

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 1543 of 2018

ORDER:

1) Assailing the order dated 30.11.2017, passed in I.A.No.1337 of 2017 in A.S.No.197 of 2014 on the file of the XII Additional District Judge, Pithapuram, wherein the request of the petitioners to appoint an advocate-commissioner to measure the schedule land of both the parties and to demarcate the respective shares with regard to enjoyment, is rejected, the present Civil Revision Petition came to be filed under Article 227 of the Constitution of India.

2) The facts in issue are as under:

The petitioners herein filed O.S.No.79 of 2002 for permanent injunction restraining the defendants and his men from interfering with their possession and enjoyment over the plaint schedule land. After a full fledged trial, the said suit was dismissed on 24.06.2010. Challenging the said judgment and decree, A.S.No.197 of 2014 came to be filed before the Court of XII Additional District Judge, Pithapuram. Pending appeal, I.A.No.1337 of 2017 came to be filed invoking Order XXVI Rule 9 of C.P.C., for appointment of an advocate commissioner to measure the land of both parties,

to demarcate their respective shares with regard to enjoyment of the parties and to locate the land.

3) A counter came to be filed opposing the same. It is stated that in the year 1981 the very same petitioners filed O.S.No.194 of 1981, in which I.A.No.749 of 1983 came to be filed seeking appointment of an advocate-commissioner to locate the very same property, which is subject matter of issue herein. An advocate-commissioner visited the locality, executed the warrant and filed his report. Basing on which O.S.No.194 of 1981 filed by the petitioner for declaration of title over the claim of 20 cents of land was negated and dismissed. It is said that suppressing the said fact, the present I.A. came to be filed. Apart from that it is stated that though the said advocate-commissioner's report was not specifically marked in the order impugned in the appeal, but the said report was considered while dismissing the suit.

4) Considering the rival submissions made, the Court below rejected the request of the petitioners. Challenging the same, the present Civil Revision Petition is filed.

5) The question that falls for consideration is whether the request of the petitioners seeking appointment of an advocate-commissioner can be considered in the appeal, where the advocate-commissioner was already appointed in

another suit filed by the very same party and in respect of the very same property?

6) As seen from the record, earlier, the petitioners herein filed O.S.No.194 of 1981 seeking partition of the property. Pending the said suit, I.A.No.749 of 1983 came to be filed for appointment of an advocate-commissioner to visit the locality and to file a report. The property which was sought to be localized in the said suit is the same property which is subject matter of dispute. Pursuant to the order made therein, the advocate commissioner-executed the warrant and filed his report. Taking into consideration the report of the advocate-commissioner, the trial Court rejected the request of the petitioners and dismissed the suit. Long thereafter, O.S.No.79 of 2002, which is impugned in the appeal, came to be filed seeking injunction restraining the defendants therein from interfering with their possession and enjoyment. Pending the said suit I.A.No.453 of 2002 came to be filed seeking appointment of an advocate-commissioner, but the same was not prosecuted though filed in the year 2002. Ultimately, the said I.A. came to be closed in view of the judgment in the main suit itself.

7) The argument of the learned counsel for the petitioners is that merely because the suit filed for declaration of title is

rejected does not by itself mean that even a suit for injunction would not lie. According to him, the issues involved in both the proceedings are different and finding of one cannot have any bearing on the other. In other words his plea is that even if the petitioners have no title over the property but still they are in possession and seek an injunction till they are dispossessed in accordance with law. He further submits that in a suit for injunction cause of action changes every minute and since the earlier advocate-commissioner's report was 35 years earlier, it would be just and proper another advocate-commissioner is appointed to localize the property.

8) As seen from the application made before the Court below, the request of the petitioners is not only for localization of the property but the request appears to be for appointment of an advocate-commissioner to measure the schedule land of both the parties and to demarcate the respective shares with regard to enjoyment of the parties and to locate the land. The question of appointment of an advocate-commissioner to measure the land of both parties, demarcate their respective shares to find out as to the enjoyment by the party cannot be accepted. If the said request is accepted, it not only amounts to collecting the evidence with regard to the person's possession, enjoyment

and right over the property but also deciding the subject matter of appeal itself. Hence the request made in the said application cannot be accepted.

