HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD

WEDNESDAY ,THE NINTH DAY OF DECEMBER
TWO THOUSAND AND TWENTY

PRESENT

THE HONOURABLE JUSTICE G SRI DEVI

CIVIL REVISION PETITION NO: 2726 OF 2019

Petition under Article 227 of the Constitution of India, aggrieved by the Order dated. 15-10-2019 passed in I.A.No. 254 of 2019 in O.S.No.896 of 2007 on the file of the Principal District Judge At L.B.Nagar Ranga Reddy District

Between:

B.Janardhan Reddy, S/o late Anantha Reddy, Aged about 62 Years, Occ. Business, R/o Plot No.535, Road No.12, Banjara Hills, Hyderabad.

...PETITIONER/Defendant

AND

1. Smt. Shantha Bai Died as per LRs, R/o H.No.7-1-95/2, Ameerpet, Hyderabad.
2. Kishen Chand, S/o Mahesh Chand, Age 55 Years, Occ. Business, R/o H.No.7-1-95/2, Ameerpet, Hyderabad.
3. Karan Chand, S/o Mahesh Chand, Age 53 years, Occ. Business, R/o H.No.7-1-95/2, Ameerpet, Hyderabad
4. Miss Rajini Chand, D/o Mahesh Chand, Age 52 years Occ. Landlady, R/o H.No.7-1-95/2, Ameerpet, Hyderabad
5. Miss Padmini Chand, D/o Mahesh Chand, Aged about 51 years, R/o H.No.7-1-95/2, Ameerpet, Hyderabad.
6. Poonam Chand, S/o Mahesh Chand, Age 49 years, Occ. Business, R/o H.No.7-1-95/2, Ameerpet, Hyderabad.

...RESPONDENTS/Plaintiffs

IA NO: 1 OF 2019

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to suspend the operation of the order dt.15-10-2019 passed in I.A.No.254 of 2019 in O.S.No.896 of 2007 on the file of the Principal District Judge, at L.B.Nagar, Ranga Reddy District, pending disposal of the above CRP.

Counsel for the Petitioner(s):SRI. R SAMEER AHMED

Counsel for the Respondents 2 to 6: SRI. V. HARI HARAN

The Court made the following: ORDER

THE HONOURABLE JUSTICE G. SRI DEVI

CIVIL REVISION PETITION No. 2726 of 2019

ORDER:

The present Civil Revision Petition is filed under Article 227 of the Constitution of India, aggrieved by the order, dated 15.10.2019 passed in I.A.No.254 of 2019 in O.S.No.896 of 2007 on the file of the Principal District Judge at L.B.Nagar, Ranga Reddy District, wherein and whereunder an application filed by the respondents/plaintiffs for appointment of an advocate-commissioner to take measurement of the plinth area of ground and first floor pertaining to the building bearing Municipal No.10-11-32 (Old No.11-32) and H.No.10-11-33 (Old No.11-33) situated at Fatehnagar, Balanagar Mandal, Ranga Reddy District, was allowed.

The facts in nutshell are as under:

The 1st respondent (since died) filed O.S.No.896 of 2007 for cancellation of agreement of sale, dated 02.04.2003 and other sale deeds executed by her during her life time in respect of the schedule property. After the death of the 1st respondent, her legal representatives were brought on record as plaintiff Nos.2 to 6. When the suit was posted for further evidence of the petitioner/ defendant, respondent Nos.2 to 6 filed I.A.No.254 of 2019 to appoint an advocate-commissioner to take measurement of plinth area of ground and first floor of the suit scheduled property. It

