

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

CIVIL REVISION PETITION No.380 of 2015

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ORDER:

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This Civil Revision Petition is filed challenging the order
dt.25-11-2014 in I.A.No.564 of 2014 in O.S.No.178 of 2007 of the
Principal Junior Civil Judge, Tiruvur.

2. The petitioners herein are plaintiffs in the above suit. They filed the suit for a perpetual injunction restraining the respondents from interfering with their alleged peaceful possession and enjoyment of the suit schedule property which is an extent of Ac.0.15 cents in R.S.No.418/1 at Vissannapeta village with house and other structures within the specific boundaries.

3. According to plaint, this property was obtained by petitioners under a decree dt.19-04-1999 in O.S.No.127 of 1991 for specific performance and a registered sale deed was executed through Court in favour of petitioners on 29-01-2003 and was registered. The petitioners alleged that they constructed a tiled house therein and subsequently intended to construct a terraced building, for which they

even obtained permission from the Gram Panchayat, Vissannapeta. They alleged that the respondents, who have nothing to do with the plaint schedule property, are threatening them that they would not allow them from enjoying the suit schedule property. They admit that the brother of 1st respondent by name Thalla Gopala Rao has a house and site on the South of the suit schedule property and to its further South. They further alleged that T.Venkata Narayana also has a site on the South and respondents are having their house and site on the further South.

4. Written statement was filed by 1st respondent opposing the suit claim. They alleged that although petitioners had started construction of a building, this was stopped in June, 2007 since the Panchayat Officials objected to the same stating that such construction was in violation of the Building Rules and approved plan. They alleged that 1st respondent had a house and site to the South of the plaint schedule property; although it originally belonged to his younger brother Gopala Rao, since he shifted to a different village, 1st respondent was looking after the said property on behalf of his brother; subsequently it was gifted to him orally by his brother on 05-07-2006; and later gift deed was registered on 30-06-

2007. He claimed that he is in exclusive possession and enjoyment of Ac.0.06 cents equivalent to 290.4 Sq. yds together with a hut as absolute owner and that petitioners knew about the said fact. He alleged that petitioners have removed the eastern boundary stone 5 months back but the western boundary stone between the property is still in tact and the existence of these boundary stones has been suppressed by petitioners. He alleged that the petitioners raised 4 inches of their building slab into the site of 1st respondent and that they dug a pit for construction of a lavatory in the South-Eastern corner of the plaint schedule property. There is a well in the North-East corner of the house and site of 1st respondent; and the distance between the well and lavatory is only 4 feet.

5. The respondents then filed I.A.No.564 of 2014 under Order XXVI Rule 9 CPC alleging that there is a compound wall on all sides of the plaint schedule property including the southern side of the property of petitioners; to decide whether the structures of the petitioners are within Ac.0.15 cents or beyond Ac.0.15 cents, it is necessary to appoint an Advocate-Commissioner to note down the physical features and the existences of structures including the compound wall and to submit a

report as to whether these structures are within Ac.0.15 cents site of 1st petitioner or beyond Ac.0.15 cents site and also to measure the extent of the plaint schedule property.

6. This application was opposed by petitioners. It was alleged that when 1st petitioner proposed to give the building erected by her in the plaint schedule property on rent to the Postal Department, Postal authorities insisted that there should be a compound wall and in view of the threats of respondents, she got constructed a wall in the alignment of the Southern side wall upto Eastern edge, this respondents wanted to take advantage of it and are contending that the Southern house wall itself is the Southern compound wall. It was further contended that since the suit is for simple injunction, if Advocate-Commissioner is appointed, it would amount to permitting the respondents to collect evidence.

7. By order dt.25-11-2014, the Court below allowed the said application. It referred to contentions of both parties and noted that the petitioners had put a doorway and 2 windows in the Southern wall and had also constructed a compound wall in the alignment of the Southern house wall upto the Eastern edge and that the respondents are contending that the Southern house wall itself is the

Southern compound wall. It held that the request of respondents is to appoint an Advocate-Commissioner to establish whether the structures erected by 1st petitioner are within Ac.0.15 cents of land claimed by petitioners or not; and appointment of Advocate-Commissioner would bring out the truth and this would avoid future litigation between the parties. It therefore directed appointment of an Advocate-Commissioner to note down the physical features of the suit schedule property including the RCC building structures and existence of compound wall with help of a qualified Surveyor and asked him to submit his report and observations along with rough sketch at the cost of respondents.

