

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

C.R.P.No.4719 of 2010

ORDER:

This Revision Petition is filed challenging the order dt.19-08-2010 in I.A.No.155 of 2010 in O.S.No.47 of 2004 of the Junior Civil Judge, Sulthanabad.

2. Petitioner herein is the plaintiff in the suit. He filed the suit for perpetual injunction restraining the respondents from interfering with her possession and enjoyment of the plaint schedule property.

3. I.A.No.57 of 2005 was filed under Order 26 Rule 7 CPC for appointment of an Advocate Commissioner to identify the land in Sy. No.146/B and C to the extent of Ac.1.10 gts. and also property in Sy. No.146/D and 147/D of extent Ac.0.32 gts by seeking help of Mandal Surveyor.

4. The Commissioner visited the schedule property on 09-04-2005 and with the help of the Mandal Surveyor, surveyed it and filed report on 25-04-2005. In the said report, he stated that the Mandal Surveyor expressed that the sub division in the survey numbers are difficult to locate on the spot. He also referred to the fact that survey Nos.146 and 147 belong to one Ramineni Mallaiah and Gudupati Thirupathi Reddy. According to

him, the portion of the land in Sy.No.146 is in dispute which he has shown in red colour in the sketch map. According to him, this disputed area is divided into two parts measuring Ac.0.12 3/4th gts each and one portion of this Ac.0.12 3/4th gts. (eastern part) is merged in Sy. No.147 and also merged in land of one Embadi Rajesham. However, in the said report, he mentioned that the plaintiff was not present on the spot when he visited it.

5. To set aside this report, I.A.No.115 of 2005 was filed by the petitioner. The said application was rejected observing that if there is any scope for reappointment of a Commissioner existing after full-fledged trial, in order to give effective decision in respect of the matter in dispute, the Court will consider whether there are grounds to appoint a fresh commissioner. This Order was passed on 28-08-2006. Thereafter, the Advocate Commissioner who submitted his report in I.A.No.57 of 2005 was cross examined. In his evidence, he stated that the Mandal Surveyor, during the course of survey, stated that it was not possible to locate the land sub division wise, that he also mentioned in his report that the plaintiff was not present in the spot when he went to execute the warrant and that he executed the warrant on Ugadi festival day. He also admitted that the land in Sy. No.146/D and 147/D were not specifically located and measured.

6. Having regard to this evidence of the Advocate Commissioner, the petitioner-plaintiff filed I.A.No.155 of 2010 to appoint an Advocate Commissioner to note down the physical features of the land and the lands of the defendants bitwise.

7. This application was opposed by the respondents contending that second Advocate Commissioner cannot be appointed for the same purpose unless and until the previous report is set aside.

8. The Court below dismissed the said application.

9. Challenging the same, this Revision Petition is filed.

10. Learned counsel for the petitioner contended that the Court below, in its earlier order dt.28-08-2006, had categorically stated that if there is scope of reappointment of Commissioner existing after full-fledged trial, it would appoint an Advocate Commissioner to give effective decision in respect of the matter in dispute in the light of the evidence of the Advocate Commissioner again. He also relied upon the decisions in **Mohammed Mohmood Ali Vs. Municipal Council, Suryapet, Nalgonda District, rep. by Commissioner/Special Officer and others**^[1] and **A.Krishna Reddy Vs. Tahsildar, Shamshabad Mandal, Ranga Reddy District and another**^[2].

11. Even though notice in the Revision Petition has been served on the respondents, none appears on their behalf.

12. I have noted the submissions of the learned counsel for the petitioner.

13. Admittedly on 30-03-2005, I.A.No.57 of 2005 was filed for appointment of an Advocate Commissioner and the same was allowed and the Advocate Commissioner was directed to locate the plaint schedule property in Sy. No.146/B & C to the extent of Ac.1.10 gts and also property in Sy. No.146/D and 147/D to an extent of Ac.0.32 gts by seeking assistance of the Mandal Surveyor. However, when survey was conducted on 09-04-2005, the said date happened to be day of Ugadi festival. On account of the fact that the said date was a festival, the petitioner was not present on that day although his counsel was present. In the evidence given by the Advocate Commissioner, he has admitted that he executed the warrant on the day when there was a Ugadi festival and that the plaintiff was not present on the spot when he went there to execute the warrant. It is unfortunate that the Advocate Commissioner chose to execute the warrant of commission on a festival day which is not convenient to parties. The absence of the petitioner on that day, on account of the festival, has thus caused

prejudice to the petitioner.

14. Even otherwise the Advocate Commissioner in the said report has stated that the Mandal Surveyor had expressed that the sub divisions in the survey numbers were difficult to locate on the spot. In the report, the Advocate Commissioner had stated that some land in Sy. Nos.147 and 146 belong to Ramineni Mallaiah and Gudupati Thirupathi Reddy, both of whom were not parties to the suit. He also stated that he could not specifically locate and measure the land in Sy. No.146/D and 147/D and that he could not identify Ac.1.10 gts of land in Sy. No.146/B and 146/C as per the boundaries mentioned in the warrant.

15. In view of this evidence, it is clear that the report of the Advocate Commissioner appointed in I.A.No.57 of 2005, particularly when he examined on a festival day at a time when the petitioner was absent, cannot be relied upon since it did not serve the purpose for which it was ordered. Therefore, the Court below ought to have rejected the said report.

16. Unfortunately when I.A.No.115 of 2005 was filed by the petitioner to set aside the said report, the Court below rejected the said application on frivolous grounds. In any event, in the order passed therein on 28-08-2006, the Court below had itself observed that if there is any scope for reappointment of Advocate Commissioner after

full-fledged trial, in order to give effective decision in the matter, the Court would consider the aspect and pass suitable orders. It was only thereafter that the Advocate Commissioner was examined as D.W.3.

17. Having regard to the evidence of the Advocate Commissioner, I am of the considered opinion that the earlier report dt.25-04-2005 submitted by him cannot be looked into and it ought to be set aside. Once the said report is set aside since the location of the land is critical to the decision in the suit and since the order dt.28-08-2006 in I.A.No.115 of 2005 itself reserves the right to the Court below to appoint an Advocate Commissioner after trial, an Advocate Commissioner ought to be appointed afresh. So I am of the opinion that the Court below ought not to have rejected I.A.No.155 of 2010 on the ground that a second Advocate Commissioner cannot be appointed.

18. In **Mohammed Mohmood Ali** (1 supra), this Court has held that if an application for appointment of Advocate Commissioner was dismissed with liberty to file fresh application, subsequent application cannot be treated as a second application and the appointment of Advocate Commissioner on that application is just and proper for localization and identification of the disputed land. The facts in the present case of somewhat similar to that case inasmuch as the Court below itself was doubtful

about the relevancy of the Advocate Commissioner's report and had reserved to itself the choice of appointing another Advocate Commissioner at a later stage, if it felt necessary. So the dismissal of I.A.No.153 of 2010 cannot be sustained.

19. Therefore, the Order dt.19-08-2010 in I.A.No.155 of 2010 in O.S.No.47 of 2004 of the Junior Civil Judge, Sulthanabad is set aside; the report given by the Advocate Commissioner in I.A.No.57 of 2005 is set aside; and I.A.No.155 of 2010 is allowed.

20. Accordingly, the Civil Revision Petition is allowed. No costs.

21. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 17-06-2015

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[\[1\]](#) 2008 (5) ALT 797

[\[2\]](#) 2008 (3) ALT 46