was stated in the affidavit filed in support of the petition that the petitioner/defendant filed O.S.No.18 of 2005, for specific performance of alleged agreement of sale dated 02.04.2003 against their mother and during her life time, she filed I.A.No.652 of 2015 in O.S.No.18 of 2005 for grant of injunction, restraining the petitioner/ defendant from interfering into the usage of staircase leading to 2nd and 3rd floors of the above said property and that the said I.A. was allowed vide order, dated 14.10.2015. In spite of the said order, the petitioner/defendant has violated the same and demolished the existing staircase, as such, they are constrained to file I.A.No.2346 of 2017 for appointment of an advocate-commissioner and also filed other I.A.s for the relief of civil imprisonment of the petitioner/defendant and attachment of property and after hearing both sides, I.A.No.2346 of 2017 was dismissed. It was further stated in the affidavit that aggrieved by the same, C.R.P.No.7301 of 2018 was filed before this Court and by an order, dated 31.01.2019, this Court, partly allowed the said C.R.P. and directed the Court below to appoint an advocate-commissioner to make local inspection so as to find out whether there was any staircase or not and disallowed the other relief i.e., appointment of an advocate-commissioner to take measurements of ground and first floor of the above said property with the help of licenced Civil Engineer on the ground that two reliefs cannot be prayed in one I.A. and also opined that they may file an application for appointment of advocate-

commissioner in O.S.No.896 of 2007. It was also stated that the petitioner/defendant is claiming 50% share in the ground and first floor of the suit scheduled property. It was further stated that the petitioner/defendant has not paid any amount towards sale consideration and that there was no receipt; that even as per the sale deed, dated 09.04.2003, the extent of space is 3500 square feet on the ground floor of the building and as per another sale deed, dated 21.05.2003, the extent of space is 1500 square feet, but as on the ground position, the extent is 7215 square feet. It was also stated that the plan attached to the sale deed, dated 21.05.2003 (Ex.A3) the measurement are 78' width and 185' in length in 3 blocks and that the deceased 1st respondent's 50% share comes to 78' x 92.5' i.e. 7215 square feet, but the contention of the petitioner/defendant is that he purchased an extent of 5000 square feet on the ground floor and it is clear that there was an excess of 2215 square feet on the ground floor. Similarly, there is an excess of 2500 square feet on the first floor because there is a projection of verandah in the first floor in the above said building. It was further stated that to know the ground realities and for proper adjudication of the above, it is just and necessary to appoint an advocate commissioner to take measurement of the property with the help of the licenced engineer and that no prejudice would be caused to the petitioner/defendant if an advocate-commissioner would be appointed.

The petitioner/defendant filed counter affidavit, *inter alia* contending that the original plaintiff late Smt. Shantha Bai executed an agreement of sale, dated 02.04.2003, which was marked as Ex.B2, and also executed three sale deeds bearing Nos.4378 of 2003, dated 09.04.2003, 8826 dated 25.09.2003 and 6292 of 2003 dated 21.05.2003, which were marked as Exs.B3, B5 and B6 through him as D.W.1 and in those documents, there is a clear recital of receipt of sale consideration and 2nd respondent/2nd plaintiff, who was examined as P.W.1, admitted in her evidence that her mother duly executed the above said agreement of sale and also registered sale deeds. It is pertinent to mention that the 2nd respondent/2nd plaintiff, is neither a witness nor a party to the above mentioned documents and he does not have locus standi to question the same by way of the petition particularly with regard to measurements. It was further stated that in the said documents, it was specifically mentioned with regard to the method of payment of sale consideration i.e. by way of cheques and cash payment and as such the very allegation that was made by the original plaintiff to the effect that those documents are nominal documents and the same were never intended to act upon is baseless and false. It was also stated that after 16 years of the execution of the said documents and delivery of possession, the present petition seeking for measurement of plinth area was filed, which clearly implies that the same was filed to drag the matter and deny the course of justice. It

was further stated that the petitioner/defendant having got the sale deeds and agreement of sale, paid the consideration as per the measurements made in the sale deeds, which are duly admitted by P.W.1 and that P.W.1, who was not present at the time of execution of the above said documents, is not competent person to file the present petition with his own affidavit. It was also stated that a perusal of the para-wise pleadings in the suit, the original plaintiff never pleaded with regard to the measurements mentioned in the sale deeds and differences about the extent in respect of the purchase of the property and the plaint is based on broad pleadings for cancellation of agreement of sale and registered sale deeds, but in the affidavit in para No.3 it was mentioned that the extent is different and it is excess other than mentioned in the registered sale deeds. It was also stated that as per the original agreement of sale dated 02.04.2003, the petitioner/defendant is entitled to half share of the property that was belonged to the original plaintiff and that infact he filed two suits vide O.S.No.18 of 2005 and O.S.No.566 of 2006 for specific performance of sale basing on the agreement of sale and when he was entitled for the half share under the agreement of sale, the question of measurements and differences in respect of the extent in the sale deeds would not arise in the present form of the suit. It was further stated that with an intention to drag on the proceedings of the suit, the present petition was filed and

that the same is liable to be dismissed as the same is devoid of merit.

