

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA

RAO

CIVIL REVISION PETITION No.4993 of 2014

%03-08-2015

#1. G.L.Purusotham and others

....

Petitioners.

Versus

\$1. Y.Nagaraju and another

.....Respondents.

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> HEAD NOTE:

!Counsel for the petitioners : Sri O.Udaya Kumar

^ Counsel for the Official respondents : Sri A.Purushotham
Reddy

? Cases referred

1. 2008) 8 SCC 671
2. 2013(16) ALD 31
3. 1958 ALT 792
4. 2013(1) ALT 548

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA

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CIVIL REVISION PETITION No.4993 of 2014

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ORDER:
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This Civil Revision Petition is filed challenging the order

dt.19-08-2014 in I.A.No.753 of 2012 in O.S.No.104 of 2012 of the

I Additional Junior Civil Judge, Tirupati.

2. The petitioners herein are defendants in the suit.

3. The respondents/plaintiffs filed the suit for a perpetual injunction restraining the petitioners from interfering with their alleged peaceful possession and enjoyment of the plaint schedule properties. In the plaint, it is alleged by respondents that petitioners created certain documents in order to encroach on the southern side of the plaint schedule properties and they also attempted to close a channel by encroaching into the lands of respondents on the southern side of the plaint schedule properties.

4. Written statement was filed by 4th defendant/4th petitioner claiming that they have jointly purchased the lands adjacent to the plaint schedule properties and that the plaint schedule properties are to the north of the land of 4th petitioner and he had no necessity to interfere with

the lands of respondents. They alleged that it was the respondents, who removed the survey stones and encroached into the land of petitioners and filed a false suit for perpetual injunction.

5. The Court below, at the instance of respondents, had appointed an Advocate-Commissioner *ex parte* and directed him to file a report as to the physical features of the suit locality. But in the said order, the Court below had not directed the said Advocate-Commissioner to take the assistance of the Mandal Surveyor. The Advocate-Commissioner filed a report in the Court below after conducting the survey.

6. Six months later the 4th respondent filed I.A.No.753 of 2012 before the Court below under Order XXVI Rule 9 CPC to appoint the same Advocate-Commissioner, to direct him to inspect the plaint schedule properties with the help of Mandal Surveyor and to locate it and file a fresh report.

7. In the affidavit filed in support of the said application, he contended that although the Advocate-Commissioner had visited the suit locality, he had done so without the Mandal Surveyor to locate the suit property and it was not explained how the Advocate-Commissioner, who is a

stranger, identified the suit locality without the help of Revenue Records. He contended that he and other petitioners filed objections before the Advocate-Commissioner asking him to inspect the suit locality with the help of Mandal Surveyor and Revenue Records and take down the measurements which are in Links, but he ignored the said objections. He therefore contended that the said report of the Advocate-Commissioner cannot be looked into and he is filing the present I.A. to set aside the earlier report and to appoint the same Advocate-Commissioner to execute the warrant with the help of F.M.B. and Mandal Surveyor, Tirupati Urban Mandal to decide who is the real encroacher.

8. This application was opposed by the respondents. They contended that both parties were present at the time of executing the warrant and no one disputed about the identification of the plaint schedule properties and after a lapse of nearly six months, the petitioners had come up with the present application seeking identification of the plaint schedule properties. They contended that there was no necessity to take the assistance of the Surveyor.

9. By order dt.19-08-2014, the Court below dismissed the said I.A. It held that there was no necessity to appoint an Advocate-Commissioner since at the time of inspection

of the suit locality by the Advocate-Commissioner appointed by it earlier, both parties were present and no one disputed about the identification of the suit property, and the present application had been filed by petitioners nearly six months after the said report was filed. It further held that it being a suit for mere injunction, there was no necessity for appointing an Advocate-Commissioner and that if the petitioners feel that they have any evidence about their possession and enjoyment of the plaint schedule properties, they should submit it before the Court and no prejudice is caused to them if Advocate-Commissioner is not appointed.

10. Challenging the same, this Revision is filed.

11. Sri O.Udaya Kumar, learned counsel for petitioners contended that the order passed by the Court below is erroneous and that since the issue in the suit is whether respondents have encroached into the land of petitioners or *vice versa*, an Advocate-Commissioner is required to be appointed to localize the property and decide the said issue. He also further contended that the Advocate-Commissioner was earlier appointed only to note down the physical features and not to identify the plaint schedule properties and in suits of this nature, without the assistance of an Advocate-Commissioner, it would be

difficult for the parties to prove their respective cases since the evidence is available on the spot.

12. Sri A.Purushotham Reddy, learned counsel for respondents, on the other hand, refuted the above contentions and supported the order passed by the Court below. He contended that in a suit for perpetual injunction, possession of the plaintiff on the date of filing of suit is only the relevant factor and only if 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 Advocate-Commissioner, he should be appointed. He also contended that in a suit for permanent injunction, an Advocate-Commissioner cannot be appointed.

13. In **Haryana Waqf Board Vs. Shanti Sarup and others**^[1], the Supreme Court had held that even in a suit for injunction where there is a necessity for demarcation of land, an Advocate-Commissioner can be appointed.

14. In **Machineni Rama Devi and others Vs. M.Sathyanarayana and another**^[2] after considering the case law, this Court had held that where there is controversy as to identification, location or measurement of the land, local investigation should be done at an early

stage so that the parties are aware of the report of the Commissioner and go to trial prepared. It held that the object of local investigation under Order XXXVI Rule 9 CPC cannot be belittled and its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but could be taken only from its peculiar nature, on the spot. The Court also held that even *ex parte*, a Commissioner can be appointed and relied upon the decision of a Division Bench of this Court in **C.Veeranna Vs. C.Venkatachalam**^[3].

15. In **Donadulu Uma Devi Vs. Girika Katamaiah @ Basaiah and others**^[4], another Single Judge of this Court held that there is no restriction with regard to the appointment of a person to carry out such local investigation under Order XXVI Rule 9 CPC and it includes impliedly the power of the Court to appoint a Commissioner to visit such property and get it surveyed and also note its physical features taking help from a qualified Surveyor subject to necessary requirement.

16. In the present case, from the pleadings of the parties it is clear that respondents alleged that it is the petitioners who encroached their property while the petitioners allege

that it is the respondents who have encroached their property. Therefore, it is necessary to localize the suit schedule properties and this can be done with the help of an Advocate-Commissioner, who takes the assistance of the Mandal Surveyor and also with reference to the F.M.B. and other relevant records.

17. The Court below erred in holding that when the Advocate-Commissioner went to note down the physical features, no one disputed about the identification of the suit property and after lapse of six months the petitioners came up with this petition, because the pleadings of the parties mandate the Court to decide as to who encroached whose land. Having regard to the case law mentioned above, I am of the opinion that the Court below is not correct in holding that there is no necessity for a revisit of the Court Commissioner and if really there is necessity to appoint a Court Commissioner, it will do so if only when the evidence on record leaves something to be explained further.

18. Therefore, the Civil Revision Petition is allowed and the order dt.19-08-2014 in I.A.No.753 of 2012 in O.S.No.104 of 2010 of the I Additional Junior Civil Judge, Tirupati is set aside and the said I.A. is allowed. No costs.

19. As a sequel, miscellaneous petitions pending if any,
in these Revisions shall stand disposed of.

JUSTICE M.S. RAMACHANDRA RAO

Date: 03-08-2015

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[\[1\]](#) (2008) 8 SCC 671

[\[2\]](#) 2013(16) ALD 31

[\[3\]](#) 1958 ALT 792

[\[4\]](#) 2013(1) ALT 548