

THE HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI

Civil Revision Petition No.5558 of 2018

Order:

This Civil Revision Petition is filed challenging the order dated 06.09.2018, passed in I.A.No.606 of 2018 in O.S.No.254 of 2011 by the learned Senior Civil Judge, Vizianagaram.

The respondent herein filed OS No.254 of 2011 seeking to declare that she is the absolute owner of the plaint 'B' schedule property, for perpetual injunction and other incidental reliefs. During the pendency of the said suit, the petitioners herein, who are defendants in the suit, filed IA No.606 of 2018 for the following relief.

"To appoint an Advocate Commissioner to localize the plaint schedule properties covered by the sale deeds Exs.A1 and A2 comprised in Sy.No.215/6 of Puritipenta village with the assistance of the Mandal Surveyor and with reference to the revenue records and to note down the physical features, the measurements of the buildings on ground with reference to the sale deeds and gift deed in Exs.A1, A2 and A3 and the position of Center Wall in between the building of the plaintiff and the defendants in the First floor and also the front yards of both the buildings and their lengths up to the road margin of National Highway No.26 as per revenue records along with rough sketch and to file the report into the Court."

In the affidavit filed in support of the said IA it is stated that the GPA holder of the plaintiff has suppressed the true facts with regard to the measurements of the buildings under Exs.A1 and A2 sale deeds and that the learned Junior Civil Judge, Gajapathinagaram, dismissed the suit OS No.75 of 1998, filed by the grand mother of the plaintiff; the said suit was with regard to the house property under Ex.A3 which was a Gift Deed

executed in favour of the plaintiff by her father; again with the same false pleadings the GPA holder of the plaintiff gave wrong measurements in the Gift Deed Ex.A3 which are inconsistent with that of the measurements in Ex.A2 sale deed; when the Hon'ble Court directed the counsel to elicit the difference in the measurements of Exs.A1, A2 and A3 during the arguments, learned counsel for the petitioners/defendants did not cross-examine PW.1 over the said measurements, but the learned counsel for the respondent/plaintiff made DW.1 admit Exs.A1 to A3, though they are not consistent with each other; unless an Advocate-Commissioner is appointed to localize and verify the measurements of the plaint schedule buildings and the alleged vacant sites on ground with reference to the documents of the plaintiff with the assistance of the Mandal Surveyor and with the aid of the revenue records the petitioners will be put to irreparable loss and injustice.

The learned Senior Civil Judge, Vizianagaram, by impugned order dated 06.09.2018, dismissed the IA No.606 of 2018 by observing that the said IA was filed at the stage of arguments only to gather evidence. It was further observed that the Advocate-Commissioner cannot be appointed at a belated stage when the matter is at the stage of arguments and that the averments in the petition do not necessitate appointing an Advocate-Commissioner.

Heard learned counsel for the petitioners and learned counsel for the respondent.

Learned counsel for the petitioners/defendants contends that the chief affidavit of DW.2 was filed on 27.06.2018 and DW.2 was cross-examined on 22.08.2018 by the plaintiff and the matter was posted to 31.08.2018 for further evidence of the defendants and on the said date

the petitioners/defendants filed the IA, under Order 26 Rule 9 CPC, for appointment of an Advocate-Commissioner. He contends that the said application was received and given GR No.5245 and the suit was posted for further evidence of the defendants on 06.09.2018; the notice was received by the respondent on the same day, but she did not file any counter to the said IA; the trial Court dismissed the said application on the same day i.e., on 06.09.2018 and directed the suit to be listed for arguments on 11.09.2018 and that the suit is posted for judgment on 29.09.2018. He specifically contends that the suit is posted for further evidence of the defendants on 06.09.2018 and after dismissing the said IA on 06.09.2018 the suit was listed for arguments on 11.09.2018. He contends that the impugned order shows that the suit is at the stage of arguments. In support of his contention that the IA was not filed at the belated stage and that the lower Court ought to have allowed the IA, he relied upon the decisions of this Court in Shaik Zareena Kasam v. Patan Sadab Khan (CRP No.3266 of 2007, dated 01.04.2011), Bandi Samuel v. Medida Nageswara Rao (CRP No.338 of 2016, dated 04.11.2016) and Gorle Demudamma v. Gorle Pydamma (CRP No.804 of 2011, dated 13.04.2016).