After considering the rival submissions, the Court below allowed the said petition. Challenging the same, the present Civil Revision Petition is filed by the petitioner/defendant.

Heard Sri R.Sameer Ahmed, learned Counsel for the petitioner/defendant, Sri V.Hari Haran, learned Counsel for the respondents/plaintiffs and perused the record.

Learned Counsel for the petitioner/defendant would submit that the impugned order, dated 15.10.2019 in I.A.No.254 of 2019 in O.S.No.896 of 2007 is perverse and contrary to law; that the Court below erred in appointing an advocate-commissioner through its order, dated 15.10.2019, without proper appreciation of the facts and circumstances and the material available on record; that the Court below ought to have dismissed the said petition on the ground of maintainability; that the Court below ought to have appreciated the objections raised by the petitioner herein against the relief sought by the respondents/plaintiffs in I.A.No.254 of 2019 in O.S.No.896 of 2007 and that the Court below ought to have given proper and detailed reasons for allowing the relief sought in I.A.No.254 of 2019 in O.S.No.896 of 2007, instead of relying upon the observation passed by this Court in C.R.P.No.7301 of 2018. In support of his contentions, he relief on the judgments of this Court

in *Bandana Mutyalu and another v. Palli Appalaraju*[1] and *Bandi Samuel and another v. Medida Nageswara Rao*[2].

Learned Counsel for the respondents/plaintiffs would submit that there was a difference with regard to the extent mentioned in the agreement of sale and also the sale deeds and that the suit was filed for cancellation of the documents executed by the deceased plaintiff No.1 during her life time in favour of the petitioner/defendant and as such, the appointment of an advocate-commissioner is necessary. He further submits that in C.R.P.No.7301 of 2018, this Court gave a specific direction to the respondents/plaintiffs to file an application for appointment of advocate-commissioner in O.S.No.896 of 20017 and as such the respondents/plaintiffs filed the present petition. He also submits that no prejudice would be caused to the petitioner/ defendant if an advocate-commissioner was appointed and that the same would helpful to the Court for proper adjudication of the matter.

Before proceeding further, it would be appropriate to refer to Order 26 Rule 9 of C.P.C., which reads as under:

> "**Order 26 Rule 9.Commissions for local investigations:** In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or

[1] (2013) 5 A.L.D 376
[2] (2017) 1 A.L.D 582

annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court: Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

In ***Bandi Samuel and another v. Medida Nageswara Rao (2 supra)*** another coordinate Bench of this Court in para No.7 held as under:

"7. The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 inter alia for elucidating any matter in dispute. There is some confusion as to in what circumstances an advocate-commissioner is to be appointed in a civil suit. To answer this question, we have to understand the expression of "elucidating any matter in dispute" in Order 26, Rule 9 of CPC. There are several expressions in this regard. Some are under the impression that no advocate-commissioner is to be appointed in suit for injunction. For example, the claim for injunction made by the plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using said way, any amount of evidence in this regard may not help the Court to render a correct finding on this aspect, as evidence in this regard would be available on the spot at the ground/field. So, a situation such as this would definitely fall within the expression of "elucidating any matter in dispute" to avoid adducing of much oral evidence by consuming time of Court and parties and ultimately with no possibility of practical approach for accurate determination of the lis. No doubt, before appointing an advocate commissioner, Court shall examine pleadings, relief claimed

> and real controversy between parties. Court has to keep in mind therefrom to decide whether there is an actual necessity to appoint advocate commissioner to decide any real controversy between parties."

