

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No.626 OF 2017

ORDER:

The revision petitioner - petitioner - defendant filed the present Civil Revision Petition under Article 227 of the Indian Constitution, challenging the order, dated 16.11.2016, passed in I.A. No.892 of 2016 in O.S. No.137 of 2015, by the learned I Additional Junior Civil Judge, Kakinada, whereby and where-under, the application filed under Order XXVI, Rule 9 and Section 151 of the Code of Civil Procedure, 1908, requesting the Court to appoint Advocate Commissioner for the purpose of measuring the property of the defendant and the plaintiff as per their documents, to note the physical features, to note down the work memos filed by the parties, to take photographs, to draw rough sketch and to file detailed report, was dismissed.

2. Heard Sri A.K. Kishore Reddy, learned counsel for the revision petitioner, and Sri A.S.C. Bose, learned counsel for the respondent.

3. The learned counsel for the revision petitioner would submit that the revision petitioner made the application only to enable the Court to adjudicate and determine whether the constructions (gate and cement ramp) made by the revision petitioner are located in the

property covered under the sale deed dated 13.09.2006 executed in his favour or whether the structures are located in the property belonging to the respondent - plaintiff, since one of the main reliefs claimed by the respondent herein was also for mandatory injunction to demolish these structures. But, the trial Court, somehow, did not properly comprehend the purpose for which the application is made and, therefore, to set aside the order and allow the application for the reliefs in the above.

4. The learned counsel for the respondent - plaintiff, *inter alia*, contends that in a suit for mandatory injunction to direct the revision petitioner - defendant to remove the gate as well as cement ramp put by him in between 'J' and 'K' portion of plaint plan, the entire burden rests on the plaintiff and, therefore, it is for the plaintiff to prove whether a gate and ramp are constructed or located in the land belonging to the plaintiff or in the land belonging to the defendant. It is also his submission that the parties to the suit have let in evidence and the suit has been coming up for arguments and at that stage, the application was for appointment of Advocate Commission for the aforesaid purposes is filed and, in fact, it is intended to collect the evidence and, therefore, the trial Court was right in rejecting the request and dismissing the application.

5. Perused the order. The trial Court, by observing that in a suit filed seeking relief of permanent injunction, burden of proof only

rests upon the plaintiff, and to establish his case, he must stand or fall on his own merits and not on the weaknesses or on the strength of the defendant; after adducing substantial evidence by both parties, the trial Court is of the opinion that seeking appointment of Advocate Commissioner only amounts to unwarranted exercise on the part of the Court and further no useful purpose would be served by measuring the properties as prayed for by the revision petitioner in the suit, and if the contention of the plaintiff that the constructions raised by him were well within his property, it is for him to establish the same by means of oral and documentary evidence, and if he seeks to establish the same by way of getting appointed an Advocate Commissioner, it certainly amounts to collection of evidence, and thereby dismissed the application.

6. What has been opined by the trial Court cannot be faulted, for the reason it is obvious that when the suit reached the stage of arguments, the revision petitioner - defendant came up with the application of this nature and the request made, when intrinsically examined, would invariably reflect that it is intended for collection of evidence, for the reason both the parties are deriving rights based on their registered sale deeds and invariably would have been marked as exhibits and it is for the trial Court to decide whether the burden resting on the plaintiff is substantiated and then the question comes shifting of onus to the defendant to rebut it by adducing evidence, in

which direction, the evidence was already adduced. Hence, there is no merit in the present revision as the order passed by the trial Court does not suffer from any material irregularity or illegality to revise the order under challenge.

7. Therefore, the Civil Revision Petition is dismissed. In the circumstances, there is no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the revision, stand closed.

A. SHANKAR NARAYANA, J

April 02, 2018.
Mgr

