

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

CIVIL REVISION PETITION No. 5762 OF 2018

ORDER :

Petitioner herein is the plaintiff. He filed O.S.No. 33 of 2009 on the file of the Additional Junior Civil Judge's Court at Dharmavaram, for specific performance of agreement of sale, dated 28.01.2003 and the suit is now at the stage of arguments. It is at that stage, the petitioner had taken out I.A. No. 183 of 2018 under Order XXVI Rule 9 of the Code of Civil Procedure, for appointment of an Advocate-Commissioner to note down the physical features of the pipe line laid from the suit schedule property to the bore well situated in the land of the petitioner's mother and such other physical features. In the said Application, the respondents - defendants filed the counter specifically contending that an issue has been framed in the suit 'whether the plaintiff is entitled to specific performance of agreement with or without possession'. In other words, the possession, which the petitioner claims, has been disputed by the respondents / defendants. For deciding the said issue, the fact as to whether the petitioner / plaintiff is in possession of the schedule property or not is to be decided. It is further stated that the suit schedule property is kept fallow due to litigation and the petitioner and his father forcibly laid a pipe line in it, taking advantage of the stay order of the Revenue Divisional Officer. It is further stated that this Application is filed only to protract the litigation, hence, they prayed for dismissal of the Application.

The learned Judge, keeping in view the ingredients that are required to be fulfilled for deciding the suit for specific performance, i.e. validity or otherwise of the agreement and

readiness and willingness on the part of the parties to perform the other part, had opined that there is no necessity to appoint an Advocate-Commissioner. The learned Judge also referred to Rule 66 of the Civil Rules of Practice, which mandates that once the matter is identified to be listed in special list, an Application for appointment of an Advocate-Commissioner to note the physical features of the suit schedule property cannot be allowed and thus, refused to grant the relief.

Learned counsel for the petitioner submits that the learned Judge had dismissed the Application merely because the matter was listed in 'special list' and in that process, failed to consider the need and necessity of appointing an Advocate-Commissioner and further failed to appreciate that no prejudice would be caused to the respondents if an Advocate-Commissioner is appointed. He further submits that since it is the case of the petitioner that he is in possession and enjoyment of the subject property, the existence or otherwise of a pipe line from the suit schedule property to the bore well situated in the petitioner's mother's land could be ascertained in the report of the Advocate-Commissioner.

This is a suit of 2009 and it is, admittedly, at the stage of arguments. The respondents stated that seeking appointment of an Advocate-Commissioner would go to show that the petitioner wanted to use the report of the Advocate-Commissioner as a piece of evidence. In other words, the intention of the petitioner is to gather evidence through the Advocate-Commissioner's report. Even assuming that such thing is permissible, considering the main relief sought i.e. specific performance of an agreement of sale, the most relevant aspect which is required to be considered in deciding the suit is the validity or otherwise of the agreement,

readiness / willingness on the part of the parties and whether there are any legal hurdles in granting the relief, the existence of a pipe line in the suit schedule property does not, in any manner, have a bearing in deciding the issue whether the suit is to be decreed or not. Merely because the learned Judge had, in his anxiety, mentioned the compulsion to adhere to Rule 66 of the Civil Rules of Practice, in an identified case, the same, by itself, does not make the orders of the Court invalid, as the learned Judge also had, in fact, considered the relevant parameters, which are required for the purpose of deciding a suit for specific performance. It may be noted that the learned Judge also had referred to a judgment of the Madras High Court in *Murugesan v. Jamuna Rani*, which indicates, as a matter of fact, the learned Judge had considered what is relevant and in that view of the matter, it cannot be said that the disposal of the I.A. was solely keeping in view of the schedule fixed under Rule 66 of the Civil Rules of Practice.

In those circumstances, I do not see any merit in this Revision and it is accordingly, dismissed. No costs.

CHALLA KODANDA RAM, J

10th October, 2018

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