As seen from the record, the suit was filed in the year 2007 for cancellation of the agreement of sale, dated 02.04.2003 and other registered sale deeds 09.04.2003, 25.09.2003 and 21.05.2003. When the said documents were filed along with the plaint, the respondents/plaintiffs 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 2007 to 2019. Before appointing commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. The reason cited by the respondents/plaintiffs in the affidavit filed along with the I.A. is that as per the direction of this Court in C.R.P.No.7301 of 2018 they filed the present petition and basing on the same the Court below allowed the petition. The reasoning given by the respondents/plaintiffs as well as the Court below cannot be accepted, as in C.R.P.No.7301 of 2018 this Court held as under:

> "24. Coming to the other portion of the relief claimed by the petitioners as to the demarcation of the area of the ground and 1st floors in the same premises, these floors are not subject matter of the suit O.S.No.18 of 2005 and so petitioners could not have filed I.A.No.2346 of 2017 for such measurement and they can possibly file it only in the other suit O.S.No.896 of 2007."

In *Sarala Jain and others v. Sangu Gangadhar*[3], another coordinate Bench of this Court held that "appointing advocate commissioner by the trial Court for the purpose of demarcating schedule property and fix boundary stones to the property of the respondents amounts to granting pre-trial decree as it satisfied part of the reliefs claimed in the suit. In such case, commissioner cannot be appointed for the said purpose. Further, it was held in this case that to appoint an advocate commissioner, Court has to keep in mind the following:

(1) Total pleadings of both parties;
(2) Relief claimed in suit;
(3) Appointment of advocate commissioner for specific purpose at interlocutory stage shall not amount to grant pre-trial decree; and
(4) Necessity to appoint advocate commissioner to decide real controversy between parties."

Admittedly, the suit is filed for cancellation of documents and that Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties, since the parties should prove their case by letting in legally acceptable evidence and the report of the Commissioner can only aid the Court in evaluating the evidence to come to just conclusion. In the instant case, the court below has not even chosen to give a prima facie finding for the purpose of issuance of commission. Under Order 26 Rule 9 of CPC the need ought to be felt by the court for the purpose of elucidating

[3] (2016) 3 ALD 197

certain details and it cannot mechanically appoint an Advocate Commissioner without focussing attention as to what are the questions of dispute and whether for deciding the disputed question the appointment was necessary. But, in this case, utter disregard to the above said principles, the court below in its cryptic order simply stated that even if the property is mentioned in terms of percentage, there would be need to ascertain whether on ground floor the property is 50% or not. This is totally unconvincing because of the reason that the relief sought in the suit is for cancellation of the registered documents and not for partition of the suit scheduled property. The Court below further allowed the application and appointed an Advocate Commissioner without even considering whether such issuance of commission is warranted at this stage except stating that in view of the observation made in C.R.P.No.7301 of 2018, the respondents/plaintiffs are entitled for the relief claimed by them. It is well-settled law that if the oral and documentary evidence are found enough to resolve the controversies in the suit, the rejection of application for appointment of a Commissioner is a valid one. A perusal of the material available on record, it appears that the learned District Judge has lost sight of the purpose and scope of the provisions of Order XXVI Rules 9 and 10 (3) of C.P.C. Therefore, I have no hesitation to hold that the impugned order of the court below is improper and suffers from material illegality.

For the aforesaid reasons and having regard to the facts and circumstances of the case and nature of the suit, the impugned order is liable to be *set aside*.

Accordingly, the Civil Revision Petition is allowed and the order, dated 15.10.2019 passed in I.A.No.254 of 2019 in O.S.No.896 of 2007 on the file of the Principal District Judge at L.B.Nagar, Ranga Reddy District, is hereby set aside.

As a sequel thereto, Miscellaneous Petitions pending if any, shall stand closed. There shall be no order as to costs.

Sd/-M.MANJULA
ASSISTANT REGISTRAR

//TRUE COPY//

SECTION OFFICER

To,

1. The Principal District Judge at L.B.Nagar, Ranga Reddy District.
2. One CC to SRI. R SAMEER AHMED Advocate [OPUC]
3. One CC to SRI. **V. HARI HARAN**, Advocate [OPUC]
4. **Two CD Copies**

HIGH COURT

GSDJ

DATED:09/12/2020

ORDER

CRP.No.2726 of 2019



ALLOWING THE C.R.P

NO COSTS.

(5) VLV 16/12/20