

(2023) 11 AP CK 0015

Andhra Pradesh High Court - Amaravati**Case No:** Civil Miscellaneous Appeal No. 1227 Of 2018

M Suguna Devi

APPELLANT

Vs

T Raikab Chand (Died) & Others

RESPONDENT

Date of Decision: Nov. 10, 2023**Acts Referred:**

- Code Of Civil Procedure, 1908 - Section 151
- Code Of Civil Procedure, 1908 - Order 9, Rule 9

Hon'ble Judges: Dr. K. Manmadha Rao, J**Bench:** Single Bench**Advocate:** C Subodh, T Janardhan Rao**Final Decision:** Disposed Of

Judgement

Dr. K. Manmadha Rao, J

1. The Appellant herein is the petitioner/ appellant before the III Additional District Judge, Nellore (in short 'the court below') filed the present Civil Miscellaneous Appeal before this Court. Aggrieved by the order dated 08.10.2018 in I.A.No. 269 of 2017 in I.A.No. 167 of 2017 in A.S.No.83 of 2016, which is filed under order IX, rule 9 read with Section 151 of C.P.C to restore the I.A.No.167 of 2017, which was dismissed on 21.03.2017 permitting the appellant to submit her side hearing for disposal of appeal. The court below dismissed the application holding that the application is filed only to drag on the matter, though sufficient opportunity has given to submit her arguments, but she did not turn up so far. Assailing the same, the present C.M.A came to be filed.

2. Heard Mr. C. Subodh, learned counsel for the appellant and Mr. T. Janardhan Rao, learned counsel for the respondents.

3. During hearing learned counsel for the appellant would contend that the appeal was posted on 21.03.2017 for enquiry on the application imposing cost and on that

day as the senior counsel was not present and the appellant paid costs and requested to post the matter on the next day, but the court below without considering her request and without giving opportunity to hear the matter, dismissed the application and simply holding that the application for restoration is not maintainable as the grounds urged by the appellant is disbelieved by the court below is highly untenable. Therefore the C.M.A is liable to be allowed.

4. Learned counsel for the respondents would contend that the court below has rightly considered the facts and circumstances and dismissed the applications. It is further contended that Advocate Commissioner has been appointed and he filed report also. Therefore the said application is not maintainable. In view of the C.M.A is liable to be dismissed.

5. Perused the record.

6. I.A.No. 167 of 2017 has been filed for appointment of an Advocate/ Commissioner for the purpose to inspect the properties of both sides and to localize their properties by virtue of their respective documents with the assistance of qualified surveyor and to decide whether the alleged IJKL portion is in the vicinity of respondents/ plaintiffs or the petitioner/ defendant therein. The court below upon perusal of the both affidavit and counter, wherein it was found that there is no just and sufficient cause to file the application for appointment of advocate commission, which is filed only to dodge the proceedings. Even though, the appellant did not turn up to submit her arguments. Therefore the court below dismissed the I.A.No.167 of 2017 on 21.03.2017.

7. It is the contention of the respondents that initially an Advocate commissioner was appointed and he filed a report in the suit. Therefore there is no need or necessity to appoint an advocate commissioner. Further it is the contention of the petitioner that on 21.03.2017 her senior counsel was out of station and paid costs to other side and requested time to post the matter next day, but the court below simply dismissed the application without giving proper opportunity.

8. Learned counsel for the respondents placed reliance on the decision of this Court in "**Jala Swamydas and Others v. Jadani Sumayun Raju** MANU/AP/0555/2005", wherein it was held as follows:

"3. The matter is coming up for admission. It is not in serious controversy that for a particular purpose, a commissioner was appointed and for the self-same purpose, another application for appointment of second commissioner had been filed. The ground raised is that for certain reasons the revision petitioners/defendants were not present at the time of inspection and hence, prejudice has been caused to them. It is needless to say that the relief prayed for in the application is a misconceived one. May be, in the facts and circumstances of the case, in the light of the memo or the objections raised by the revision petitioners, they could have prayed for re-entrustment of warrant

to the self same commissioner by affording proper opportunity to be present at the time of inspection. If they are, so, aggrieved of the nature of the report, which had been filed, it is needless to say that the petitioners are entitled to raise the appropriate objections also in this regard. The consistent view always has been that without setting aside the report of the first commissioner, a second commissioner for the self same purpose cannot be appointed."

9. However, advocate/ commissioner appointed in the suit before the court below and there was a report. Therefore there is no need or necessity to appoint an Advocate/ commissioner once again. It is contention of the appellants that the court below has not given ample opportunity to the appellant to argue the matter, as noted by the court below. Since the impugned application is filed to restore the I.A.No.167 of 2017, as the application for appointment of advocate of commissioner was dismissed for default. The court below has not passed the order on merits. Therefore, this Court finds that an opportunity has to be given to the parties to decide the issue on merits for fair disposal.

10. Under the aforementioned circumstances, it is just and proper to set aside the impugned order dated 08.10.2018. It is made clear that the impugned order is set aside by taking into consideration of the fact that the impugned order passed in the commissioner appointment application is not on merits. Therefore it has to be decided on merits only.

11. Accordingly, the C.M.A is disposed of, while setting aside the impugned order dated 08.10.2018 and further the court below is directed to restore the I.A.No. 167 of 2017 and dispose of the same on merits in accordance with law, to meet the ends of justice, within four (04) weeks from the date of receipt of a copy of this order. There shall be no order as to costs.

As a sequel, miscellaneous applications pending, if any, shall also stand closed.