Learned counsel for the respondent/plaintiff, on the other hand, contends that the IA has been filed at the stage of arguments only to collect the evidence. He further contends that the suit is of the year 2011 and only to drag on the proceedings, the present application has been filed by the petitioners herein. He further contends that the Court below has rightly dismissed the said application and there are no grounds to interfere with the same. He relied upon the judgments of this Court

reported in *Yenugonda Bal Reddy v. Manemma*¹, *Papasani Sankara Reddy v. Kandula Hanumantha Reddy*², and *Dammalapati Satyanarayana v. Datla Venkata Ramabhadra Raju @ D.V.R. Raju*³.

As seen from the record, the suit was filed in the year 2011. The registered sale deeds dated 09.10.1986 and 08.10.1986 and the registered gift deed dated 30.04.2009 were also shown in the list of documents to the plaint. When the said documents i.e., Exs.A1, A2 and A3 were filed along with the plaint, the petitioners herein are well aware of the contents of the said documents and they did not file any IA seeking appointment of an Advocate-Commissioner all through from 2011 to 2018. The reason cited by the petitioners in the affidavit filed along with the IA is that as per the direction of the Hon'ble Court they did not cross-examine PW.1 over the measurements of the buildings covered by Exs.A1 to A3, but the learned counsel for the plaintiff made DW.1 admit Exs.A1 to A3. The said reasoning given by the petitioners cannot be accepted, as it is the duty of the counsel to cross-examine the witness according to the documents. After the evidence is over the petitioners cannot throw the blame on the lower Court for not effective cross-examination of PW.1 and seek the appointment of an Advocate-Commissioner. The said IA was filed in 2018, when the suit is that of the year 2011.

The decision relied upon by the learned counsel for the petitioners in *Shaik Zareena Kasam's* case (supra) does not apply to the facts of the present case for the simple reason that in the said case such an IA was filed at the stage of cross-examination of PW.1 and the trial Court

¹ 2011 (3) ALT 232

² 2013 (4) ALD 322

³ 2006 (4) ALD 675

dismissed the said application as a belated one, but in the instant case the IA was filed when the suit was at the stage of arguments.

Further, the facts in Bandi Samuel's case (supra), relied upon by the learned counsel for the petitioners, are entirely different and the trial Court was directed to hear and dispose of the application afresh on its own merits and pass appropriate orders.

Another decision relied upon by the learned counsel for the petitioners in Gorle Demudamma's case (supra) also does not apply to the facts of the present case, as in the said case IA was filed for appointment of an Advocate-Commissioner before adducing evidence on behalf of the defendants.

On the other hand, in Dammalapati Satyanarayana's case (supra), relied upon by the learned counsel for the respondent, the respondents therein filed IA for appointment of an Advocate-Commissioner and the trial Court allowed the said IA. The said order was challenged in the revision petition and the contention of the learned counsel for the revision petitioners therein was that appointment of an Advocate-Commissioner for the purpose of localizing the suit schedule property, much before the trial commenced, would amount to a step, enabling the concerned party to gather evidence. In those circumstances, the revision petition was allowed and the order under revision was set aside.

In Yenugonda Bal Reddy's case (supra), relied upon by the learned counsel for the respondent, the plaintiff filed the suit for declaration of title and permanent injunction alleging that there is a dispute with regard to the boundaries and in the said suit he also filed a petition seeking appointment of an Advocate-Commissioner. The trial

Court dismissed the said IA and aggrieved by the same the plaintiff therein approached this Court by filing the CRP and this Court upheld the order of the lower Court holding that it is for the plaintiff to plead and establish that he is in possession of plaint schedule land.

In Papasani Sankara Reddy's case (supra), relied upon by the learned counsel for the respondent, this Court confirmed the order passed by the trial Court holding that the petitioner has filed the application for appointment of a Commissioner to gather evidence instead of discharging his burden by adducing independent evidence.

As seen from the record, IA for appointment of an Advocate-Commissioner was filed in the year 2018, when the suit is that of the year 2011 and is ripe for arguments. The reasoning given by the petitioners for seeking the appointment of an Advocate-Commissioner is that they did not cross-examine PW.1 with regard to measurements and that DW,.1 was made to admit Exs.A1 to A3. Advocate-Commissioner cannot be appointed to gather evidence as held in the decisions discussed above.

In view of the facts and circumstances of the case, I do not find any error, jurisdictional or otherwise, to interfere with the order of the trial Court. The Civil Revision Petition is, accordingly, dismissed. There shall be no order as to costs.

As a sequel thereto, the miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand dismissed.

KONGARA VIJAYA LAKSHMI, J

Date: 10th December 2018
Nsr

THE HON'BLE SMT JUSTICE KONGARA VIJAYA LAKSHMI



Date: 10th December 2018

Nsr