of 2011 on 13.08.2014 by the VI Junior Civil Judge, City Civil Court, Hyderabad.

The suit O.S.No.1832 of 2011 is filed by the plaintiff therein for an injunction against defendant No.1/the Greater Hyderabad Municipal Corporation for perpetual injunction restraining the defendant Corporation, its employees, workmen etc., from demolishing the suit schedule property either in part or in whole. There is no other relief claimed in the suit. In the said suit, the 2nd defendant impleaded himself as a party by filing I.A.No.569 of 2012. Later, the very same 2nd defendant moved an application I.A.No.170 of 2014 seeking appointment of a commissioner. This application came to be allowed. Questioning the same, the present revision petition is filed.

This court has heard Sri J.Prabhakar, learned counsel for the petitioner, and Sri Ashok Kumar Agarwal, learned counsel for the respondents.

Sri J.Prabhakar points out that the suit is a simple suit for injunction filed against the Greater Hyderabad Municipal Corporation questioning their action in demolishing the suit schedule property which is described at the end of the plaint. In that suit, the 2nd defendant got himself impleaded and later filed I.A.No.170 of 2014. The learned counsel drew the attention of this court to paragraph No.5 of the affidavit filed in support of the application in I.A.No.170 of 2014, wherein, the deponent

states that due to construction made by the plaintiff/present revision petitioner, the property of the 2nd defendant/petitioner in I.A.No.170 of 2014 got damaged. His contention is that he is a neighbour and due to construction made by the revision petitioner, his property got damaged. Therefore, the 2nd defendant sought for appointment of a commissioner to inspect the suit schedule property and to measure the plinth area, to take photographs etc.

Learned counsel points out that the lower court committed a gross error in appointing a commissioner. It is his contention that matters which are not covered by the pleadings and matters which are not relevant for the case on hand are sought to be brought into record through the advocate commissioner. He therefore submits that the court below committed a fundamental error in appointing an advocate-commissioner in the facts and circumstances of the case.

On the other hand, Sri Ashok Kumar Agarwal, the learned counsel for the respondents, submits that there is evidence to show some damage occurred to the property of the 2nd defendant due to the construction made by the revision petitioner. The learned counsel also submits that by the appointment of a commissioner, no harm will be caused to the plaintiff and that for proper adjudication of the entire matter, evidence of the commissioner and his report would be useful.

The point for consideration is whether in the facts and circumstances of the case, the appointment of an advocate commissioner is called for or not, and whether the lower court has rightly exercised its jurisdiction.

The power of a court to appoint an advocate commissioner cannot be doubted. The question is whether in the facts and circumstances of

the case and for the purpose of enquiry in this case, whether the appointment of a commissioner was necessary. As noticed earlier and as submitted by the learned counsel for the respondents, the suit is a simple suit for injunction restraining the 1st defendant-municipal corporation from demolishing the suit schedule property. The plaintiff's case is that the 1st defendant is acting illegally and contrary to law and demolishing his property. Therefore, he filed a suit for injunction.

In the suit for an injunction and the relief is claimed only against defendant No.1 Corporation, the 2nd defendant has filed this application to appoint a commissioner. Even the reason for the appointment of a commissioner, as spelt out in paragraph No.5, is that due to the so-called illegal construction made by the revision petitioner/plaintiff, the property of the petitioner in I.A.No.170/2014/2nd defendant in the suit got damaged.

This court notices that even if the allegations mentioned in paragraph No.5 of the affidavit are true, they gave rise an independent cause of action for the 2nd defendant to make a claim against the plaintiff in the suit, the revision petitioner herein. This fact was overlooked by the court below. In addition, even if the damages were caused to the property of the 2nd defendant, the need and necessity for inspecting the suit schedule property, and to measure the same and also to take photographs is not explained. Mere fact that constructions are made in the suit schedule property cannot be a ground to appoint a commissioner. The purpose of appointing a commissioner in certain cases is to ascertain some facts which the court cannot directly ascertain by itself. In any suit in which the Court deems a local investigation to be required or proper for the purpose of elucidating any matter in dispute, or of ascertaining the

market value of any property, or the amount of any *mesne profits* or damages or annual net profits, 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, as per provisions of Order 26 Rule 9 CPC. The court below did not keep in mind any of these factors in appointing a commissioner.

Even if there is some damage to the property of the 2nd defendant, who is the 1st respondent herein, the cause of action is independent and it cannot be clubbed with or decided in the present suit, which is a suit for injunction. The court below also failed to notice that there is no relationship between the damages that are said to have occurred and the prayer sought. The prayer is to appoint an advocate commissioner to measure the plinth area and also to take photographs of the construction. This court finds absolutely no connection between the averments in the petition and the need to appoint a commissioner. The entire exercise of power by the court below is contrary to the settled principles of law. There are absolutely no merits in the order that is impugned.

For the foregoing reasons, the civil revision petition is allowed, setting aside the impugned order. In the circumstances, no costs.

Pending miscellaneous applications, if any, shall stand closed in consequence.

D.V.S.S.SOMAYAJULU,J

Date: 30.11.2018
Dsr