

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

CIVIL REVISION PETITION No.338 of 2016

Between:

Bandi Samuel & another

.....Petitioners

and

Medida Nageswara Rao

.....Respondent

Date of Judgment pronounced on : 04-11-2016

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes/No
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

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< **GIST:**

> **HEAD NOTE:**

! Counsel for the petitioners : Sri VVN Narayana Rao

^ Counsel for the respondent : Sri P. Narsing Rao

? **Cases referred**

1. 2013 (6) ALT 26
2. 2001(4) CCC 416 (Bom)
3. AIR 1986 Madras 33
4. AIR 1988 Orissa 248
5. 1958 ALT 792=AIR 1959 AP 170
6. 1988 (1) ALT 353
7. 2005 (6) ALD-389
8. 2006 (3) ALD 362
9. 2010 (4) ALD 198
10. 2011 (4) ALD 231
11. 2013 (1) ALT 548
12. 2009 (2) ALD 238
13. 2012 (3) ALD 384
14. 2011 (2) ALD 472
15. 2006 (4) ALD 675
16. (2009) 12 SCC 773
17. 2010 (4) ALD 198
18. 2008 (8) SCC 671
19. CDJ 2007 SC 1339
20. (2001) 2 SCC 762
21. 2015 (5) ALD 429
22. 2016 (1) ALT 134

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**CIVIL REVISION PETITION No.338 of 2016****ORDER:**

The 1st plaintiff, since 2nd plaintiff died of the suit in O.S.No.75 of 2009 on the file of Principal Junior Civil Judge, Tuni, is the revision petitioner and revision respondent is the sole defendant.

2. The suit filed was for permanent injunction in relation to plaint plan ABCD lane by removing the constructions said to have been made by the defendant. The claim of the plaintiff is that he purchased the property from the mother of the defendant by name Kantamma. The record shows the defendant earlier filed O.S.No.219 of 1993 for permanent injunction against his brother and mother and the matter was settled before the Lok Adalat. Plaintiff alleges that latter the suit lane was occupied by constructing compound wall obstructing the easementary right of ingress and egress, thereby sought for appointment of an Advocate Commissioner for measurement and demarcation of the lane by measuring the property of the plaintiff and the defendant respectively.

3. The defendant opposed the petition saying the very suit seeking permanent injunction without declaratory relief for alleged removal of construction from plaint plan ABCD lane won't lie and Exs.A1 and A2 no way relate to plaintiff's right over suit property and there are no documents or any local body approved plans filed to support the claim and there are no grounds to appoint Advocate Commissioner therefrom.

4. The lower Court by the impugned order dated 05.11.2015, dismissed the petition with the observation that the suit is of the year 2009 and is at the stage of arguments. At this stage filing of the petition for appointment of Advocate Commissioner by the plaintiff no way sustains. There is existence of ABCD lane between house of plaintiff and defendant but for the dispute is regarding the width and alleged encroachment of part of the lane by the defendant and the evidence on record is sufficient to adjudicate the lis, thereby there is no requirement of appointment of Advocate Commissioner for any localization and it is nothing but collecting evidence.

5. Learned counsel for the revision petitioner/plaintiff submitted that the impugned order is baseless and unsustainable and should have been considered for appointment of Advocate Commissioner for localization and demarcation of the lane including on its width. The counsel for the defendant revision respondent supported the order of the lower Court.

6. Appointment of Commissioner in terms of part III i.e. matter “**Incidental proceedings**” of CPC is provided by section 75 of the Code.

“**75. Power of court to issue commissions:-** Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—(a) to examine any person; (b) to make a local investigation; (c) to examine or adjust accounts; or (d) to make a partition; (e) **to hold a scientific, technical, or expert investigation**; (f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit; (g) to perform any ministerial act. With this, Section 75, it would be appropriate now to refer

Order XXVI Rule 9 of CPC, which provides appointment of **“Commissioner for local investigation.”**

7. The object of Order 26 Rule 9 of Civil Procedure Code is not to assist a party to collect evidence where the party can procure the same. An Advocate Commissioner can be appointed under Order XXVI Rule 9 of the Code of Civil Procedure 1908 inter alia for **elucidating any matter in dispute**. There is some confusion as to in what circumstances an advocate-commissioner is to be appointed in a civil suit. To answer this question, we have to understand the expression of **“elucidating any matter in dispute”** in Order 26, Rule 9 of CPC. There are several expressions in this regard. Some are under the impression that no advocate-commissioner is to be appointed in suit for injunction. For example, the claim for injunction made by the plaintiff is based on the plea that there is only one way to his house and that he is being prevented by the defendant from using said way, any amount of evidence in this regard may not help the Court to render a correct finding on this aspect, as evidence in this regard would be available on the spot at the ground/field. So, a situation such as this would definitely fall within the expression of “elucidating any matter in dispute” to avoid adducing of much oral evidence by consuming time of Court and parties and ultimately with no possibility of practical approach for accurate determination of the lis. No doubt, before appointing an advocate commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. Court has to keep in mind therefrom to decide whether there is an actual necessity to appoint advocate commissioner to decide any real controversy between parties.

