

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

C.R.P.No.4812 of 2018

ORDER:

This revision petition is filed under Article 227 of the Constitution of India assailing the order dated 17.07.2018 passed in I.A.No.26 of 2017 in O.S.No.7 of 2013 on the file of the Court of Junior Civil Judge, at Narayanapet.

2. Heard the learned counsel for the petitioner.

3. Hereinafter, the parties will be referred to as they were arrayed before the trial Court.

4. The facts leading to filing of the present revision are briefly as follows:

The petitioner filed O.S.No.7 of 2013 against the respondent for declaration to declare him as the owner of the suit schedule property and consequential perpetual injunction restraining the respondent from interfering with the suit schedule property. During pendency of the suit, the petitioner filed I.A.No.26 of 2017 under Section 151 and Order 26 Rule 9 CPC for appointment of advocate commissioner. The respondent filed counter opposing the claim of the petitioner. The trial Court dismissed the petition after affording a reasonable opportunity to both parties. Hence, the revision.

5. Now, the point that arises for consideration is, whether there is any illegality, irregularity or impropriety in the impugned order?

6. To substantiate the argument, learned counsel for the petitioner has drawn the attention of this Court to the decision

in **N.SAVITRAMMA AND ANOTHER v. B.CHANGA REDDY**¹

wherein it was held at para No.16 as follows:

“16. The question as to when a Commissioner could be appointed, should be within the wide discretion of the trial Court, but it cannot be said that no commissioner could be appointed before the issues are framed or the evidence is led. Decided cases which are binding on me, hold that a Commissioner could be appointed even *ex parte*. Therefore, I dissent from the above-said judgment of Lakshminarayana Reddy and follow the Division Bench decisions of the Court. The contention of the learned counsel for the respondent cannot therefore, be accepted.”

7. Let me consider the facts of the case on hand in the light of the above legal principle.

8. The petitioner filed O.S.No.7 of 2013 against the respondent seeking declaration and consequential perpetual injunction in respect of the suit schedule property. During pendency of the suit, the petitioner filed an application under Order 26 Rule 9 CPC seeking the following relief:

“For the reasons stated in the accompanying affidavit, the petitioner/plaintiff pray your Honour may be pleased to appoint Advocate commissioner in order to survey and demarcate the suit land and the land of the respondent/defendant, since the respondent/defendant created false boundaries to the extent of his purchased land with the assistance of Assistant Director of Survey Department in order to resolve the controversy between the parties hereto in order to come to a just decision to pass judgment and decree in the suit in the interest of justice and pass such any other order or orders as this Hon’ble court deems fit and proper in the interest of justice and equity.”

¹ 1988 (1) A.L.T.353

9. I have carefully perused the affidavit and counter filed by both the parties before the trial Court. The respondent has taken a specific plea in the counter that the advocate commissioner cannot be appointed for the measurement of the land of the petitioner only. It is the case of the petitioner that the land of the respondent was submerged in a canal. The affidavit filed by the petitioner is silent with regard to the submersion of the land of the respondent in the canal. Whether the land of the respondent was submerged in a canal or not is purely a disputed question of fact. It appears there is a boundary dispute between the parties. A boundary dispute can be resolved with the help of the oral and documentary evidence adduced by both the parties. It is needless to say that in a suit for declaration, the plaintiff may succeed or fail basing on the strength or weaknesses of his case. The plaintiff is not entitled for the relief of declaration basing on the lacunae or latches, if any, on the part of the defendant. A duty is casts upon the plaintiff to establish his case by preponderance of probabilities. Then only, the onus of proof shifts on the defendant to establish the stand taken by him in the written statement. The petitioner is asking to appoint commissioner to measure the land of the petitioner and respondent thereby to identify the suit schedule property. The Court cannot appoint an advocate commissioner to measure the land of the respondent-defendant. The present petition is filed in order to collect the evidence in the shape of advocate commissioner report, by way of appointing advocate commissioner. It is a settled principle of law that an advocate

commissioner cannot be appointed for the purpose of collection of evidence. As observed earlier, the boundary dispute can be resolved basing on the oral and documentary evidence adduced by both the parties. A perusal of the record reveals that the respondent's vendor purchased the land much prior to the date of purchase of land by the petitioner. The trial Court considered all these aspects in right perspective and dismissed the petition. The decision cited by the learned counsel for the petitioner is no way helpful to substantiate his case. This Court cannot lightly interfere with the discretionary orders passed by the trial Court, unless there is an error apparent on the face of it. The trial Court has not committed any error while dismissing the petition. I am fully endorsing the findings recorded by the trial court. There is no illegality, irregularity or impropriety in the order of the trial Court, which warrants interference of this Court. Hence, the civil revision petition is liable to be dismissed.

10. Accordingly, the Civil Revision Petition is dismissed at admission stage. No order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

Dt:21.08.2018

Rns