

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.6601 OF 2017

ORDER:

This civil revision petition is filed, under Article 227 of the Constitution of India, challenging the order dated 09.11.2017 in E.A. No.1036 of 2016 in E.P. No.85 of 2007 in O.S. No.3751 of 2003 passed by the II Junior Civil Judge, City Civil Court, Hyderabad, whereby the learned Junior Civil Judge allowed the petition filed under Rule 9 of Order XXVI read with Section 151 of the Code of Civil Procedure, 1908 (for short 'CPC') and appointed Advocate-Commissioner Sri Parshuram Budiga for the purpose mentioned in the petition.

The petitioner herein is the first respondent, first respondent herein is the petitioner, and respondents 2 and 3 herein are the respondents 2 and 3 in the E.A. The parties will hereinafter be referred to as they are arrayed before the court below for convenience.

The petitioner filed a petition under Rule 9 of Order XXVI CPC to appoint an Advocate-Commissioner, to note down the physical features and to ascertain whether the parties raised common wall in common passage dividing the same into equal halves. During pendency of E.P. No.85 of 2007, the first respondent compromised the matter with the petitioner in the month of May, 2010. As per the compromise, both the parties withdrawn the criminal cases against each other and the Respondent shall withdraw the EP. As per the terms of compromise, the petitioner divided the common place by raising the wall and separated the ingress and egress of their respective properties. The parties signed on the memorandum

of understanding, but there are no signatures of the parties on the 2nd page. The parties and witnesses were signed on the memorandum of compromise, the original copy was also with the petitioner herein. Taking advantage of the situation, the first respondent denied the execution of memorandum of compromise and filed E.P. The main contention of the petitioner is that he raised the same contention before this Court in CRP No.939 of 2016 and in the presence of both the counsel, this Court made an observation at paragraph 3 of the order as follows:

“3.It is the submission across the bar, from both sides, that there was a decree for permanent Injunction, while execution under Order XXI Rule 32 C.P.C as per the J.Dr in compromising the execution lis in two criminal cases viz., C.C. Nos.42 and 47 of 2006. Pursuant to it, they entered into compromise in May, 2010 and reduced into writing by both parties and the copy of the same enclosed. In further saying referring to the terms of compromise even C.C Nos.42 and 47 of 2006 on the file of VIII Additional Chief Metropolitan Magistrate, Nampally, Hyderabad were compounded and the D.Hr being a party to the compromise terms as per which the disputed passage, in relation to the permanent injunction relief, divided between them as part No.1 and part No.2, by allotting part No.1 exclusively to D.Hr and part No.2 exclusively to J.Dr and they allegedly constructed the wall dividing the same, thereby, the decree, however, unexecutable from the division of the disputed lis by relinquishing respective rights by allotting exclusive rights and even the compromise terms are over. Instead of filing an application for withdrawal without considering the issue No.5 in memorandum of compromise, the D.Hr has proceeded further and the executing Court ordered to sent J.Dr to civil prison and he filed E.A. No.1337 of 2015 under Order XXI Rule 26 C.P.C and that was also ended in dismissal on 19.11.2015, thereby the impugned order of the lower Court liable to be set aside and the E.P proceedings are liable to be terminated.

It is further observed at paragraph 5 that,

“5) In view of the disputed facts, in terms of compromise, containing the signatures that requires adjudication and once the compromise effected, the parties are bound for the settlement with a contractual obligations therein for the executing Court to determine by giving opportunity to the petitioner/ J.Dr to file an application to that effect under Section 47 C.P.C and the executing Court shall determine the same by virtue of this direction and there shall be interim stay enforcing warrant to commit the J.Dr to civil prison in the meantime extending till three weeks from the date of receipt of this order. In the meantime, the executing Court shall decide such an application to be filed within 15 days from the date of receipt of the order to enquire and dispose of the same within two (2) months from the date of receipt of this order. If it could not be possible for the executing Court to dispose of, as above it shall seek for extension of time and pending the same by virtue of this order, by suspension of the warrant to commit the accused person to civil prison.”

The petitioner further submitted that in view of the compromise entered by the parties and as per the terms of the compromise it is stated that the passage shall be divided into two equal halves and one first party shall enjoy the one such half and 1st amongst the second party shall enjoy the other half. That the 1st and, amongst the second party shall raise wall with his own funds in the common passage dividing the same into two equal halves.

The first respondent filed counter in the petition denying material allegations *inter alia* contending that the petition is filed as abuse the process of law and filed with an ill motive for the purpose of gaining the time and denied the execution of compromise decree itself and that the executing court cannot go beyond the decree and pass any order and unless the compromise is recorded by the court,

in the execution petition, by fraud, coercion etc., the same can be acted upon and prayed for dismissal of the petition.

Upon hearing argument of both the counsel, the trial court appointed Sri Parsuram Budiga as an Advocate-Commissioner to note down and to find out whether there is existence of any dividing wall in the common passage of suit schedule building is in existence.

The petitioner, who is the first respondent before the executing court, filed this revision under Section 227 of the Constitution of India while contending that the reason for appointment is only due to an observation made in paragraph 3 of the order in CRP No.939 of 2016 directing enquiry under Section 47 CPC and if the commissioner is appointed it would amount to collection of evidence, and therefore, appointment of an Advocate-Commissioner by the executing Court is illegal and prayed to set aside the order passed by the court below.

In the earlier round of litigation, in CRP No.939 of 2016 this court made an observation, at paragraph 3, that a petition under Section 47 CPC can be filed challenging the executability, satisfaction and discharge of the decree obtained by the petitioner/decree holder in O.S. No.3751 of 2003, but no such application is filed before the Court other than in the E.P. itself, such application is filed questioning the executability, satisfaction and discharge of the alleged compromise executing memorandum of compromise between the petitioner and the first respondent. But appointment of an Advocate-Commissioner exercising power under Rule 9 of Order XXVI of CPC is without any application under Section 47 CPC

as observed by this Court in CRP No.939 of 2016 is an error apparent on the face of record and if any application is filed under Section 47 CPC questioning the executability, satisfaction and discharge of the decree, then there is possibility of exercising such power to find out whether the decree was satisfied in terms of the memorandum of understanding. But at this stage, appointment of an Advocate-Commissioner to note down whether there is existence of any dividing wall in the common passage of suit schedule building in terms of the memorandum of compromise does not arise and the executing court cannot go beyond the decree except contemplating the provision under Section 47 CPC.

Therefore, I find that the appointment of an Advocate-Commissioner is an error on the face of the record and the same is hereby set aside while leaving it open to the first respondent file an appropriate application under Section 47 CPC, if he wishes to file, questioning the executability, satisfaction and discharge of the decree.

In the result, the civil revision petition is allowed while setting aside the order dated 09.11.2017 in E.A. No.1036 of 2016 in E.P.No.85 of 2007 in O.S. No.3751 of 2003 passed by the II Junior Civil Judge, City Civil Court, Hyderabad. No costs.

Consequently, miscellaneous petitions, if any, pending shall stand closed.

M.SATYANARAYANA MURTHY, J

Date:15.03.2018
BV