

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CIVIL REVISION PETITION No.2229 OF 2017

ORDER:

This Civil Revision Petition is filed under Article 227 of the Constitution of India assailing the order dated 21.09.2016 passed in I.A.No.427 of 2016 in O.S.No.23 of 2011 on the file of the Court of the Senior Civil Judge, Kothapet, East Godavari District.

2. Heard the learned counsel for both parties.

3. A perusal of the record reveals that the petitioner filed O.S.No.23 of 2011 on the file of the Court of Senior Civil Judge, Kothapet, against the respondents seeking a declaration and consequential perpetual injunction in respect of an extent of Ac.0.11 cents in R.S.No.442/1 of Kothapet Village and Mandal, East Godavari District. During pendency of the suit, the petitioner filed I.A.No.202 of 2011 for appointment of an advocate commissioner to measure the suit schedule property with the help of Mandal Surveyor and the same was allowed. In pursuance of the orders of the trial Court, the advocate commissioner inspected the suit schedule property and filed the report. The advocate commissioner was examined as PW.5 and his report was marked as Ex.C.1. During the course of cross-examination, PW.5 has stated that the petitioner/plaintiff gave a memo requesting him to demarcate the Government poramboke (puntha), which is situated on the north of the suit schedule property. For one reason or other, the advocate commissioner has not answered the work memo filed by the petitioner. While so, the first respondent, who is third defendant in the suit, filed I.A.No.427 of 2016 for

appointment of an advocate commissioner to measure the land in R.S.Nos.440, 442/1, 458 and 439 with the help of Mandal Surveyor. The petitioner and other respondents opposed the petition for appointment of the second advocate commissioner. The trial Court, after considering the material available on record, allowed the petition appointing the previous advocate commissioner to measure the land in question. Feeling aggrieved by the order of the trial Court, the petitioner/plaintiff preferred the revision.

4. The question that falls for consideration is whether there is any illegality, irregularity or impropriety in the impugned order.

5. It is an admitted fact that the petitioner filed O.S.No.23 of 2011 against the respondents seeking a declaration and consequential perpetual injunction in respect of an extent of Ac.0.11 cents in R.S.No.442/1 of Kothapet Village and Mandal, East Godavari District. A perusal of the record reveals that the petitioner's side evidence was almost closed. At that point of time, the first respondent, who is the third defendant in the suit, filed I.A.No.427 of 2016 for appointment of the advocate commissioner and the same was allowed. Hence, the revision.

6. In a suit for declaration, the plaintiff may succeed or fail basing on the strength or weaknesses of his/her case. It is needless to say that the plaintiff is not entitled for the relief of declaration basing on the laches or lacunae, if any, on the part of the defendants. While passing orders in the petition filed for appointment of advocate commissioner, the Court has to consider the suit schedule property with reference to relief sought for. The

dispute revolves around an extent of Ac.0.11 cents in R.S.No.442/1 of Kothapet Village. The first respondent/third defendant filed the petition for appointment of the advocate commissioner to measure the land in R.S.Nos.440, 442/1, 458 and 439 of Kothapet Village. It is an admitted fact that the land situated in Survey Nos.440, 458 and 439 is not the subject matter of the suit. This Court is unable to understand how the trial Court has appointed the advocate commissioner to measure the land situated in Survey Nos.440, 458 and 439 of Kothapet Village. The Court can decide the *lis* involved in the suit even without measuring the land by the advocate commissioner situated in Survey Nos.440, 458 and 439 of Kothapet Village. The trial Court, without considering the scope of the suit, allowed the petition by appointing the advocate commissioner on the sole ground that no prejudice will be caused to the petitioner/plaintiff, if the advocate commissioner is appointed. Whether the appointment of advocate commissioner will cause prejudice to the petitioner or not has no relevancy in view of the relief sought in the petition. Viewed from any angle, appointing the advocate commissioner to measure the land in Survey Nos.440, 458 and 439 is beyond the scope of the suit. The order passed by the trial Court is not sustainable either on facts or in law. There is an error apparent on the face of the order passed by the trial Court. If the order of the trial Court is allowed to stand, certainly it would amount to miscarriage of justice.

7. Taking into consideration the facts and circumstances of the case, this Court is of the considered view that it is a fit case to set aside the impugned order.

8. In the result, the Civil Revision Petition is allowed, setting aside the order dated 21.09.2016 passed in I.A.No.427 of 2016 in O.S.No.23 of 2011 on the file of the Court of the Senior Civil Judge, Kothapet, East Godavari District. Consequently, I.A.No.427 of 2016 stands dismissed. However, the observations made by this Court are confined to this revision petition only. There shall be no order as to costs.

9. Consequently, Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

Date: 23.11.2018
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T.SUNIL CHOWDARY, J

