

***THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

+C.R.P.No. 5837 OF 2015

%Dated 19-02-2016

#Sarala Jain, W/o Mahaveer Jain, 40 years, Business,

R/o Dubba, Nizamabad, and others.

... PETITIONERS

VERSUS

\$Sangu Gangadhar, S/o Buchanna, 60 years,

Agriculture, Dichpally, Nizamabad, and others.
RESPONDENTS

...

! Counsel for Petitioners : K.M.Mahender Reddy.

^ Counsel for Respondents : B.Venkat Rama Rao.

< GIST:

> HEAD NOTE:

? Cases referred:

1. 2013 (3) ALD 64 (SC)
2. 2011 (2) ALD 472
3. 2010 (5) ALD 83
4. 2009 (5) ALD 459
5. 2006 (1) ALD 372
6. 2004 (2) ALD 426
7. KERLT-1966-0-86
8. MANU/MH/0871/2003
9. R.S.A.No. 258/2004 (INJ)
10. (1987) 4 SCC 71
11. (2003) 6 SCC 641
12. 1999 (5) ALD 113
13. (2008) 8 SCC 671
14. AIR 1990 CALCUTTA 26

15. AIR 1983 AP 214
16. AIR 1975 SC 1810
17. AIR 1967 SC 436

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

-

CIVIL REVISION PETITION No. 5837 OF 2015

ORDER:

This revision petition is filed by respondent Nos. 1 to 3-defendant Nos. 1 to 3 in I.A.No. 1390 of 2012 in O.S.No. 322 of 2012 on the file of the Court of Principal Junior Civil Judge, Nizamabad (for short, 'the trial Court'), under Article 227 of the Constitution of India to revise the order dated 23-11-2015 passed by the trial Court appointing an advocate commissioner to fix boundaries of schedule property by exercising power under Order 26 Rule 1 read with Section 151 of the Code of Civil Procedure (for short, 'C.P.C.').

For convenience of reference, the ranks given to the parties before the trial Court will be adopted throughout this order.

The petitioner-plaintiff filed the suit for perpetual injunction against the respondents-defendants and for demarcation of schedule property alleging that he was the absolute owner of agricultural land in S.No. 329 of an extent of Ac. 18.32 guntas situated at Nadeipalli Village Sivaru, Dichpally Mandal, Nizamabad District. The petitioner succeeded the same from his father Sangu Buchanna, S/o Chinnanna. Out of Ac. 18.32 guntas, the petitioner sold an extent of Ac. 15.11 guntas to the respondents while retaining Ac. 3.21 guntas for himself. Thus, he is the owner of Ac. 3.21 guntas *i.e.* schedule property. Taking advantage of illiteracy of the petitioner, the respondents raised a boundary dispute only to grab the land of the petitioner by changing boundary stones and, thereby, causing inconvenience. Having no other alternative, the petitioner submitted an application to the Assistant Director, Survey and Land Records, Nizamabad, to fix boundaries of his agricultural

land in an extent of Ac. 3.21 guntas. Accordingly, on 01-01-2012, Mandal Surveyor, Dichpally, along with Village Revenue Officer, Nadepalli Village, surveyed the land and fixed boundary stones. Despite fixing boundary stones, the respondents are still raising boundary dispute and attempting to encroach schedule property. Again, the petitioner requested the Assistant Director, Survey and Land Records to conduct survey of schedule property. Acceding to the request of the petitioner, the Assistant Director, Survey and Land Records, Nizamabad, along with V.R.O., Nadepalli Village, again conducted survey, demarcated the land *i.e.* schedule property, fixed boundaries *vide* proceedings No. A3/418/2012 dated 12-06-2012 and prepared a trench map. Even thereafter, the respondents continued to raise the boundary dispute. Therefore, to avoid unnecessary complications, the petitioner filed the suit for permanent injunction and to fix boundaries of schedule property with the help of surveyor. While the suit is pending, the present petition is filed to appoint advocate commissioner to demarcate schedule property with the help of surveyor from the office of the Assistant Director, Survey and Land Records.

