

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA

RAO

CRP No. 525 OF 2015

ORDER:

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.18.11.2014 in I.A.No.295 of 2012 in O.S.No.735 of 2011 of the III Additional Senior Civil Judge, Kakinada.

2. Petitioner herein is the plaintiff in the above suit. He filed the said suit initially in the year 2007 before the I Additional Junior Civil Judge Kakinada as O.S.No.739 of 2007 for perpetual injunction restraining the respondents from interfering with his alleged peaceful possession and enjoyment of the plaint 'A' schedule property, which contains two vacant sites. Subsequently, the said suit was renumbered as O.S.No.735 of 2011 and came to be tried by the III Additional Senior Civil Judge, Kakinada in view of the change in pecuniary jurisdiction since the plaintiff had also sought for declaration of title in respect of Plaint 'B' schedule property of an extent of 20.66 sq. yards described as 'EFGH' in the plaint plan and for recovery of possession of the said item by alleging that in the middle of December, 2010, the 1st respondent had encroached the said portion of the plaint plan. It was also alleged that the 1st respondent had changed the survey stones and pillars/walls.

3. In view of these developments, the petitioner filed I.A.No.295 of 2010 under Order XXVI Rule 9 CPC to appoint an Advocate-Commissioner to localize the plaint 'B' schedule property (EFGH portion of the plaint plan) with the help of Mandal Surveyor , Sarpavarma Mandal.

4. In the affidavit filed in support of the petitioner, the petitioner reiterated that in December, 2010, after the suit was filed, the 1st respondent, who had land on the southern side of the petitioner's site, had encroached the land in 'B' schedule, changed the survey stones and pillars, and so he was advised to seek appointment of Advocate-Commissioner to localize the 'EFGH' marked portion of the plaint plan.

5. Counter affidavit was filed by the respondents to the said application denying the alleged encroachment in December, 2010 or the changing of the survey stones and pillars. It was pointed out that the petitioner did not choose to file application seeking appointment of Advocate-Commissioner before the I Additional Junior Civil Judge, when he filed O.S.No.739 of 2007, and only with a view to drag on the matter, this application was filed even though there is no encroachment by the 1st respondent. It was also contended that there is no necessity to appoint an Advocate-Commissioner to localize the property.

6. By order dt.18.11.2014 the Court below dismissed the said application.

7. It observed that the said application was filed on 09.07.2012 but it is coming for enquiry from 2012 to 2014 and the parties had not advanced their arguments therein having filed it in 2012; therefore the question of prejudice to the parties would not arise, since they are aware about the pendency of the IA. It also observed that when it is not the contention of the petitioner that 1st respondent is trying to change the physical features of the subject property and that the changes that are made are already covered by the pleadings of the petitioner in the plaint and plaint plan, it is not necessary to measure the property. It further observed that although the petitioner had sought to localize the 'B' schedule property, since he had already given measurements, the Court can come to the conclusion as to whether or not there is any encroachment. The Court below further observed that party should not be permitted to utilize the power of the Court to collect evidence when he or she can get the evidence personally and therefore, the said I.A. is liable to be dismissed.

8. Challenging the same, this Revision is filed.

9. Counsel for the petitioner contended that the whole approach of the trial Court is perverse, since it is the case of

the petitioner that there was an encroachment pending the suit, and if an Advocate-Commissioner is not appointed to localize the alleged encroached portion, merely on the basis of the oral evidence of the parties, the Court will not be able to decide the said issue. He also contended that when the application was filed in 2012, the Court had kept it pending till November, 2014 and the petitioner cannot be punished for the delay of the Court in disposing it off.

10. Counsel for the 1st respondent Sri S.Subba Reddy, had refuted the above contentions and supported the order passed by the Court below. He further contended that the petitioner having filed the I.A. in July, 2012 ought to have insisted the Court below to decide it within a reasonable time and now, when the trial is concluded he cannot be granted any relief and this Court should dismiss the Revision and not interfere with the order passed by the Court below.

11. I have noted the submission of both sides.

12. Firstly, it is an undisputed fact that I.A.No.295 of 2012 had been filed in July, 2012. For whatever reason, the Court below could not dispose it off till November, 2014. Any delay on the part of the Court in disposing of the said I.A. cannot be allowed to prejudice the petitioner. It is settled law that the mistake of the Court should not prejudice a party. Therefore the contention of the respondents that the impugned order should be allowed to stand because the petitioner did not take

any steps for early disposal of the I.A. cannot be accepted.

13. Secondly, the facts of the case reveal that the petitioner is alleging an encroachment by the 1st respondent pending suit and it is also the specific case of the petitioner that the survey stones had also been removed or changed by the 1st respondent who had a vacant site to the southern side of the petitioner's property.

14. The petitioner therefore sought amendment of the plaint making these allegations and seeking relief of declaration of title and recovery of possession of 'EFGH' portion which is allegedly encroached by the 1st respondent pending the suit.

15. No doubt, these allegations are denied by the 1st respondent.

16. The object of local investigation under Order XXVI Rule 9 CPC cannot be be little. 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. A Commissioner, in effect, is a projection of the Court, appointed for a particular purpose. A party has got a right to place evidence which he would require to substantiate his case before the Court and, of course, subject to the law of evidence and the Code, and it is

the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive such evidence.

17. The local investigation is the best way to find out the position where there are allegations of encroachment or where there are controversies relating to identification, location or measurement of the suit land and the petitioner cannot be deprived of the said right under a misconception that appointing an Advocate-Commissioner and securing his report amounts to collection of evidence.

18. As held by this Court in ***Bandaru Mutyalu and another v. Palli Appalaraju***^[1], when the controversy is as to identification, location or measurement of land, local investigation should be done at an early stage so that parties are aware of the report of the commissioner and both are prepared for trial.

19. The view of the Court below that merely because the petitioner had alleged that the 1st respondent encroached 'EFGH' portion of the plaint plan, there is no necessity to appoint an Advocate-Commissioner, is clearly perverse. This is because during trial the plaintiff would assert that there is an encroachment and the defendant would deny the same. In such a situation no amount of oral evidence would assist the Court in coming to a conclusion either way, since the

evidence as to whether there is any encroachment or not is available on the spot and it can only be secured if an Advocate-Commissioner is appointed invoking the power under Order XXVI Rule 9 CPC. Therefore, I am of the considered view that the impugned order cannot be sustained.

20. So, the Civil Revision Petition is allowed. The order dt.18.11.2014 in I.A.No.295 of 2012 in O.S.No.735 of 2011 of the III Additional Senior Civil Judge, Kakinada is set aside and the said I.A. is allowed. There shall be no order as to costs.

21. Consequently, Miscellaneous Petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

26th August, 2014.
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