

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.Nos.1668 and 2282 of 2014

COMMON ORDER :

Since these two Revisions arise out of the same dispute between the same parties, they are being disposed of by this common order.

2. The petitioners in both the suits are plaintiffs in the above suit.
3. They filed the said suit against respondent alleging that the respondent had encroached 0.91 Sq.ft. (equivalent to 10.1111 Sq.yds.) of land belonging to them and showed the alleged encroachment in 'B' schedule to the plaint. The petitioners also claimed relief of declaration of title, recovery of possession of the area, and also a perpetual injunction restraining the respondent from interfering with their peaceful possession and enjoyment of plaint 'B' schedule property and other reliefs.
4. Written statement was filed by respondent opposing the claim of petitioners.
5. Trial commenced and concluded, and the matter was posted for arguments.
6. At that stage, the petitioners filed I.A.No.51 of 2014 to re-open the suit, and I.A.No.52 of 2014 to appoint an Advocate-Commissioner to measure the plaint 'A' and 'B' schedule properties with reference to petitioners' title deeds and then file a report.

7. In the affidavit filed in support of this application, the petitioners contended that they were advised by their counsel that an Advocate-Commissioner's appointment is necessary to avoid wastage of valuable time of the Court as regards the measurement particulars given in the plaint, and that was why these applications were filed.
8. Counter-affidavits were filed by respondent opposing these applications. It was pointed out that the matter had been posted for arguments, and since the entire evidence had been let-in, these applications are not maintainable since they are aimed to collect evidence.
9. By common order dt.15.04.2014, the Court below dismissed both the applications. It referred to the fact that the matter had been posted for arguments to 23.12.2011 and after that several adjournments took place and certain applications were filed which were allowed or dismissed, and that since it is a comprehensive suit filed for declaration, possession and consequential permanent injunction, the petitioners have to prove their case depending upon their documents and not to depend upon weakness of the defendant.
10. Challenging the same, the present Revisions are filed.
11. Heard Sri M.S.R. Subrahmanyam counsel for petitioners; and Sri V.V.N. Narayana Rao, counsel for sole respondent.
12. The counsel for petitioners contended that petitioners and respondent are neighbours, and the specific allegation in the plaint is that the respondent had encroached about 0.10 Sq.yds

of land belonging to petitioners; that disputes of this nature cannot be determined on the basis of oral evidence, since evidence to prove this allegation is available on the spot; and the Court below had erred in dismissing these applications.

13. On the other hand, the counsel for respondent supported the order passed by the Court below. He relied on the decisions in **Papasani Sankara Reddy v. Kandula Hanumantha Reddy and others** and **Chekuri Lavanya v. Kalidindi Ravi Kumar Varma and others**.

14. I have noted the submissions of both sides.

15. It is true that the applications seeking appointment of Commissioner have been filed somewhat belatedly by petitioners, but having regard to the nature of dispute between parties, i.e., the alleged encroachment of the property of petitioners by respondent, I am of the opinion that the evidence in this regard, from its peculiar nature, would only be available on the spot and no amount of oral evidence would establish this fact.

16. In **Badana Mutyalu and Badana Laxminarayana vs. Palli Appalaraju** and **Smt. Donadulu Uma Devi vs. Girika Katamaiah @ Basaiah, M. Sreenivasulu and Smt. K.B. Rajeswari**, this Court has taken a view that in cases where there is allegation of encroachment or there is a dispute about localization, Court should appoint Advocate-Commissioner, since the evidence of such allegations is of a peculiar nature and is available only on the spot.

17. In **Haryana Waqf Board vs. Shanti Sarup and Ors.**, a suit was

filed for declaration and injunction in respect of certain property and the matter had gone up to the High Court of Punjab and Haryana in the form of Second Appeal which had been dismissed. In an appeal against the said judgment the Supreme Court observed that since the dispute between the parties was whether the respondent had encroached upon any land belonging to appellant, it was a case of demarcation of disputed land, and therefore, it was a fit case to appoint an Advocate-Commissioner under Order 26 Rule 9 C.P.C. and direct investigation.

18. This judgment has also been followed by another learned single Judge of this Court in **Smt. Donadulu Uma Devi vs. Girika Katamaiah @ Basaiah, M. Sreenivasulu and Smt. K.B. Rajeswari**.
19. In **Papasani Sankara Reddy** (1 supra), cited by the counsel for respondent, a learned single Judge of this Court in a case where there is a similar allegation of encroachment, has taken a view that unless the plaintiff commences his evidence, an Advocate-Commissioner should not be appointed for inspection of the suit schedule property, for its measurement and for demarcation of the same.
20. This view, in my opinion, is contrary to the Division Bench judgment of this Court in **Chalapati Veeranna and Ors. vs. Chalapati Venkatachalam** wherein a Division Bench of this Court had held that it is open to the Court to issue an *ex parte* Commission under Order 26 Rule 9 C.P.C. even on the date of the filing of the suit.
21. This view of the Division Bench has also been followed by a

learned Single Judge of this Court in **N. Savitramma and another v. B. Changa Reddy** and also in **Palli Appalaraju** (3 supra), referred to above.

22. Therefore, in my respectful opinion, **Papasani Sankara Reddy** (1 supra) is not good law.

23. In **Chekuri Lavanya** (2 supra), cited by the counsel for respondent, an application for appointment of Advocate-Commissioner was dismissed on the ground that the delay in filing it is a valid ground to dismiss it without considering its merits. It was also observed therein that in a suit for declaration, the plaintiff must succeed or fail basing on the strength of the weakness of the case, and that even if an Advocate-Commissioner is not appointed, it would not cause any prejudice to petitioners.

24. With great respect to the learned Judge, I am unable to agree with the said view.

25. Having regard to the specific allegation about encroachment by respondent in respect of the plaint schedule property in the plaint, if an Advocate-Commissioner is not appointed, the Court would be forced to decide the issue merely on the basis of oral evidence. In such a case, both parties would assert on oath in respect of their respective stands. Therefore, since the evidence to prove allegation of encroachment is of a peculiar nature which is available on the spot, if an Advocate-Commissioner is not appointed, grave prejudice would be caused to petitioners. I am also of the opinion that the delay in filing the application cannot be a ground to dismiss it.

26. In this view of the matter, the Revisions are allowed, and the common order dt.15.04.2014 in I.A.No.51 of 2014 and I.A.No.52 of 2014 is set aside. No order as to costs.
27. Having regard to the fact that the suit is an old suit, the Court below is directed to dispose of the same as expeditiously as possible, preferably within a period of six (06) months from the date of receipt of a copy of this order.
28. As a sequel, miscellaneous petitions pending, if any, in these Revisions shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 29.10.2015

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