

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P. No.7633 of 2018

O R D E R:

This Revision is filed under Article 227 of Constitution of India challenging the order dated 13.11.2018 in I.A.No.147 of 2018 in O.S.No.84 of 2009 of the Senior Civil Judge, Nizamabad.

2. Petitioners herein are the plaintiffs in the suit. They filed the said suit against the respondents for perpetual injunction restraining the respondents from interfering with the alleged possession and enjoyment of suit schedule property which is agricultural land situated at Khanapur Shivar, Nizamabad Mandal and District.

3. Respondents 1 and 2 filed the written statement opposing the suit claim and denied the possession of the petitioners over the suit schedule property.

4. After the trial was completed and the matter was posted for arguments, petitioners filed I.A.No.147 of 2018 under Order XXVI Rule 9 C.P.C for appointment of Advocate Commissioner for local inspection to ascertain the factum of possession over the suit schedule property.

5. In the affidavit filed in support of the said application, petitioners contended that the issue of possession as on the date of filing of the suit has to be decided and it is necessary

to appoint an Advocate Commissioner to make local inspection and submit a report regarding possession on this part over the suit schedule property and it would not amount to collection of evidence.

6. Counter affidavit is filed by the respondents 1 and 2 opposing this application. They contended that appointment of an Advocate Commissioner to ascertain the factum of possession of the suit schedule property cannot be entertained and is not maintainable. They contended that the suit is for injunction and the Court has to decide the question of possession basing on the evidence and petitioners cannot be permitted to gather evidence through Advocate Commissioner.

7. By order dated 13.11.2018, the Court below dismissed the application. It noted that this application has been filed at the state of arguments, that the parties had let in evidence, and if any Advocate Commissioner is appointed to ascertain the possession, it amounts to nothing but collection of evidence. It also considered the decisions cited by the petitioners and held them to be inapplicable by observing that the purpose of appointment of Advocate Commissioner in the instant case was to determine the possession of the petitioners, and not for noting down the physical features or for demarcation of the subject land.

8. Assailing the same, this Revision is filed.

9. Heard Sri T.Gangadhar, learned counsel for the petitioners and Sri G.Rajeshwar Rao for respondents 1 and 2.

10. Counsel for the petitioners contends that the order passed by the Court below is erroneous and the Court below ought to have appointed Advocate Commissioner to ascertain the factum of possession. He also drew the attention of this Court to the cross-examination of D.Ws.1 and 3 on the aspect of possession. He also cited decisions in **Jajula Koteswar Rao Vs. Ravulapalli Masthan Rao**¹ and **Shameem Begum Vs. Vennapusa Chenna Reddy and another**².

11. Counsel for the respondents 1 and 2 refuted the above contentions and supported the order passed by the Court below.

12. From the facts narrated above, it is clear that the suit was filed by the petitioners to ascertain their possession over the plaint schedule property and seeking relief of perpetual injunction. The trial of the suit had concluded and the matter is posted for arguments. No doubt in a suit for perpetual injunction possession as on the date of filing of the suit has to be considered by the Court below apart from other aspects, but parties have to let in evidence in support of their respective pleadings and the Court has to decide the suit on

¹ 2016 (1) ALT 134

² 2018 (1) HLT 114

the basis of the pleadings, evidence on record and applicable case law.

13. In ***Jajula Koteswar Rao's case*** (1 supra), there was an allegation of encroachment by the defendant. In those circumstances, this Court held that where there is a controversy as to identification, location or measurement of the land, local inspection through Advocate Commissioner is required to be done and issues relating to encroachment cannot be decided by oral evidence; and in cases where said allegations are made also, Advocate Commissioner can be appointed and it does not amount to collection of evidence.

14. In the instant case, there is no such allegation of encroachment but there is a dispute as to who was in possession of the suit schedule property on the date of filing of the suit. There was no dispute with regard to localization or identification of the suit schedule property. Therefore, the said decision has no application to facts of the case.

15. In ***Shameem Begum's case*** (2 supra) an application for appointment of Advocate Commissioner for local inspection to note down the physical features of the suit schedule property in a suit for bare injunction was dismissed. The Court observed that there is a distinction between fishing out information and collection of evidence. What is prohibited is fishing out information through an Advocate Commissioner

and in particular as to who is in possession of the property but appointment of Advocate Commissioner to note down visible physical features is not prohibited. The said judgment thus held that it is prohibited for a party to get an Advocate Commissioner appointed to obtain information as to who was in possession. The said decision is in fact against the petitioners.

16. I am satisfied that in the instant case, the Court below has given cogent reasons as to why an Advocate Commissioner cannot be appointed to ascertain the possession of the petitioners over the suit schedule property. So I hold that there is no error of jurisdiction in the order of the Court below warranting interference of this Court under Article 227 of Constitution of India.

17. Accordingly, Civil Revision Petition fails and is dismissed. No order as to costs.

18. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

M.S.RAMACHANDRA RAO, J

13.02.2019

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