

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.R.P.No.4838 of 2014

ORDER

This revision under Article 227 of the Constitution of India is filed challenging the order dated 15.11.2014 passed in I.A.No.393 of 2014 in O.S.No.155 of 2013 by the Principal Junior Civil Judge, Avanigadda, appointing an Advocate Commissioner to note down the physical features of the suit schedule property based on the work memos submitted by both the counsel to the Commissioner.

2. The petitioner herein filed suit for perpetual injunction based on the registered sale deed allegedly executed by the first respondent herein in his favour on 27.03.2012 and since then, he is in possession and enjoyment of the property in his own right and that as the first respondent made an attempt to interfere with his possession, he filed the said suit.

3. Along with the suit, the petitioner also filed an interlocutory application for grant of interim injunction after the written statement is filed by the defendants. In the written statement, the defendants contended that the plaintiff obtained the said sale deed as mortgage deed and therefore, the sale is not binding. Apart from that, they contended that they are in possession and enjoyment of the suit schedule property raising asbestos sheet shed and plants therein. The petitioner admitted that the asbestos sheet shed and plants are in existence in the suit schedule property. Thus, there is no dispute about the existence of both asbestos sheet shed and plants in the suit schedule property as per the contentions of both the parties. But

the person, who raised those shed and plants, is a question to be decided only during trial. At this stage, Commissioner cannot be appointed to find out as to who raised the said asbestos sheet shed and plants. It is also one of the contentions of the counsel for respondents that the respondents are residing in the shed and therefore, the Commissioner was appointed by the Court below. The order is now under challenge on various grounds.

4. During hearing, learned counsel for petitioner would contend that the petitioner himself admitted about the existence of asbestos sheet shed and plants and there is no dispute with regard to the physical features, which is sought to be recorded by the Commissioner during inspection. He further contended that in the absence of any dispute with regard to the physical features, the Commissioner cannot be appointed and requested this Court to set aside the order.

5. On the other hand, the counsel for respondents supported the order in all respects.

6. The undisputed facts are that the first respondent had executed a registered sale deed dated 27.03.2012 in favour of the petitioner/plaintiff and that the asbestos sheet shed and plants are in existence as on the date of filing the suit. But the person, who raised those shed and plants, is a question to be decided only after trial. At this stage, appointment of Advocate Commissioner to note down the physical features of the property in dispute does not arise and apart from that, question of noting down as to who is in possession of the

shed is nothing but collection of evidence and therefore, the Commissioner cannot be appointed for collection of evidence since the parties are bound to prove their independent case by producing necessary evidence and cannot take assistance of the Court by filing an application for appointment of Advocate Commissioner.

7. Order 26 Rule 9 read with Section 75 of C.P.C., empowers the Court to issue commission to make local investigation which may be required for the purpose of elucidating any matter in dispute. Though the object of local investigation is not to collect evidence which can be taken in the Court, the purpose to obtain such evidence can only be held on the spot with a view to elucidate any point, which is left over in the evidence produced before the Court. But it is not necessary for either of the parties to apply for appointment of Commissioner. The Court may issue commission for local investigation if the circumstances permits that local investigation is necessary for elucidating the matter in dispute.

8. Therefore, it is clear that a Commissioner cannot be appointed for collection of evidence, which is required to be proved by parties by adducing or producing necessary evidence before the Court. Moreover, the physical features are not in dispute in the present suit and the appointment of Advocate Commissioner to note down the physical features, which are not in dispute, is an illegality committed by the Court below. Therefore, the order passed by the Court below is *ex facie* erroneous on that basis and the order is liable to be set aside.

9. In the result, the Civil Revision Petition is allowed, setting aside the order dated 15.11.2014 passed in I.A.No.393 of 2014 in O.S.No.155 of 2013 by the Principal Junior Civil Judge, Avanigadda. No order as to costs. Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SATYANARAYANA MURTHY, J

25th January, 2018

sj

