

THE HON'BLE SRI JUSTICE R.RAGHUNANDAN RAO

CIVIL REVISION PETITION No.581 of 2021

ORDER:-

The petitioner herein had filed O.S.No.667 of 2011 before the Principal Junior Civil Judge, Nellore against the respondent herein and Vallepu Pedda Ankaiah for grant of permanent injunction, restraining them from interfering with the possession of the petitioner over the suit schedule property consisting of Ac.3.02 cents of land in Sy.No.2066/1 of Nellore Bit-1.

2. As Vallepu Pedda Ankaiah had passed away and no others were taken to bring the L.Rs on record, the suit was dismissed against the said Vallepu Pedda Ankaiah. However, the suit was decreed against the respondent herein by a judgment and decree dated 04.09.2017. The case of the petitioner, which was accepted by the trial Court was that the property originally belonged to the forefathers of the respondent herein and the said property has been purchased by the mother of the petitioner and another lady, by way of a registered deed of sale dated 31.03.1960 and as such, the petitioner herein had proved his title and possession over the property. The trial Court also took into account in W.P.No.12770 of 2011 filed by the petitioner herein to protect his possession over the property against the action of the revenue authorities, who sought to take over the said land on

the ground that it is assigned land under the Land Encroachment Act, 1905.

3. After the disposal of the suit, the petitioner filed E.P.No.182 of 2018 on the ground that the respondent was seeking to violate the orders of the trial Court. At that stage, the respondent herein moved E.A.No.233 of 2019 for appointment of an advocate commissioner to note down the physical features of the property. This application was filed by the respondent on the ground that the respondent continues to remain in possession of the property along with his children in the houses constructed by them with asbestos sheet roof and that he continued to cultivate the property by raising dry crops. It was the contention of the respondent that as the petitioner was never in possession of the schedule property and as the judgment and decree was obtained by the petitioner by suppressing true facts, the appointment of an advocate commissioner to inspect the schedule property by noting down the physical features and taking photographs of the same would be sufficient for the Court to do justice.

4. The petitioner herein had filed his counter stating that the respondent had already filed photographs of the schedule property to make out his case and as such, appointment of an advocate commissioner for filing photographs would not be necessary. The petitioner also took the plea that the application was filed only for the purpose of protracting the litigation and would not serve any purpose.

5. The trial Court after considering the submission of both sides, allowed the application by an order dated 02.12.2020, appointing an advocate commissioner to note down the physical features of the petition schedule property and to take photographs of the schedule property. Aggrieved by the said order, the petitioner has approached this Court, by way of the present civil revision petition.

6. The Executing Court took the view that for a just determination of the case, appointment of an advocate commissioner to note down the physical features of the property and to take photographs of the property would meet the ends of justice and no injustice would be caused to the petitioner herein if the petition is allowed.

7. Sri Nuthalapati Krishna Murthy, learned counsel for the petitioner would submit that appointment of an advocate commissioner to note down the physical features is effectively an application for adducing the fresh evidence to over turn the judgment and decree passed by the trial Court. He submits that such an exercise is impermissible by the Executing Court as the Executing Court cannot go behind the decree or arrive at findings which are at odds with the decree. Even though a ground was taken in the revision petition that a commissioner cannot be appointed in execution petition proceedings, the same has not been pressed.

8. Sri C. Subodh learned counsel, appearing for the respondent would submit that the said land is assigned land which could not have been sold to the petitioner herein and in any event, the respondent and his family members are residing in the schedule property which can easily be demonstrated by the advocate commissioner, noting down the physical features of the property.

9. It is now settled law that an advocate commissioner cannot be appointed to collect evidence and the role of an advocate commissioner would be restricted to noting down the physical features, for the purpose of assisting the Court in arriving at a finding of fact where there is some ambiguity or further material is necessary for the Court to arrive at a finding. In the present case, the trial Court of competent jurisdiction has already decided the question of possession of the property in favour of the petitioner herein. This finding cannot be over turned by the Executing Court while passing orders in an Execution Petition. The Executing Court ought not to have directed the appointment of an advocate commissioner in such a circumstance. Further, the Executing Court except stating that appointment of an advocate commissioner would not be prejudicial to the interest of the petitioner has not given any finding as to the lacuna or ambiguity that needs to be clarified before the trial Court. In the absence of such a finding, the trial Court could not have directed the appointment of an advocate commissioner.

10. For all the aforesaid reasons, I am of the opinion that the order of the Executing Court requires to be set aside.

11. Accordingly, the Civil Revision Petition is allowed. There shall be no order as to costs.

Miscellaneous petitions, pending if any, in this Civil Revision Petition shall stand closed.

JUSTICE R.RAGHUNANDAN RAO

Date : 01.02.2022

RJS

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