
(2005) 06 AP CK 0065
In the Andhra Pradesh High Court
Case No : CRP No. 6651 of 2004

Koduru Sesha Reddy

APPELLANT

Vs

Gottigundala Venkata Rami Reddy and Others

RESPONDENT

Date of Decision : 27-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 1

Citation : (2006) 1 ALD 372

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : P. Sridhar Reddy, for the Appellant; Singam Venkata Rao, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—The petitioner is the plaintiff in O.S. No. 23 of 2001 on the file of the Court of the Senior Civil Judge, Gudur. He filed the suit against the respondents for the relief of perpetual injunction in respect of the suit schedule property. Along with the suit, he filed two applications, one under Order 39 Rule 1 C.P.C., for temporary injunction and Anr. being I.A.No. 146 of 2001 under Order 26 Rule 9 C.P.C., for appointment of an Advocate Commissioner. Both the applications were ordered ex parte. The Advocate Commissioner filed a report noting down the physical features, alleged to be of the suit schedule property.

2. The respondents filed I.A. No. 396 of 2004 for appointment of another Advocate Commissioner. According to them, the appointment of Commissioner by the Court in I.A. No. 146 of 2001 was without notice to them and that the petitioner had mislead the Commissioner at the time of noting down the physical features. This application was resisted by the petitioner. Through its order dated 29-10-2004, the trial Court allowed the LA. The petitioner challenges the same.

3. Sri P. Sridhar Reddy, the learned Counsel for the petitioner submits that though it is permissible for a Court to appoint a second Commissioner in relation

to the same matter, it can be done only when the earlier report is set aside for the reasons to be recorded and without taking such a step, a second Commissioner cannot be appointed for the same purpose. He has placed reliance upon certain judgments of this Court.

4. Sri Singam Venkata Subba Rao, the learned Counsel for the respondents, on the other hand, submits that the principal invoked by the learned Counsel for the petitioner would apply, only in cases, where the previous report came to be submitted with the participation of the parties and not where the report was secured ex parte, on the basis of an ex parte order.

5. The petitioner filed I.A. No. 146 of 2001 under Order 26 Rule 9 C.P.C., for appointment of a Commissioner. It was at a stage, where the respondents were not served with notices. A Commissioner was appointed through an ex parte order. The warrant was executed by the Commissioner and he submitted the report depicting the physical features of the suit schedule property. A perusal of the report does not disclose that he made an endeavour to the respondents on notice.

6. The respondents came forward with the present LA., for appointment of another Commissioner by alleging that the contents of the report filed by the Commissioner appointed in I.A. No. 146 of 2001 were on the basis of unilateral representation made by the petitioner and that it does not reflect the correct state of affairs. Obviously, with a view to get a proper report before it, the trial Court allowed the LA.

7. It is true that there are several judgments of this Court, which are to the effect that before appointment of a second Advocate Commissioner, the Court should record its dissatisfaction about the report submitted by the first Commissioner. The object is to avoid a situation where the Court is faced with conflicting reports.

8. It hardly needs any emphasis that in a suit for perpetual injunction, it is for the plaintiff to prove that he is in possession of the suit schedule property, as on the date of filing of the suit. The necessity to appoint Commissioner would arise, if only, the evidence, which is already on record, leaves something to be explained further and the Court feels that the best way to go nearer the truth of the matter is by appointing a Commissioner. Except where, the purpose of appointing a Commissioner is to note the physical features existing as on that day, appointment of Commissioner is to be undertaken only after hearing both the parties. The report submitted by an ex parte Commissioner would hardly be of any evidentiary value or of assistance of deciding the dispute. It represents only a one sided version and the Commissioner is guided by only that party, at whose instance, he was appointed. Such reports can be taken into account only, for a limited purpose. For instance, if it is complained by the party, who obtained an order of temporary injunction, that the respondents therein have brought about a change in the state of affairs despite the order of injunction the Court

can make use of such report, in arriving at a conclusion in this regard. Beyond that, no evidentiary value can be attached to ex parte reports.

9. In the instant case, the petitioner did not complain that the respondents herein have brought about any change in the suit schedule property, after the temporary injunction was granted. Therefore, the report submitted by the Commissioner appointed in I.A. No. 146 of 2001 virtually loses its significance. If a party wants that a Commissioner be appointed for reporting the state of affairs existing on the site, they have to seek appointment of Commissioner duly putting the other party on notice. It is only then, that the report submitted by the Commissioner can be said to be reflecting the facts, nearer to truth.

10. Even in such cases, particularly, in suits for perpetual injunction, appointment of a Commissioner to note down the physical features cannot precede the recording of evidence. The parties have to adduce their evidence in support of their respective contentions as to possession. The Court would be justified to appoint Commissioner, only if it feels that the evidence on record is not sufficient to record a finding, for the purpose of granting or refusing the relief of injunction. In the instant case, the trial is yet to commence.

In the judgments cited by the learned Counsel for the petitioner, the appointment of Commissioner was after the recording the evidence was concluded.

11. In view of the above discussion, this Court is of the view that the report of the Commissioner appointed in LA. No. 146 of 2001 cannot be made use of, for the purpose of deciding the dispute in the suit and that and the appointment of Commissioner through order in I.A. No. 396 of 2004 is premature.

12. For the foregoing reasons, the C.R.P. is allowed and the order under revision is set aside. It is further directed that the trial Court shall not take into account the report submitted by the Advocate Commissioner in I.A. No. 146 of 2001. It is made clear that the necessity to appoint an Advocate-Commissioner can be considered by the trial Court only after the parties lead their evidence and if it feels that such a step is necessary.