The respondents filed counter denying material allegations *inter alia* contending that appointment of advocate commissioner to survey and demarcate schedule property and fix boundaries is misconceived, cannot be entertained and noting down physical features of schedule property is nothing but collection of evidence. The respondents also denied ownership of the petitioner while contending that they are the exclusive owners and in possession and enjoyment of the property; in the absence of proof that the petitioner is in possession and enjoyment of the property including ownership over the property, commissioner cannot be appointed to demarcate the land of the respondents and to fix boundaries of schedule property as it amounts to granting main relief; and prayed to dismiss the petition.

Upon hearing argument of both counsel, the trial Court allowing the petition and issued the following direction:

"Sri B.Satyanarayana Goud, Advocate, is appointed as advocate/commissioner for the purpose of survey and demarcation of the suit schedule property with the assistance of surveyor from the office of Assistant Director, Survey and Land Records, Nizamabad, and fix the boundary stones of the respondents. The fee of advocate/commissioner is fixed at Rs.3,500/- directly payable by the petitioner/plaintiff."

Feeling aggrieved by the order under challenge, respondent Nos. 1 to 3 filed the present revision petition raising several contentions mainly contending that unless the petitioner established his right and title to the property during trial, he is not entitled to claim the relief of appointment of advocate commissioner to fix boundaries of the land of the respondents, it amounts to granting pre-trial decree and, if such relief is granted, nothing remains to be tried by the trial Court. Therefore, the relief granted by the trial Court is against the settled principles of law and prayed to allow the revision petition, exercising power under Article 227 of the Constitution of India, setting aside the impugned order passed by the trial Court.

During hearing, learned counsel for the respondents mainly contended that when the suit is filed for perpetual injunction and confirmation of schedule property demarcated by surveyor, appointing advocate commissioner to demarcate boundaries is misconceived and it amounts to granting the main relief which is pre-trial decree. Consequently, the same cannot be sustained under law. To support the contention of learned counsel for the respondents, he placed reliance on ***Mohd. Mehtab Khan and others Vs. Khushnuma Ibrahim and others***^[1]. Learned counsel also contended that appointing advocate commissioner for demarcation of the property of the respondents is nothing but collection of evidence, the same is not permissible under law and, to support his contention, placed reliance on

Yenugonda Bal Reddy Vs. Manemma and others^[2], ***Batchu Narayana Rao Vs. Batchu Venkata Narasimha Rao***^[3], ***Sagi Vijaya Ramachandra Raju and others Vs. Koppiseti Satyanarayana and others***^[4], and ***Koduru Sessa Reddy Vs. Gottigundala Venkata Rami Reddy and others***^[5]. On the strength of the principles laid down in the above judgments, it is contended that appointment of commissioner by the trial Court for demarcation of schedule property and to fix boundary stones to the land of the respondents is illegal, contrary to the principles of law, it is nothing but exercising jurisdiction illegally or irregularly and prayed to set aside the order passed by the trial Court.

Per contra, learned counsel for the petitioner contended that appointment of advocate commissioner in a suit for injunction is not new and it is a well recognized and settled principle of law that commissioner can be appointed to demarcate boundaries which does not amount to collection of evidence. To support his contention, learned counsel relied on ***D.Vidya Sagar Rao and another Vs. K.Indira Devi and others***^[6], ***Pennamma Vally Vs. Achuthan Unni***^[7], ***Omprakash Vs. Ramesh Ramnivas Soni and others***^[8] and ***Laxman Sabanna Athani Vs. Mahadev Babu Bastawade and another***^[9]. Learned counsel further contended that suit for demarcation of property and fixing boundaries is maintainable and placed reliance on ***E.Achuthan Nair Vs. P.Narayanan Nair and another***^[10]. In view of the legal position in the above decisions, the order of the trial Court does not suffer from any illegality or irregularity. Therefore, the order under challenge does not call for interference of this Court and prayed to dismiss the revision petition.