8. No doubt an Advocate-Commissioner cannot be appointed for making an enquiry about factum of possession of the property in dispute, which is nothing, but fishing of information and not elucidating any matter in dispute.

9. There are circumstances in which, it is only a Commissioner inspecting the property promptly and recording timely assessment of what obtains relating to the property from threat of changing or obliterating the existing physical features to destroy valuable evidence on ground, could alone assist courts to decide correctly. If such prompt actions are not taken, it may destroy the valuable rights of the parties.

10. In **Bandaru Mutyalu Vs. Palli Appalaraju**¹, it was held 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 trial prepared and the object of local investigation under Order XXVI, Rule 9 of the Code which cannot belittled for that conclusion placed reliance upon **Sanjay Son of Namdeo Khandare Vs. Saheb Rao Kachru Khandare**²; **Ponnusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam**³; **Mahendranath Panda Vs. Purnanada & Others**⁴; **C.Veeranna v. C.Venkatachalam**⁵ and **Savitramma v. B.Changa Reddy**⁶.

¹ 2013 (6) ALT 26

² 2001(4) CCC 416 (Bom)

³ AIR 1986 Madras 33

⁴ AIR 1988 Orissa 248

⁵ 1958 ALT 792=AIR 1959 AP 170

⁶ 1988 (1) ALT 353

11. In **J. Satyasri Rambabu Vs. A. Anasuya**⁷, this Court at paragraph No.6 held as under: It is no doubt true that the Courts are normally reluctant to appoint a Commissioner for noting physical features of the suit schedule property, particularly in a suit for injunction since the same would amount to collecting evidence in favour of one of the parties. However, there is absolutely no reason to hold that it is a hard and fact rule. Having regard to the facts and circumstances of the case and particularly whenever the Court prima facie finds that there is an attempt on the part of one of the parties to alter the physical features of the suit property and it is necessary to take note of the same, it is always open to the Court to appoint a Commissioner for inspection of such property.

12. In **Mallikarjuna Srinivasa Gupta Vs. K.Sheshirekha**⁸, in which case, a suit was filed for declaration of title and an application was filed contending that the defendant therein encroached a portion of the site. The stand of the defendant therein was that he has not encroached any portion of the site as alleged by the plaintiff. In the circumstances, this Court held as follows: “By mere looking into the sale deed or the lay out, it is not possible to determine the rights, unless it is verified whether any portion of the building is constructed in Plot No.62. Therefore, it is essential to consider the request of the petitioner for appointment of Advocate Commissioner for the purpose mentioned therein.

⁷ 2005 (6) ALD-389

⁸ 2006 (3) ALD 362

13. In **Varala Ramachandra Reddy Vs. Mekala Yadi Reddy and others**⁹, it was held that an Advocate Commissioner can be appointed in an injunction suit for local inspection of the suit site and to demarcate the suit schedule property with the help of the Surveyor.

14. In **Shaik Zareena Kasam v. Patan Sadab Khan**¹⁰, this Court at paragraph No.10 held as under: Whenever there is a dispute regarding boundaries or physical features of the property or any allegation of encroachment as narrated by one party and disputed by another party, the facts have to be physically verified, because, the recitals of the documents may not reveal the true facts and measuring of land on the spot by a Surveyor may become necessary. It was also held referring to **Mallikarjuna Srinivasa Gupta** and **Varala Ramachandra Reddy** supra, that if there is some delay in filing the application to appoint an Advocate Commissioner and if there are some laches on the part of one party, the Court may impose reasonable costs

15. In **Donadulu Uma Devi v. Girika Katamaiah @ Basaiah**¹¹ it was held AT PARA 12 that when there is a dispute or issue with regards to identity of a property in a litigation it is necessary to appoint a Commissioner for localizing the property which may be even by taking necessary assistance from a qualified surveyor which will not amount to collecting evidence which is prohibited.

