

THE HON'BLE Ms. JUSTICE B.S.BHANUMATHI

Civil Revision Petition No.138 of 2023

ORDER:

This revision, under Article 227 of the Constitution of India, is preferred against the order, dated 01.12.2022, dismissing I.A.No.481 of 2022 in A.S.No.106 of 2018 on the file of the Court of XI Additional District Judge, Tenali, filed under Section 107(2) read with Order XXVI Rule 9 and Order 41 Rule 27 CPC praying the Court to appoint an advocate commissioner to note the physical features of the petitioner's property, 1st respondent's property and HCFG gully of plaint plan, more particularly, unauthorized construction made by 1st respondent in the portion of GHI in HCFG gully of plaint plan and to measure the HCFB gully of plaint plan with the assistance of Town Surveyor, Tenali, as per the title deeds of petitioner and to demarcate its boundaries and also to note the measurements of the encroachments made by 1st respondent into the HCFG gully of plaint plan and to file commissioner's report along with sketch and also Surveyor's sketch and thereby receive the same as additional evidence in the appeal.

2. Heard *Sri Kotha Rama Mohan Rao*, learned counsel appearing for the petitioner and *Sri G.Ramesh Babu*, learned counsel appearing for 1st respondent. The 2nd respondent died.

3. The facts, in brief, are as follows:

The revision petitioner filed the suit in O.S.No.142 of 2014 on the file of the Court of I Additional Junior Civil Judge, Tenali, against the respondents for mandatory injunction and for other reliefs. On merits, the said suit was dismissed. Against the decree & judgment, appeal in A.S.No.106 of 2018 is preferred before XI Additional District & Sessions Judge, Tenali. It is the contention of the petitioner that the trial Court in its judgment commented that the petitioner has not filed any petition for appointment of advocate commissioner to show that disputed gully has width of 4 feet 3 inches at IC point shown in the plaint plan and 6 feet 6 inches at GF point shown in the plaint plan. Later, he came to know that filing of sale deed and link document are not sufficient to find out the factum of encroachment by 1st respondent into the disputed gully shown in the plaint plan. Therefore, he was advised to file the present application seeking appointment of advocate commissioner.

4. The respondent filed counter denying the petition averments and contending further as follows:

The respondents never encroached into the property of the petitioner. The petitioner is not entitled to fill the gaps of the suit, after pronouncement of the judgment. The appeal is filed in the year 2018. The present petition is filed at the fag-end of the appeal. Therefore, it is not maintainable. Under the guise of the petition, the petitioner is making efforts to collect the evidence. A commissioner cannot be appointed for collecting evidence. The petition is liable to be dismissed.

5. After hearing both parties, the trial Court dismissed the petition holding that the application filed by the petitioner is not an obscure to be filled up in the present case for pronouncing the judgment in the appeal and that the prayer of the petitioner is not convincing.

6. Hence, the aggrieved petitioner/appellant is before this Court.

7. The grievance of the petitioner/appellant is that the purpose of filing the petition has emanated particularly in view of the observations of the trial Court in dismissing the suit for want of proof of existence of physical fact and the trial Court is not satisfied with the proof by filing sale deed alone, and therefore, the petitioner cannot be found fault for not seeking similar relief during the pendency of appeal.

8. Since appeal is continuation of the suit and additional evidence is also permissible in appeal, Court has to see whether there is necessity to appoint a Commissioner to ascertain the facts existing physically and also whether it would help the Court in deciding the *lis* on merits. While seeking the relief of appointment of Commissioner, the petitioner has also invoked jurisdiction of the appellate Court under Order 41 Rule 27 CPC which permits receipt of additional evidence in appeal. Of course, Court can examine the necessity to permit additional evidence within the parameters stipulated under Order 41 Rule 27 CPC. In this regard, the explanation offered by the appellant is that the trial Court dismissed the suit basing on the observations which are already stated above.

9. The appellate Court further observed that the evidence now to be placed is neither required to enable the appellate Court to pronounce the judgment nor for any other substantial cause and further that the petitioner did not show that in spite of due diligence, the lower Court failed to consider his request.

10. For better understanding, Order 41 Rule 27 CPC is reproduced hereunder:

"27. Production of additional evidence in Appellate Court. - (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

Thus, from the above, it is clear that Order 41 Rule 27 CPC gives ample authority to an appellate Court to permit additional evidence not only when the case is covered by clauses (a) or (aa) of Rule 27 (1) CPC but also when the Court requires any document to be produced or witness to be examined to enable it to pronounce judgment or for any other substantial cause under Rule 27(1)(b). Therefore, Court can independently assess whether the proposed evidence would enable it to pronounce the judgment.

11. Certainly, in the present case, since a fact existing physically may not be proved only through documentary evidence but can be proved by inspection of a commissioner on material fact in dispute regarding existence of pathway and the trial Court based its findings to dismiss the suit on no proof of such fact, the appellate Court could have exercised its discretion in allowing the evidence to be placed on a very material fact on which the whole *lis* is based.

12. A reading of the impugned order discloses that by adopting a pedantic approach, the petition was dismissed rather than adopting an approach which would advance the cause of justice to decide the matter on merits. As such, the impugned order is liable to be set aside.

13. In the result, the Civil Revision Petition is allowed setting aside the order, dated 01.12.2022, passed by XI Additional District Judge, Tenali, in I.A.No.481 of 2022 in A.S.No.106 of 2018. As a sequel, I.A.No.481 of 2022 is allowed and the lower appellate Court is directed to appoint a Commissioner fixing the time limit for the purpose of expeditious disposal of the appeal. The appellate Court shall make every endeavour to dispose of the appeal as expeditiously as possible not exceeding three months from the date of receipt of a copy of this order.

There shall be no order as to costs.

Pending miscellaneous applications, if any, shall stand closed.

B.S.BHANUMATHI, J

26.07.2023
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