Considering rival contentions and perusing material available on record, the point that arises for consideration is thus:

"Whether appointing advocate commissioner for demarcating the property of the respondents amounts to granting pre-trial decree, if so, whether the order passed by the trial Court is an illegal exercise of jurisdiction and liable to be set aside?"

The power of revision under Article 227 of the Constitution of India is supervisory in nature and this Court can interfere with the orders passed by subordinate Courts or tribunals only when subordinate Courts or tribunals failed to exercise jurisdiction or where exceeded their jurisdiction or exercised jurisdiction illegally or irregularly conferred on them. Time and again scope of Article 227 of the Constitution of India came up for consideration before the Apex Court and the Apex Court laid down certain principles. It is well settled that High Court can exercise supervisory jurisdiction under Article 227 of the Constitution of India to keep subordinate Courts or tribunals within the boundaries of their jurisdiction. The Apex Court, in ***State, through Special Cell, New Delhi Vs. Navjot Sandhu @ Afshan Guru and others***^[11], examined the power of High Court to interfere with orders of subordinate Courts or Tribunals in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. In the light of the law laid down by the Apex Court, it is abundantly clear that this court can exercise only its jurisdiction in exceptional circumstances which is supervisory in nature. Therefore, if the Court finds that there is an illegal exercise of jurisdiction by the trial Court, this Court can interfere with the order under challenge otherwise this Court cannot exercise power though the order is wrong.

Keeping in mind the scope of Article 227 of the Constitution of India, I would like to advert to various contentions of both counsel. The main contention of learned counsel for the respondents is that the suit is filed for both permanent injunction and confirmation of survey and demarcation of

schedule property conducted by surveyor by fixing survey stones to the respective extents but such decree can be passed only after completion of trial by pronouncing judgment and, if any of the reliefs claimed by the petitioner is granted, it amounts to grant of pre-trial decree which is impermissible under law whereas learned counsel for the petitioner would contend that commissioner can be appointed for demarcation of the property where there is boundary dispute but did not advance any argument that appointment of advocate commissioner for demarcating boundaries of the property does not amount to pre-trial decree.

In view of the specific contention raised by learned counsel for the respondents, it is appropriate to advert to the reliefs claimed in the plaint. As per the plaint, the petitioner claimed the following reliefs extracted hereunder:

- "(a) *a decree for permanent injunction be passed against the defendants restraining them from alienating, sell, mortgaging etc., to the extent of their respective extents as narrated in the plaint to third parties till the disposal of the suit; (Amended as per the orders of this Hon'ble Court in I.A.No. 253 of 2015 dated 25-06-2015);*
- (b) *a decree confirming the survey and demarcation of suit schedule property conducted by the surveyor by fixing the boundary stones to the respective extents of the plaintiff and the defendants;*
- (c)
- (d)"

It is clear from the reliefs claimed by the petitioner that the first relief is permanent injunction restraining the defendants from alienating the property *etc.*, to third parties till disposal of the suit. The very first relief is of unmeaning reference for the reason that permanent injunction can be granted under Section 38 of the Specific Relief Act, 1963 (for short, 'the Act of 1963'), against the defendants if there is any infringement or invasion of legal right or obligation of the plaintiff but here the petitioner sought the relief of permanent injunction restraining the respondents from alienating their respective extents till disposal of the suit while admitting that he sold Ac. 15.11 guntas out of Ac. 18.32 guntas which devolved upon him from his

father by succession. Thus, the relief claimed in clause (a) is to pass a decree for permanent injunction till disposal of the suit. If injunction is granted till disposal of the suit, it is nothing but temporary injunction during pendency of the suit. There is a marked distinction between permanent injunction and temporary injunction as per Section 37 of the Act of 1963. Temporary injunction can be granted only during pendency of the suit and permanent injunction can be granted only after completion of trial by pronouncing judgment. However, the relief claimed in clause (a) is not much relevant for deciding the real dispute.

