

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CIVIL REVISION PETITION No.3149 of 2014

ORDER:

This civil revision petition is filed questioning the order, dated 11.08.2014, passed in I.A.No.304 of 2014 in O.S.No.1656 of 2006, by the II Additional Junior Civil Judge, Kakinada.

The suit O.S.No.1656 of 2006 is filed for an injunction simplicitor. In that suit, after the trial was completed, an application was filed by the petitioner/plaintiff seeking appointment of an Advocate-Commissioner to measure the plaint schedule property by referring to Exs.A1, A2, A3, A4 and A7 and to file his report into court showing the extent of land available. This application was strongly opposed by the respondents.

After hearing both the parties, the impugned order was came to be passed, by which the said application was dismissed. Questioning the same, the present revision petition is filed.

This court has heard Sri S.Subba Reddy, learned counsel for the petitioner and Sri A.S.C.Bose, learned counsel for the respondents.

Learned counsel for the petitioner argues that the power available under Or.26 Rule 9 CPC cannot be curtailed. He points out that the lower court relied upon two judgments where it was held that in a suit for temporary injunction, the question of appointment of an Advocate-Commissioner does not arise. To meet this finding, he relies upon two judgments in *Bandaru Mutyalu v. Palli Appalaraju*¹ and *K.Dayanand v. P.Sampath Kumar*² and argues that the power to appoint an advocate-commissioner even in the suit for injunction is not taken away

¹ (2013) 5 ALD 376

² (2015) 2 ALD 319

and that the power is available. It is his contention that there is a dispute about the exact extent of land that is available on ground. The learned counsel points out that in the cross examination of the defendant/present respondent in CRP, measurements were not given of the property that is bequeathed by the mother. He points out the admission of the witness who stated that he cannot ascertain the exact extent without measuring the land. The learned counsel points out that the present respondent admitted as DW 1 that some part of the land was sold by him, therefore, there is a dispute as per the learned counsel as to the exact extent of land available and there is also a dispute about the defendant's encroachment into the land, i.e., the plaintiff's share. Learned counsel also points out that the present respondent as DW 1 stated that he has no objection to get the land measured through advocate-commissioner. Therefore, the learned counsel prays that the appointment of an advocate-commissioner is necessary in the circumstances of the case to determine the real issue.

In reply there to, the learned counsel for the respondents submits that the entire exercise is only for the purpose of gathering evidence. The learned counsel points out that the plaint schedule property is described with great clarity and certainty, and that the boundaries and survey numbers are also clearly furnished. Therefore, the learned counsel submits that whether the plaintiff was in possession of the land as described in the plaint as on the date of the suit and whether there was any threat to his possession is the only issue that is involved in this suit, since the suit is filed for injunction simplicitor. The learned counsel submits that the issue about the extent of land available on the ground etc., are matters beyond purview of the suit itself. He also submits that

the case law relied upon by the learned counsel for the petitioner are the case law where there is a dispute about the existence of land on ground and there is need for localization of the land in order to assist the court to pronounce an order. Therefore, it is his contention that the application filed is for the purpose of gathering evidence and that is beyond the scope of the suit and it is also filed belatedly.

The point for consideration is whether the lower court has committed any error in passing the impugned order.

As far as the contention that the application filed belatedly is concerned, the issue is no longer *res integra* in view of the Full Bench Judgment of this court in *Bande Siva Shankara Srinivasa Prasad v. Ravi Surya Prakash*³.

This court also notices that the plaintiff as *dominus litis* has described the plaint schedule with absolute certainty. Survey number, patta number, extent and the boundaries are clearly described in the plaint schedule. Therefore, it is clear that as far as plaint schedule as described in the plaint is concerned, there is no dispute about the existence of the land on the ground or its dimensions or measurements along with the boundaries. This court also notices that in the course of cross examination, the witness of the defendants has clearly stated that the plaintiff is entitled to Ac.2.37½ cents of land as per Will, but he has filed the suit only for Ac.2.01½ cents. The witness also admitted that the schedule mentioned property is the property of the plaintiff. The witness also stated that he has no right to interfere with and enter upon the schedule mentioned property. The witness also categorically admitted

³ 2016 (2) ALD 1 (FB)

that he has no objection if a decree is granted in favour of the plaintiff for the plaint schedule property, which is an extent of Ac.2.01½ cents.

In the light of these clear and categorical admissions and the fact that the suit is a mere suit for an injunction, this court is of the opinion that the question of appointing an advocate-commissioner for the purpose of measuring the plaint schedule property with reference to Exs.A1, A2 to A4 and A7 does not arise. Similarly, the measurement of the property with the aid and assistance of a surveyor would in the opinion of this court amount to clear gathering of evidence. The dispute about the extent of the land said to have been encroached etc., are really immaterial for the purpose of decision in this particular suit. As mentioned earlier, the suit is a simple suit for injunction. The plaintiff will have to necessarily prove his lawful possession of the plaint schedule property and the threat to his possession. Out of the two judgments cited by the learned counsel for the petitioner, this court notices that in *Bandaru Mutyalu v. Palli Appalaraju* (1 supra) there was a question and controversy with regard to localization of ABCD site and property had to be localized. In the other case in *P.Sampath Kumar* (2 supra), ultimately the learned single Judge of this Court dismissed the CRP filed against appointment of a commissioner to note down the physical features.

This court, after hearing and considering the scope and ambit of enquiry in the present suit, is of the opinion that the prayer made in the application I.A.No.304 of 2014 would go far beyond the scope of the enquiry and the relief claimed in the suit. Therefore, this court is of the opinion that the lower court did not commit any error in passing the impugned order. This court holds that there are no merits. Accordingly,

the civil revision petition is dismissed. In the circumstances, no order as to costs.

Pending miscellaneous applications, if any, shall stand closed in consequence.

D.V.S.S.SOMAYAJULU,J

Date: 29.11.2018
Dsr

