

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA

RAO

C.R.P.No.4934 OF 2015

ORDER :

This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.29.10.2014 in I.A.No.1761 of 2014 in O.S.No.817 of 2006 of the Principal Junior Civil Judge, Ongole, Prakasam District.

2. The petitioner herein is the defendant in the above suit. The respondent filed the said suit against the petitioner for declaration of his right in the plaint schedule property and for consequential mandatory injunction directing the petitioner to remove X X1 wall constructed in the schedule site shown in the plaint plan.

3. According to the respondent/plaintiff at a place shown as X X1 in the plaint plan, there was previously a mud wall existing, which was the wall of the petitioner, but the said mud wall was removed and another wall was constructed with a width of 9 inches at the same place, and in doing so, the petitioner occupied the site belonging to the respondent and his family at the time when they are away on pilgrimage to Tirupathi.

4. Written statement was filed by the petitioner opposing the suit claim and contending that the wall X X1 was not correctly shown in the plaint plan. He denied that previously

there used to be a mud wall and the same has been removed and the present wall has been constructed with a width of 9 inches. He alleged that in the plaint plan, the respondent had not shown the extent of the respondent's property or its measurements, that it was a vague and misleading plan and therefore the respondent is not entitled to any relief in the suit.

5. Issues were framed. Trial commenced and PWs.1 and 2 were examined. The matter stands posted for further evidence of the respondent.

6. At that stage, the respondent filed I.A.NO.1761 of 2014 under Order XXVI Rule 9 CPC alleging that if an Advocate-Commissioner is appointed and measurements are taken in between the respondent's western house wall and western compound wall, it would indicate the difference in measurements. He pleaded that it is necessary to appoint an Advocate-Commissioner to visit the suit schedule property to measure the distance between the petitioner's western house wall and the newly constructed compound wall shown as XX1 in the plaint plan.

7. Counter affidavit was filed by the petitioner opposing this application. He contended that filing of this application is an abuse of process of law and is not acceptable since it is filed eight years after filing of the suit; that it is filed only for collection of evidence; and an the Advocate-Commissioner cannot be appointed for collection of evidence. He also

denied that he had encroached any part of the respondent's property.

8. By order dt.29.10.2014, the Court below allowed the said application.

9. It held that from the averments in the affidavit filed in support of the I.A., it appears that it is necessary to appoint an Advocate-Commissioner to decide the issue of encroachment.

10. Challenging the same, this Revision is filed.

11. Counsel for the petitioner contended that the application for appointment of Advocate-Commissioner was filed eight years after filing of the suit and the Court below ought not to have entertained it. He further contended that the petitioner had not encroached any land belonging to the respondent and that if an Advocate-Commissioner is appointed, it would amount to collection of evidence, which is impermissible in law. He placed reliance on a judgment of this Court reported in ***Papasani Sankara Reddy v. Kandula Hanumantha Reddy and others***^[1].

12. In ***Papasani Sankara Reddy***'s case(1 supra), there was a pleading by the plaintiff that the defendant had occupied part of the public street and raised construction. This Court held that unless plaintiff had relevant evidence in his custody, he is not expected to file the suit and even though Order XXVI Rule 9 CPC envisages appointment of Advocate-

Commissioner for elucidation of the matters in dispute, Commissioner is ordinarily to be appointed only where the Court is of the opinion that available evidence is not enough to arrive at a proper and correct conclusion for the effective adjudication of the dispute involved in the suit.

13. With great respect to the learned Judge, the view expressed by him in ***Papasani Sankara Reddy***'s case(1 supra) (that 'unless the plaintiff leads evidence and the Court comes to the conclusion that available evidence is not enough to arrive at a proper and correct conclusion for the effective adjudication of the disputes involved in the suit, an Advocate-Commissioner cannot be appointed') is contrary to the Division Bench judgment of this Court in ***C.Veeranna v. C.Venkatachalam***^[2] wherein it was held that even ex parte, an Advocate-Commissioner can be appointed without issuing notice to the other side.

14. Further in ***Savitramma and another v. B.Changa Reddy***^[3], a learned single Judge of this Court had held that it cannot be said that no Commissioner could be appointed before the issues are framed or evidence is led.

15. The decisions in ***C.Veeranna***(2 supra) and ***Savitramma***(3 supra) had been followed by this court in ***Bandaru Mutyalu and another v. Palli Appalaraju***^[4] and it had held that in circumstances where there is controversy as

to identification, location or measurement of the land, local investigation should be done.

16. The contention of the counsel for the petitioner is that appointment of an Advocate-Commissioner would result in collection of evidence, which is impermissible.

17. In the facts and circumstances of the present case, where there is an allegation of encroachment by the petitioner of the land of the respondent, such a contention cannot be accepted since mere oral evidence will not aid either party.

18 The object of the local investigation under Order XXVI Rule 9 CPC is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in Court but can be taken only from the peculiar nature, on the spot. The Commissioner in effect is a projection of the Court appointed for a particular purpose. The law of evidence enjoins upon a party to prove the fact which he relies on and in that sense, an obligation is cast upon the party; and if he fails to discharge that obligation, adverse consequence will follow and he will have to face the repercussions of the same.

This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order XXVI Rule 9 CPC.

19. Therefore, I also reject the contention of the petitioner that appointment of an Advocate Commissioner in the facts and circumstances of the case, amounts to collection of

evidence.

20. In fact in ***Haryana Waqf Board v. Shanti Sarup and others***^[5], the Supreme Court has also held that in a case where demarcation of the disputed land is warranted, it would be appropriate for the Court to direct investigation by appointing a local investigation under Order XXVI Rule 9 CPC.

21. Admittedly, at the stage when the application was filed, only PWs.1 and 2 had been examined and the matter was posted for further evidence of the respondent. In the circumstances it cannot be said that there is any undue delay on the part of the respondent in seeking appointment of an Advocate Commissioner.

22. Therefore, I see no error of jurisdiction in the order passed by the Court below.

23. Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs.

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

M.S.RAMACHANDRA RAO, J

02nd September, 2015.

gra

[\[1\]](#) 2013(5) ALT 40

[\[2\]](#) 1958(5) ALT 792

[\[3\]](#) 1988(6) ALT 353

[\[4\]](#) 2013 (6) ALT 26

[\[5\]](#) 2008 (8) SCC 671