According to Section 75 and Order XXVI of C.P.C., Court has discretion to appoint a commissioner but the discretion has to be exercised in a judicious and sound manner and not whimsically. Before appointing commissioner, Court shall examine pleadings, relief claimed and real controversy between parties. In clause (b), the petitioner claimed to pass decree confirming the survey and demarcation of schedule property conducted by the surveyor *etc.*, referred in the earlier paragraphs. In the affidavit filed along with the petition, a clear assertion is made that the surveyor surveyed the land on 01-01-2012 and again on 12-06-2012 on the applications of the petitioner and also issued proceedings No. A3/418/2012. So, the petitioner sought the relief to confirm the survey conducted by the surveyor on the two occasions referred *supra* whereas the trial Court appointed advocate commissioner to demarcate schedule property with the assistance of the surveyor and fix boundary stones to the land of the respondents. In fact, in the petition filed under Order 26 Rule 9 of C.P.C., the petitioner sought for appointment of advocate commissioner to survey schedule property with the help of surveyor and fix boundary stones to the land of the petitioner and the respondents but, instead of granting such relief, the trial Court directed the commissioner to demarcate schedule property with the assistance of surveyor from the office of the Assistant Director and fix

boundary stones to the land of the respondents. The order of the trial Court is bereft of any reason for not directing the commissioner to fix boundary stones to schedule property. In any view of the matter, appointing advocate commissioner for demarcating schedule property and fix boundary stones to the land of the respondents is nothing but granting pre-trial decree in view of the law laid down by the Apex Court in **Mohd. Mehtab Khan** (1st *supra*), wherein the Apex Court held as follows:

"Given the ground realities of the situation, it is neither feasible nor practical to take the view that interim matters, even though they may be inextricably connected with the merits of the main suit, should always be answered by maintaining a strict neutrality, namely, by a refusal to adjudicate. Such a stance by the Courts is neither feasible nor practicable. Court, therefore, will have to venture to decide interim matters on consideration of issues that are best left for adjudication in the full trial of the suit. In view of the inherent risk in performing such an exercise which is bound to become delicate in most cases the principles that the Courts must follow in this regard are required to be stated in some detail though it must be made clear that such principles cannot be entrapped within any strait-jacket formula or any precise laid down norms. Courts must endeavour to find out if interim relief can be granted on consideration of issues other than those involved in the main suit and also whether partial interim relief would satisfy the ends of justice till final disposal of the matter. The consequences of grant of injunction on the defendant if the plaintiff is to lose the suit along with the consequences on the plaintiff where injunction is refused but eventually the suit is decreed has to be carefully weighed and balanced by the Court in every given case. Interim reliefs which amount to pre-trial decrees must be avoided wherever possible."

If the principle laid down in the above judgment is applied to the present facts of the case, appointing advocate commissioner by the trial Court for the purpose of demarcating schedule property and fix boundary stones to the property of the respondents amounts to granting pre-trial decree as it satisfied part of the reliefs claimed in the suit. In such case, commissioner cannot be appointed for the said purpose. Yet, the relief claimed by the petitioner in clause (b) is only to confirm the survey and demarcation of schedule property conducted by the surveyor by fixing

boundary stones to respective extents of both parties. In para Nos. 7 and 8 of the plaint, it is averred that the petitioner got surveyed schedule property and fixed boundary stones demarcating his property. In view of demarcation of the property by surveyor already, the petitioner sought for confirmation of the survey and demarcation of schedule property conducted by the surveyor. When surveyor already demarcated schedule property and fixed boundary stones to respective extents of both parties, question of again appointing advocate commissioner to demarcate the property and fix boundary stones to the property of the respondents is erroneous on the face of record in the absence of any allegation that the boundary stones are removed. Therefore, I find substantial force in the contention of learned counsel for the respondents. However, learned counsel for the petitioner except contending about maintainability of the suit for fixation of boundaries, no legal position is brought to my notice to support the order passed by the trial Court appointing advocate commissioner for the said relief which amounts to grant of pre-trial decree. Therefore, it is clear that the order of the trial Court is an illegal exercise of jurisdiction that conferred on it as the order passed by the trial Court is beyond the scope of the suit and not even incidental. Hence, the same is liable to set aside on this ground.

