

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

CIVIL REVISION PETITION No.4195 OF 2014

ORDER:

This Revision is filed challenging the order dated 08.10.2014 in I.A.No.128 of 2014 in O.S.No.67 of 2012 on the file of Principal Senior Civil Judge, Rayachoty.

The petitioner herein is the plaintiff in the suit. He filed the suit for declaration of his title to the plaint schedule property and for recovery of possession thereof and also sought a mandatory injunction for removing the structures erected therein.

It is a specific case of the plaintiff that he is the owner of land in Survey No.790; that on the southern side of the said survey number, there is Survey No.840, in which the 1st defendant owned certain land; and that the 1st defendant high handedly, with the help of the 2nd defendant, trespassed into the plaint schedule land and erected the Zinc Sheet shed and laid stone slab fencing.

Written statement was filed disputing the plaint averments. In the written statement, it is admitted by the 1st defendant that he purchased the land in Survey No.840 and it is the specific case of the 1st defendant that the plaintiff is trying to grab his property in Survey No.790 although land of the 1st defendant is in neighbouring Survey No.840.

The petitioner/plaintiff then filed I.A.No.128 of 2014 contending that the defendants/respondents are disputing the location of the plaint schedule property and its measurements, it is therefore necessary to identify the suit schedule Survey Nos.790 and 840; and an Advocate Commissioner be appointed to measure the land with the assistance

of a Mandal Surveyor and also to note down the existing physical features. Thus, the petitioner wanted an Advocate Commissioner to be appointed to identify whether the plaint schedule property is situated in Survey No.790 or in Survey No.840 with the assistance of a Mandal Surveyor.

Counter affidavit has been filed in the I.A. by the respondents opposing the application. In the counter affidavit, it is stated that the petitioner has not chosen to identify the schedule property, its location or measurements in Survey No.790, which is of a large extent of Acs.6.31 cents; that the petitioner kept blank in plaint the northern boundary to the plaint schedule property; that the suit is speculative; and filing of this I.A. indicates that the petitioner has no knowledge of the exact location of the plaint schedule property. It is also contended that the plaint schedule property is not at all in existence on the ground in Survey No.790.

By order dated 08.10.2014, the Court below dismissed the said I.A. It held that when the petitioner has shown the schedule of the property in the plaint and there is no necessity to appoint an Advocate Commissioner to identify the same.

Challenging the same, this Revision is filed.

Learned counsel for the petitioner contended that the Court below erred in dismissing the application on the ground that the description of the property is mentioned in the schedule to the plaint without understanding the pleading of the petitioner/plaintiff that the 1st defendant had trespassed and occupied the property belonging to the petitioner in Survey No.790 even though the property of the 1st defendant is in Survey No.840, which is the neighbouring survey number. He contended that the disputes of this nature can only be resolved by appointment of

an advocate commissioner, since the evidence of this nature can only be taken from its peculiar nature on the spot through a local investigation done under Order XXVI Rule 9 C.P.C.

Learned counsel for the respondents, on the other hand, contended that the Court below has correctly dismissed the I.A. for appointment of Advocate Commissioner; that the petitioner/plaintiff himself is not able to identify his property; that this is a speculative suit to grab the property of the 1st defendant; and that since the northern boundary is not clearly mentioned in the plaint, there is no necessity to appoint an Advocate Commissioner. He also relied on the judgments of this Court reported in ***Yenugonda Bal Reddy v. Manemma***^[1] and ***Papasani Sankara Reddy v. Kandula Hanumantha Reddy***^[2].

I have noted the submissions of both sides.

The gist of the pleading of the plaintiff is that the 1st defendant, who has land in Survey No.840, has trespassed into the land of the plaintiff/petitioner which is in Survey No.790; that Survey No.790 is adjacent to Survey No.840; and since the 1st defendant is disputing the location of the plaint schedule property as well as the measurements thereof, appointment of Advocate Commissioner is warranted to identify the plaint schedule property and its location in Survey No.790 or in Survey No.840. In the light of these pleadings, on the mere ground that the description of the property with boundaries is clearly shown in the plaint, the Court below could not have dismissed the application for appointment of Advocate Commissioner holding that it is not necessary to identify the property.

In ***Badana Mutyalu v. Paalli Appalaraju***^[3], this Court has

taken a view that the object of local investigation under Order XXVI Rule 9 C.P.C. 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; that either party to the suit could have an Advocate Commissioner appointed even before the trial; and in situations 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 also held that if this done, the party against whom the report may have gone may choose to adduce evidence in rebuttal.

In ***Yenugonda Bal Reddy*** (1 supra), the dispute was with regard to the possession of the plaint schedule property. In those circumstances, the Court held that when once the possession itself is in dispute, it is for the plaintiff to plead and establish that he is in possession of plaint schedule property and that appointment of an Advocate Commissioner cannot be done. Such is not the case here. So, the decision has no application to the present case, because it is the case of the petitioner herein that the defendant had occupied his property.

In ***Papasani Sankara Reddy*** (2 supra), this Court upheld the decision of a trial Court that application for appointment of Advocate Commissioner cannot be made when the petitioner therein had not even started adducing his evidence. No authorities are cited in support of the said conclusion. The said conclusion runs contrary to the Division Bench decision of this Court reported in ***C. Veeranna v. C. Venkatachalam***^[4] wherein this Court has held that even an *ex parte* commissioner could be appointed if the circumstances warranted. The said Division Bench judgment was also followed in ***Savitramma v. B. Changa Reddy***^[5]. Therefore, the decision in

Papasani Sankara Reddy (2 supra) to the extent it held that till applicant for appointment of Advocate Commissioner leads evidence, such application cannot be entertained, is not good law. It was also held in **Papasani Sankara Reddy** (2 supra) that the purpose of seeking appointment of an Advocate Commissioner in that case was that the petitioner was trying to gather evidence. Such a conclusion cannot be drawn in the present case, because the evidence as to encroachment is such that from its peculiar nature it can only be taken on the spot and no amount of oral evidence could establish it. Therefore, I am of the view that the judgment of **Papasani Sankara Reddy** (2 supra) would not apply to the facts of the present case.

In this view of the matter, I am of the opinion that the Court below has erred in rejecting I.A.No.128 of 2014 and its order therefore cannot be sustained.

Accordingly, the Civil Revision Petition is allowed; the order dated 08.10.2014 in I.A.No.128 of 2014 in O.S.No.67 of 2012 on the file of the Principal Senior Civil Judge, Rayachoty, is set aside; I.A.No.128 of 2014 is allowed; and the Court below is directed to appoint an Advocate Commissioner to identify whether the plaint schedule property is situated in Survey No.790 or in Survey No.840 with the assistance of a Mandal Surveyor. The Advocate Commissioner shall also measure the land and note down the existing physical features. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

M.S. RAMACHANDRA RAO, J

29.01.2015

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[\[1\]](#) 2011 (2) ALD 472

[\[2\]](#) 2013 (4) ALD 322

[\[3\]](#) 2013 (5) ALD 376

[\[4\]](#) AIR 1959 AP 170 = 1958 ALT 792

[\[5\]](#) 1988 (1) ALT 353