8. Challenging the same, this Revision is filed.

9. The learned counsel for petitioners contended that the suit being one for simple injunction, appointment of an Advocate-Commissioner would enable the respondents to collect evidence in support of their case and the Court below was not correct in appointing the Advocate-Commissioner. He placed reliance on a judgment of this Court in **A.Gopal Reddy Vs. R.Subramanyam Reddy and another**^[1].

10. In the said case, this Court observed that the suit

filed by petitioner being one for perpetual injunction, the only question which arises is whether the plaintiff is in possession and enjoyment of the suit schedule property and the burden rests on him to prove the possession. It observed that appointment of Commissioner to note down the physical features or to undertake other related activities in a suit for injunction is a rarity and that this is because the plaintiff cannot be permitted to gather evidence to prove his possession and he has to satisfy the Court through oral and documentary evidence. It further held that appointment of Commissioners at the instance of defendant in such suits is a still rare phenomenon. It observed that the occasion to appoint an Advocate-Commissioner would arise, if only the trial of the suit is in progress and a typical question, which needs the examination by a Commissioner arises, and that the appointment of a Commissioner cannot be made at the threshold. With great respect to the said view, I am of the opinion that the said decision is contrary to the judgment of the Supreme Court in **Haryana Waqf Board Vs. Shanti Sarup and others**^[2] wherein the Hon'ble Supreme Court held that even in a suit for injunction where there is a necessity for demarcation of land, an Advocate-Commissioner can be appointed.

11. In **Bandana Mutyalu and another Vs. Palli Appalaraju**^[3], this Court had followed a Division Bench decision of this Court in **C.Veeranna Vs. C.Venkatachalam**^[4] and another decision in **Savitramma and another Vs. B.Changa Reddy**^[5] and held that either party to the suit could get appointed an Advocate-Commissioner before the trial and that 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 the trial prepared. This Court had held referring to the judgment in **Ponnusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam**^[6] that if a dispute arises as to whether constructions put up by a party in suit were within his land or whether he had encroached into the land of the plaintiff, an Advocate-Commissioner can be appointed. The Madras High Court held that the object of local investigation under Order XXVI 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 Madras High Court also

held that local investigation is the best way to find out the position and the party intending to place evidence before the Court through local investigation by the Commissioner, cannot be deprived of that right. This view of the Madras High Court was accepted by this Court in **Bandana Mutyalu** (3 supra).

12. I am therefore of the opinion that the view expressed in **A.Gopal Reddy** (1 supra) being contrary to the view of the Division Bench of this Court in **C.Veeranna** (4 supra), and the decision in **Savitramma** (5 supra) as well as in **Bandaru Mutyalu** (3 supra), it does not represent the correct law and I am not inclined to therefore follow it.

13. Since in the present case, the question is whether the compound wall said to have been erected by petitioners is within Ac.0.15 cents allegedly purchased by them or beyond the Ac.0.15 cents within the land claimed by respondents, the said issue can be decided only through an Advocate-Commissioner with the help of a qualified Surveyor. I therefore hold that the Court below has rightly allowed the said application by the impugned order.

14. I therefore do not find any merit in the Revision and it is accordingly dismissed. No costs.

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

JUSTICE M.S. RAMACHANDRA RAO

Date: 12-08-2015

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- [\[1\]](#) 2013(4) ALD 347
 - [\[2\]](#) (2008) 8 SCC 671
 - [\[3\]](#) 2013(5)ALD376 = 2013(6)ALT26
 - [\[4\]](#) 1958 ALT 792
 - [\[5\]](#) 1988(1) ALD 353
 - [\[6\]](#) AIR 1986 Madras 33