The main contention of learned counsel for the respondents is that appointment of advocate commissioner to make local investigation amounts to collection of evidence and, in support of his contention, placed reliance on **Sagi Vijaya Ramachandra Raju** (4th *supra*), **Batchu Narayana Rao** (3rd *supra*), **Koduru Sesha Reddy** (5th *supra*) and **Yenugonda Bal Reddy** (2nd *supra*). In all the above four judgments, this Court consistently held that appointment of advocate commissioner, in a suit for declaration of title and permanent injunction or in a suit for injunction simplicitor, to note down physical features amounts to collection of evidence. A similar view was expressed by this Court in **Malla Bhaskara Rao and others Vs. Konchada**

Ananda Rao ^[12]. Whereas, learned counsel for the petitioner; while contending that in a suit for demarcation of boundaries and for injunction, advocate commissioner can be appointed; placed reliance on **D.Vidya Sagar Rao** (6th *supra*), **Omprakash** (8th *supra*), wherein this Court and the High Court of Bombay (Nagpur Bench) respectively held that when there is a boundary dispute and both parties alleging encroachment of their property, identification of the property by demarcation is necessary. Learned counsel for the petitioner also drawn attention of this Court to **Pennamma Vally** (7th *supra*), wherein a Division Bench of Kerala High Court held that

"It is of frequent occurrence, especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it. The ordinary rule regarding the onus incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Where any other rule recognized, the result might be that some boundaries would be incapable of judicial settlement."

In **Laxman Sabanna Athani** (9th *supra*), Karnataka High Court (Circuit Bench at Dhrawad) reiterated the same principle that commissioner can be appointed, when there is dispute regarding boundary, to demarcate the property with the help of Assistant Director of Land Record *etc.*, and commissioner report can be relied upon in the absence of any *mala fide* attached to the officer.

In view of the law declared by this Court and other Courts, there is little controversy about appointment of advocate commissioner to demarcate boundaries of property. However, the Supreme Court in **Haryana Waqf Board and others Vs. Shanti Sarup and others** ^[13] 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 C.P.C.

The appellate Court found that the trial Court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per Para 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because the land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial Court was wrongly rejected.

It is also not in dispute even before the appellate Court, the appellant Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land. For the reasons aforesaid, we are of the view that the High Court ought to have considered this aspect of the matter and then decided the second appeal on merits. Accordingly, we set aside the judgment and decree passed in the second appeal and the second appeal is restored to its original file. The High Court is requested to decide the second appeal in the light of the observations made hereinabove within six months from the date of supply of a copy of this order to it. The appeal is thus allowed. There will be no order as to costs."

In view of the above judgment, commissioner can be appointed for localization of property when there is dispute or issue with regard to identity of property in litigation. Therefore, by applying the principle laid down in **Haryana Waqf Board** (13th *supra*), commissioner can be appointed for demarcating property even if the law laid down by this Court is ignored in view of the inconsistency in the law declared by this Court.

One of the contentions of learned counsel for the petitioner is that suit for demarcating boundaries is maintainable. In **E.Achuthan Nair** (10th *supra*), the Apex Court held that suit for demarcation of property is maintainable since it is a suit of civil nature and cognizance of which is not