9) At this stage, learned counsel for the petitioners would contend that though the request is wrongly worded, in substance the plea of the petitioners is only to localize the land. When the suit property is open land admeasuring 20 cents situated in Sy.No.171 of Kondevaram village, the question of property changing its status every minute as urged by the petitioners cannot be accepted. A perusal of the judgment in O.S.No.79 of 2002, it would clearly show that it was specifically mentioned that “there is a Koradi between green marked portion and red marked portion shown in the plaint plan belonging to Medisetti Suryanarayana and the said Medisetti Suryanarayana sold the property to the defendants 1 and 2 and they are enjoying the same”. The averments in the plaint itself goes to show that Medisetti Suryanarayana is in possession and enjoyment over the Koradi which is on the western side of his land and the same was subsequently sold to the defendant. The Court below perused the earlier judgments in O.S.Nos.153 of 1981 and 194 of 1981, wherein the plea of the petitioners for declaration of title over the property mentioned therein rejected and which has become final, was taken into consideration along

with the advocate-commissioner's report filed therein. In para No.17 of the said judgment, the trial Court observed that "in view of the admission made by PW.1 about the commissioner report in previous cases, as the finding of the Junior Civil Judge in O.S.No.153 of 1981 has becomes final and the plaintiffs cannot take a different plea and go back on the finding given by the Court which was binding on the plaintiffs".

10) It is well established law that an application under Order XXVI Rule 9 of C.P.C., can be entertained for appointment of an advocate-commissioner for local investigation to note down the physical features regarding possession of property in a suit for bare injunction, but it cannot be ordered as a matter of course. The very wording of Rule 9 of Order XXVI says that in any civil suit in which the Court deems a local investigation is necessary 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 can issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. Therefore, the discretion is left to the Court to find out as to whether it is just and proper for appointment of an advocate-commissioner.

11) Learned counsel for the petitioners tried to rely upon the judgment of this Court in *Velaga Narayana and others v. Bommakanti Srinivas and others*¹ in support of his plea. But it was a case where the trial Court rejected the appointment of an advocate-commissioner on the ground of availability of Mandal Surveyor's report, but the High Court set aside the same on the ground that when the report of Surveyor is disputed by the petitioners and a genuine dispute exists between the parties in relation to the identity of the subject matter of suit, the Court below was not justified in rejecting the request of appointment of an advocate-commissioner.

12) Learned counsel for the petitioners also relied upon a judgment of this Court in *Donadulu Uma Devi v. Girika Katamaiah @ Basaiah and others*², to show that appointment of an advocate-commissioner is necessary having regard to the facts in issue. I am of the view that the said judgment also may not apply to the case on hand for the reason that in the said case, the Court ordered appointment of Commissioner as there was some dispute with regard to the identity of the property.

¹ (2014) 3 ALD 605

² (2013) 2 ALD 86

13) As stated above, earlier an advocate-commissioner was appointed, who submitted a report in the earlier suit and the contents of which were spoken to by a witness examined in the present suit and the same was referred to in the judgment impugned in the appeal. The report of the advocate-commissioner in the said suit was between the same parties and with regard to very same property. Since it is an agricultural land and the claim of the petitioners is that agriculture work is still going on in the said property without any change in the nature of the land, appointment of another advocate-commissioner may not be necessary. In case the appellate Court, during the adjudication of the appeal feels that another report of advocate-commissioner is warranted for better appreciation of the matter, it can do so on its own.

14) Accordingly, the Civil Revision Petition is disposed of. There shall be no order as to costs. The miscellaneous petitions, if any pending, in this Civil Revision Petition shall stand closed.

C. PRAVEEN KUMAR, J

03.08.2018
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