⁹ 2010 (4) ALD 198

¹⁰ 2011 (4) ALD 231

¹¹ 2013 (1) ALT 548

16. In **K.Dayanand And Another vs P. Sampath Kumar-CRP No.3760 of 2014, DT.11-11-2014**, after considering the dicta observed in the rulings reported in **G. Nagabhushanam Vs. T.Eswaramma¹²; Thalla Sulochana Vs. Thalla Issac and Another¹³; Yenugonda Bal Reddy Vs. Manemma and Others¹⁴; Dammalapati Satyanarayana & Others Vs. Datta Venkata Ramabhadra Raju @ D.V.R. Raju and Others¹⁵; J. Satyasri Rambabu supra; Shaik Zareena Kasam supra; ECE Industries Limited Vs. S.P. Real Estate Developers Private Limited & Others¹⁶; 1997 (1) A.P.L.J. 61 (SN); Varala Ramachandra Reddy Vs. Mekala Yadi Reddy & Others¹⁷; Haryana Waqf Board and others Vs. Shanti Sarup and others¹⁸ and Donadulu Uma Devi supra**, it was held that **there is no absolute bar on appointment of Commissioner in a suit for injunction also as per the law laid down in the above referred judgments nor the provisions of Section 75 and Order XXVI Rule 9 do impose such a prohibition.**

17. The Supreme Court in **Gurunath Manohar Pavaskar & others vs. Nagesh Siddappa Navalgund and others¹⁹**, has held that the learned trial Judge may appoint an Advocate-Commissioner for the purpose of taking measurement and demarcation of the disputed suit land.

¹² 2009 (2) ALD 238

¹³ 2012 (3) ALD 384

¹⁴ 2011 (2) ALD 472

¹⁵ 2006 (4) ALD 675

¹⁶ (2009) 12 SCC 773

¹⁷ 2010 (4) ALD 198

¹⁸ 2008 (8) SCC 671

¹⁹ CDJ 2007 SC 1339

18. The Supreme Court in **Haryana Waqf Board supra**, at paragraphs 4 to 8 held as under: "Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial Court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the Court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 CPC.

19. **Coming to evidentiary value of Advocate-Commissioner's report:** A party can countermand the evidence of Commissioner's report by letting in other evidence. A Local examination by Commissioner can only report on existing facts and not how they came about, as per decision of **Hon'ble Supreme Court in Lekh Raj V. Muni Lal and others²⁰**.

20. In **Bandaru Mutyalu supra** referring to the Division Bench expression of this Court in **C.Veeranna supra**, that was placed reliance by another Single Judge Bench expression of **Savitramma supra** that in turn placed reliance to the conclusion in saying there is no principle of law or rule or provision that in a suit for bare injunction, no commissioner can be appointed to measure and demarcate the property so also even at the initial stage before commencement of trial, leave about even an ex parte advocate commissioner can be appointed as held by the Division Bench (supra) with no notice even required for such appointment, but for referring to Order XXVI Rule 18, requirement of notice only for execution of the warrant by the commissioner appointed even ex parte and thereby, all depends upon the discretion of the Court

²⁰ (2001) 2 SCC 762

from the factual matrix of each case of any necessity to consider either on the request of plaintiff or on the request of the defendant or defendants as the case may be. In **Jammi Venkatakrishna Rao Vs. J.V.H. Ravindranath**²¹, commissioner was held to be appointed to note down existing physical features which is not fishing of information. In **Jajala Mariadas and Another Vs. Bodhala Aroghyam**²², it was observed referring to the facts therein of the suit claim relating to perpetual injunction and recovery of possession by declaration of title by removal of the so called encroachment of 91 square feet out of that B schedule property and injunction restraining interference for delivery in saying plaintiff and defendant are neighbours and defendant said to have encroached that portion of the land belonging to the plaintiff. Evidence in this regard of encroachment would only be available on the spot and no amount of oral evidence would establish the fact and for that conclusion referred the earlier expressions in relation to the nature of lis and requirement of localization of the disputed property under encroachment or otherwise, where demarcation of the disputed property is involved it is a fit case for appointment of Advocate Commissioner, as held by the Apex Court in **Haryana Waqf Board supra**, and same was followed in **Smt. Donadulu Uma Devi supra** and there is no time limit for appointment of Advocate Commissioner as even an exparte Advocate Commissioner for localization and noting of physical features can be appointed at the time of filing suit and delay in filing is otherwise not a ground to negate. It was ultimately in saying evidence to prove allegation of encroachment is of a peculiar

²¹ 2015 (5) ALD 429

²² 2016 (1) ALT 134

nature which is available on the spot and if Advocate Commissioner is not appointed grave prejudice would be caused and allowed that application.

21. Here in this case on hand, for the so called construction by encroachment of the suit lane concerned, there is no material reflected from the petition, counter and order of the lower Court to show what are the measurements of the lane and by what document and what is the encroachment that is made to measure and demarcate. Thereby it requires consideration afresh by the lower Court with reference to the law laid down in the expressions supra.

22. Having regard to the above, the revision petition is disposed of giving liberty to the plaintiff to file fresh petition within one week from the date of receipt of this order before the lower Court and lower Court is directed therefrom to receive counter, hear and dispose of the application on own merits with reference to any material relating to the length and width of the lane and if so the extent of the alleged encroachment by the defendants for the plaintiff if able to show to consider for appointment of Advocate Commissioner for its ascertainment by measurement and demarcation and noting of physical features.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 04.11.2016

Note: L.R. Copy to be marked

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