

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.2533 OF 2017

ORDER:

This civil revision petition is filed by the petitioner-plaintiff, under Article 227 of the Constitution of India, assailing the order dated 17.3.2017 passed in I.A.No.152 of 2014 in O.S. No.156 of 2012 on the file of the Court of Principal Junior Civil Judge, Kadiri.

2. Heard the learned counsel for the petitioner. Despite service of the notice, respondents did not choose to appear and contest the matter. Hence, this Court is inclined to pass the order on merits.

3. The petitioner filed O.S.No.156 of 2012 against the respondents for perpetual injunction in respect of suit 'A' schedule property and ABCD Rastha in suit 'B' schedule property. During the pendency of the suit, the petitioner filed the interlocutory application under Order XXVI Rule 9 of CPC for appointment of Advocate Commissioner. The respondents filed counter opposing the claim of the petitioner. The trial Court, after affording reasonable opportunity to both the parties, allowed the petition in part. Aggrieved by the part dismissal of the petition, the petitioner filed the present civil revision petition.

4. To substantiate the argument, learned counsel for the petitioner has drawn the attention of this Court to the following decisions:

Mohammed Jaffer Abdul Quadeer Qureshi v Aziz-ur-Rehman Qureshi¹, wherein this Court held at paragraph No.12 as follows:

¹ 2016 (3) ALD 38

12. ... There is no hard and fast rule or a settled proposition of law that an Advocate Commissioner cannot at all be appointed for any purpose in a suit for perpetual injunction and it cannot be laid down as a rule of thumb that in no suit for perpetual injunction, an Advocate Commissioner can be appointed; however, the law is well settled that a Commissioner cannot be appointed to find out as to who amongst the parties is in possession of the property as it is the function of the Court to decide the issue as to who amongst the parties is in possession of the property and the said judicial function cannot be delegated to an Advocate Commissioner. Under law, in any suit in which the Court deems local investigation is requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to an advocate or any competent person and direct to make such investigation and to report to the Court.

K.Dayanand v P.Sampath Kumar², wherein this Court held

at paragraph No.25 as follows:

25. There is no absolute bar on appointment of Commissioner in a suit for injunction also as per the law laid down in the above referred judgments nor the provisions of Section 75 and Order XXVI Rule 9 do impose such a prohibition. The respondent-plaintiff filed the present application for appointment of Advocate Commissioner to note down the physical features of the schedule property only and not for the purpose of finding out who is in possession of the property. The Court below recorded valid reasons for appointment of Commissioner. The Court below in the considered opinion of this Court is perfectly justified in appointing the Advocate Commissioner and that the said order is in accordance with the principles laid down in the above referred judgments. Therefore, the order under revision does neither suffer from any fundamental infirmity nor any jurisdictional error, which warrants interference of this Court under Article 227 of the Constitution of India. Taking into consideration the totality of circumstances, this Court is of the considered view that appointment of Commissioner in this case would undoubtedly and certainly assist the Court below to arrive at a just and correct conclusion.

Badana Mutyalu v Palli Appalaraju³, wherein this Court

held at paragraph No.19 as follows:

19. So it has been held that either party to the suit could have a Commissioner appointed even before the trial. In view of the above decisions, I hold that in situations where there is controversy as to identification, location or measurement of the land, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The party

² 2015 (2) ALD 319

³ 2013 (5) ALD 376

against whom the report may have gone may choose to adduce evidence in rebuttal.

5. Let me consider the facts of the case on hand in the light of the above legal principles.

6. The petitioner filed the suit against the respondents for perpetual injunction in respect of suit 'A' schedule property and ABCD Rastha in suit 'B' schedule property. As per the recitals of suit 'B' schedule property, width of ABCD Rastha is 10 feet. A perusal of the record reveals that there is a dispute as to width of ABCD Rastha, which is abutting to the suit 'A' schedule property. Both the parties belong to one family and they got the properties under the family partition. Whether the width of ABCD Rastha is 10 feet or not is the controversy involved in the suit. There is no dispute with regard to the existence of Rastha. The trial Court allowed I.A.No.152 of 2014 in part appointing the Commissioner-Sri S.Md.Faizullah, Advocate, to note down the existing physical features of suit 'A' schedule property with the help of Mandal Surveyor concerned and submit report on or before 24.4.2017. For one reason or the other, the trial Court rejected the relief sought by the petitioner to measure the width of ABCD Rastha. If such relief was also granted by the trial Court, the report of Advocate Commissioner would throw some light on the controversy involved in the suit. Even if the Advocate Commissioner is appointed, no prejudice would be caused to the respondents. In the instant case, appointment of Advocate Commissioner to measure the width of ABCD Rastha would not amount to collection of evidence on behalf of the petitioner. The trial Court has not considered the scope of the suit and the relief sought by the petitioner. The reasons

recorded by the trial Court while rejecting the second relief are not sustainable and are liable to be set aside.

7. Having regard to the facts and circumstances of the case and also the principles enunciated in the cases cited supra, I am of the considered view that it is a fit case to grant the second part of the relief sought by the petitioner.

8. In the result, the civil revision petition is allowed, setting aside the order dated 17.3.2017 passed in I.A.No.152 of 2014 so far as dismissing the prayer for appointing Advocate Commissioner to measure the width of ABCD Rastha. Consequently, I.A.No.152 of 2014 in O.S. No.156 of 2012 on the file of the Court of Principal Junior Civil Judge, Kadiri, is allowed. Sri S.Md.Faizullah, Advocate is appointed as Advocate Commissioner to measure the width of ABCD Rastha covered by suit 'B' schedule property with the help of the Mandal Surveyor concerned and file report before the trial Court, within the time stipulated by it. In case, Sri S.Md.Faizullah, Advocate is not inclined to execute the warrant, the trial Court is at liberty to appoint another Advocate Commissioner and proceed in accordance with law. Miscellaneous petitions if any pending in this revision petition shall stand closed.

T.SUNIL CHOWDARY, J.

Date: 16.7.2018
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