barred. In the facts of the above judgment, during pendency of the suit, the trial Court appointed commissioner to locate boundary in the manner indicated by the agreement dated 25-09-1960. The commissioner did, in fact, submit a report locating the boundary. Thus, dispute regarding identification of boundary between two adjacent land owners is certainly a dispute of civil nature and it is not barred either expressly or impliedly. Learned counsel also placed reliance on ***Ratnamala Dasi and others Vs. Ratan Singh Bawa***^[14]; ***Government of the State of Orissa, Bhubaneshwar Vs. Jaldh Rama Rao and Company, Machilipatnam***^[15]; ***M/s. Supreme General Films Exchange Limited Vs. High Highness Maharaja Sir Brijnath Singhji Deo of Maihar and others***^[16]; and ***Vemareddi Ramaraghava Reddy and others Vs. Konduru Seshu Reddy and others***^[17]. In all the judgments, this Court and other High Courts consistently held that suit for demarcation of property is maintainable since cognizance of it is not barred under Section 9 of C.P.C. The order under challenge before this Court is limited to appointment of advocate commissioner for demarcating the property with the assistance of surveyor and fix boundaries to schedule property. Maintainability of the suit in a civil Court is not an issue in the subject matter of the revision. In those circumstances, this Court need not examine the issue of maintainability of the suit for demarcation of boundaries of schedule property etc.,. Accordingly, no finding is recorded.

To appoint an advocate commissioner, Court has to keep in mind the following:

- (1) *Total pleadings of both parties;*
- (2) *Relief claimed in suit;*
- (3) *Appointment of advocate commissioner for specific purpose at interlocutory stage shall not amount to grant pre-trial decree; and*
- (4) *Necessity to appoint advocate commissioner to decide real*

controversy between parties.

The trial Court appointed advocate commissioner for fixing boundaries to the property of the respondents only though the petitioner sought for appointment of advocate commissioner to demarcate schedule property and fix boundary stones to his property and the property of the respondents. Apart from that, the relief under clause (b) in the plaint is only to confirm the boundaries since the property was already demarcated twice. As such, appointment of advocate commissioner for the same purpose does not arise. If the suit is filed for fixing boundaries by the Court, then appointment of advocate commissioner would serve purpose to decide the real controversy between the parties but it is not even the case of the petitioner that schedule property is not demarcated. In such case, appointment of advocate commissioner is wholly unnecessary and it is beyond the scope of the suit. The trial Court did not look into the reliefs claimed in the suit; plea of the petitioner regarding survey of land and fixation of boundary stones; and the purpose for which commissioner is sought to be appointed. In those circumstances, the order passed by the trial Court cannot be sustained as it amounts to granting pre-trial decree in view of the law declared in **Mohd. Mehtab Khan** (1st *supra*) and it is, therefore, liable to be set aside. Accordingly, the point is answered in favour of the respondents and against the petitioner. .

In the result, the civil revision petition is allowed setting aside the order dated 23-11-2015 passed in I.A.No. 1390 of 2012 in O.S.No. 322 of 2012 on the file of the Court of Principal Junior Civil Judge, Nizamabad. Pending miscellaneous petitions in this revision, if any, shall stand closed in consequence. No order as to costs.

Date: 19-02-2016.

M.SATYANARAYANA

MURTHY, J.

JSK

[\[1\]](#) 2013 (3) ALD 64 (SC)
[\[2\]](#) 2011 (2) ALD 472
[\[3\]](#) 2010 (5) ALD 83
[\[4\]](#) 2009 (5) ALD 459
[\[5\]](#) 2006 (1) ALD 372
[\[6\]](#) 2004 (2) ALD 426
[\[7\]](#) KERLT-1966-0-86
[\[8\]](#) MANU/MH/0871/2003
[\[9\]](#) R.S.A.No. 258/2004 (INJ)
[\[10\]](#) (1987) 4 SCC 71
[\[11\]](#) (2003) 6 SCC 641
[\[12\]](#) 1999 (5) ALD 113
[\[13\]](#) (2008) 8 SCC 671
[\[14\]](#) AIR 1990 CALCUTTA 26
[\[15\]](#) AIR 1983 AP 214
[\[16\]](#) AIR 1975 SC 1810
[\[17\]](#) AIR 1967 SC 436