

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.4314 OF 2018

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, questioning the legality and propriety of the order in I.A.No.723 of 2018 in O.S.No.548 of 2009 dated 21.06.2018, pending on the file of III Additional Junior Civil Judge, Kadapa, whereby, the petition is filed under Order XXVI Rule 9 of C.P.C was dismissed.

The petitioners filed O.S.No.548 of 2009 for injunction simplicitor and the respondents/defendants denied the same raising various contention, including denying possession of the plaintiffs over the suit schedule property. It is the contention of the plaintiffs/petitioners from the beginning that, there existed two bore-wells and the land is uneven. But, in the evidence of D.Ws. 1 & 2, they denied the very existence of two bore-wells in the land. Therefore, the petitioners were compelled to file an application under Order XXVI Rule 9 C.P.C to appoint an Advocate Commissioner to note down the physical features of the petition schedule property, including noting down the electricity poles, transformer and submersible motor, two old wells in the petition schedule property.

The respondents filed counter, denying material allegations, *inter alia* contending that the first defendant was never in possession of the suit schedule property at any point of time, while asserting that they are in possession and enjoyment of the suit

schedule property since the date of Ex.B-1. Further, during the course of cross-examination of D.Ws.1 & 2, deposed in support of their claim regarding possession. But, the first defendant erected two bore-wells and installed submersible motor along with the transformer, electricity poles and that there is standing crop in the suit schedule property, besides two old wells and that, Advocate Commissioner cannot be appointed to note down the physical features for collection of evidence and prayed to dismiss I.A.No. 723 of 2018, since the physical features are not in dispute.

The Trial Court upon hearing argument of both the counsel, dismissed the petition on the ground that, in a suit for injunction simplicitor, the burden is upon the plaintiffs to establish both possession or enjoyment of the property and the invasion or interference of the legal right of the plaintiffs and that the Court cannot appoint an Advocate Commissioner for collection of evidence.

Aggrieved by the said order, the present civil revision petition is filed on the ground that, since the defendants/respondents denied the very existence of two bore-wells, submersible pumps and electricity poles, it necessitates appointment of Advocate Commissioner to note down the physical features, which would be helpful to the Court to decide the real controversy between the parties.

During hearing, Smt. M. Siva Jyothi, learned counsel for the petitioners while reiterating the contentions urged in the petition, placed reliance on the judgment of the learned Single Judge of this

Court in **Shaik Zareena Kasam v. Patan Sadab Khan and others**¹ and requested to allow this petition, setting-aside the order in I.A.No.723 of 2018 in O.S.No.548 of 2009 dated 21.06.2018, pending on the file of III Additional Junior Civil Judge, Kadapa.

Whereas, Sri R. Prasad, learned counsel for the respondents supported the order passed by the Court below in all respects.

It is an undisputed fact that these petitioners filed suit for injunction simplicitor based on possession, while alleging that the respondents/defendants made an attempt to interfere with the possession and enjoyment, which gave rise to cause of action for filing the suit for injunction simplicitor. When the petitioners approached the Court for specific performance and the petitioner is in possession and enjoyment of the property, it is for the petitioners/plaintiffs to establish possession and enjoyment of the property as on the date of filing suits, besides proof of invasion or infringement of legal right by the petitioners/plaintiffs, which gave rise to cause of action by adducing independent evidence.

The Trial Court also referred to the judgment of this Court in **G. Nagabhushanam v. T. Eswaramma**², wherein, this Court held that, the burden to prove the possession, is squarely upon the respondent. Appointment of Commissioner in suits for injunction, be it, at the instance of the plaintiff, is a rare phenomenon. Even where such Commissioners are appointed, it would be only for the

¹ 2011 (4) ALT 541

² 2009 (3) ALT 651

limited purpose of clarifying the physical features of the suit schedule property.

In the present case, the petitioners/plaintiffs intended to take assistance of process of the Court to prove the possession of the petitioners by appointing an Advocate Commissioner, where an Advocate Commissioner is only an officer of the Court. Seeking appointment of Advocate Commissioner is nothing but taking assistance of the Court for collection of evidence. When the physical features are not in dispute, as per the allegations made in the written statement, appointment of Advocate Commissioner to note down the physical features, more particularly, very existence of two bore-wells, submersible pumps and electricity poles is nothing but collection of evidence, since, it is useful to prove the possession of the petitioners/plaintiffs as on the date of filing the suit.

Learned counsel for the petitioners relied on the judgment of this Court in **Shaik Zareena Kasam v. Patan Sadab Khan and others** (referred supra), wherein, in paragraph 10, it was held as follows:

“Whenever there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by another party, the facts have to be physically verified, because, the recitals of the documents may not reveal the true facts and measuring of land on the spot by a Surveyor may become necessary. It is always better if the parties are allowed to adduce evidence at the stage of trial for better appreciation of the facts which will help the Court in effectively deciding the main dispute between the parties. If there is some delay in filing the application to appoint an Advocate Commissioner and if there are some laches on the part of one party, the Court may impose reasonable costs, but it is not desirable to dismiss an application on the ground of mere delay in filing it. In the light of the above referred decisions, I am

of the view that the impugned order does not sustain in the eyes of law.”

This Court in an identical situation in **Batchu Narayana Rao v. Batchu Venkata Narasimha Rao³, Koduru Sesha Reddy v. Gottigundala Venkata Rami Reddy and others⁴ and Yenugonda Bal Reddy v. Manemma and others⁵**, held that a commissioner cannot be appointed for collection of evidence in a suit for declaration and permanent injunction or in a suit for injunction simplicitor, to note down the physical features of the land as it amounts to collection of evidence. Similar view was expressed by this Court in **Malla Bhaskara Rao and others v Konchada Ananda Rao⁶**. Therefore, in view of the law declared by this Court, referred to supra, the Advocate Commissioner cannot be appointed to note down the physical features of the land, more particularly, when there is no dispute with regard to identity of the property. The petitioners/plaintiffs at best are entitled to adduce evidence to substantiate their case, that they are in possession of the suit schedule property by producing an independent evidence without taking advantage of weakness in defence set-up by the respondents/defendants and cannot take the assistance of the Court to prove the possession of the petitioners.

Therefore, the order passed by the Court below I.A.No.723 of 2018 in O.S.No.548 of 2009 dated 21.06.2018, observing that, it amounts to collection of evidence is free from any legal infirmity,

³ 2010 (5) ALD 83

⁴ 2006 (1) ALD 372

⁵ 2011 (2) ALD 472

⁶ 1999 (5) ALD 113

warranting interference of this Court, while exercising power under Article 227 of the Constitution of India, since the power of this Court is limited.

Article 227 of the Constitution of India deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in *certiorari* jurisdiction and such power can also be exercised *suo motu*.

It is a well settled principle that the High Court can exercise supervisory power under Article 227 of Constitution of India, as held by the Apex Court in **State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru**⁷, that under Article 227 of Constitution of India the High Court can interfere with the directions of the Subordinate Courts.

In view of the law laid down by the Apex Court, this Court cannot exercise its power under Article 227 of the Constitution of India, since the power can be exercised only to keep the subordinate Courts and Tribunals within its bounds. Therefore, I am unable to exercise power under Article 227 of the Constitution

⁷ 2003 (6) SCC 641

of India to interfere with the findings recorded by the trial Court since the trial Court acted within its bounds and passed the order, which is under challenge.

In the result, the civil revision petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

Dated: 31.08.2018

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