

**THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI**

**Civil Revision Petition No.2589 of 2013**

**ORDER:-**

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by the unsuccessful respondent/defendant, assailing the order, dated 14.03.2013, of the learned V Additional Junior Civil Judge, Warangal, passed in I.A.No.528 of 2012 in O.S.No.1438 of 2006 filed by the petitioner/plaintiff under Order XXVI Rule 9 of the Code of Civil Procedure, 1908, requesting to appoint an advocate commissioner to note down the physical features of the suit schedule joint wall.

**2.** I have heard the submissions of Sri T.S.Anand, the learned counsel for the petitioner/defendant ('defendant', for brevity) and of Smt. A.Jayasree, the learned counsel appearing for Sri B.Narayana Reddy, the learned counsel for the respondent/plaintiff ('plaintiff', for brevity). I have perused the material record.

**3.** The facts which are necessary to be stated as a preface to this order, in brief, are as follows:-

The plaintiff brought the suit against the defendant for declaration and perpetual injunction in respect of a joint wall of 18 inches width and 56 feet length running from East to West between the houses of the parties, more fully described in the schedule annexed to the plaint. The defendant, while resisting the suit, made a counter claim for mandatory injunction for removal of the portions including slabs of ground floor and first floor on

the Northern side of the plaintiff's house and for getting the same removed through process of the Court in case of failure of the plaintiff to remove the same. In the said suit, the plaintiff filed the subject application for appointment of an advocate commissioner for noting down the physical features of the suit joint wall *inter alia* pleading as follows: "The joint wall is the wall between the houses, which are ancestral. It is in dilapidated condition. The plaintiff constructed a new house in his portion by leaving 3 feet width of land in between the newly constructed house and the joint wall. Abutting the said joint wall, there is still a "dhoni" (tin sheeted water channel) for letting out the rain water that collects between the two houses. There are traces of open cupboards on the joint wall on the side of the plaintiff's house which is in dilapidated condition. When the defendant made efforts to raise the height and width of the said joint wall towards the side of the plaintiff's house without any manner of right or exclusive right to the use of the joint wall, the plaintiff is constrained to bring the suit. If the advocate commissioner is appointed for noting down the physical features of the suit joint wall and proposed illegal construction over it, it would be possible to place the real factual details before the Court."

**4.** In the counter, the defendant, while denying the contentions of the plaintiff, *inter alia* pleaded as follows: "The plaintiff has to establish the pleaded material facts for substantiating the relief of declaration by adducing necessary oral and documentary evidence; and the plaintiff has to succeed on his own strength but

not by way of securing evidence by means of appointment of advocate commissioner. The plaintiff has to establish his case by adducing evidence on his side and cross-examining the witnesses of the defendant. The suit is one for perpetual injunction and in such a suit, no advocate commissioner can be appointed for noting down the physical features. The petition is intended to drag on the proceedings.”

**5.** The trial Court, advertent to the pleadings of the parties and the reliefs claimed in the suit, appointed an advocate commissioner for the purposes sought for by the plaintiff *inter alia* observing that the appointment of the advocate commissioner and securing a report after personal inspection by the advocate commissioner is necessary in view of the specific issues framed in the suit and the reliefs claimed by the defendant in the counter claim. Aggrieved thereof, the defendant filed this revision.

**6.** The learned counsel for the defendant, while reiterating the case of the defendant, which is stated *supra*, forcefully contended as follows: “In a suit of this nature where the relief claimed is declaration and perpetual injunction, the plaintiff has to establish his case by adducing necessary oral and documentary evidence and that the plaintiff must succeed on his own strength but he cannot seek appointment of an advocate commissioner for securing or collecting evidence. In a suit of this nature, an advocate commissioner cannot be appointed. In a suit of the year 2006, commissioner’s appointment was sought in the year 2012 after a long lapse of six years. The plaintiff is dragging on the suit

proceedings and, hence, the order of the trial Court is liable to be set aside.” He also called in aid certain decisions in support of his contentions.

**7.** *Per contra*, the learned counsel for the plaintiff, by supporting the orders of the Court below and while reiterating the contentions of the plaintiff, would submit as follows: “The whole issue is about the joint wall existing between the two houses. The suit is not for bare injunction and the relief of declaration was also sought. In view of the fact that the defendant also made a counter claim, if an advocate commissioner is appointed to note down the physical features, the dispute can be set at rest once and for all. The trial Court also expressed its view that securing a report by appointing an advocate commissioner is necessary for effective resolution of the issues settled in the suit and also in view of the counter claim made by the defendant. Hence, the order of the trial Court needs no interference by this Court.”

**8.** I have given detailed and thoughtful consideration to the facts and submissions, which are narrated *supra* in detail.

**9.** As rightly pointed out by the learned counsel for the plaintiff, the suit is one for declaration and perpetual injunction. According to the contentions of the plaintiff, the joint wall has still some features like “dhoni” (tin sheeted water channel) in between the houses of both the parties for letting out the rain water besides traces of open cupboards on the side of the plaintiff’s house and that therefore, if an advocate commissioner is

appointed to note down the physical features as well as its old dilapidated condition and other features, the same would be helpful for deciding the issues framed for determination in the suit. Coming to the contention that the advocate commissioner cannot be appointed in a suit of this nature, suffice it is stated that the said contention is untenable and this Court is not impressed with the said contention.

**10.** Be that as it may, the learned counsel for the defendant placed reliance on the following four decisions.

- 1. *Arredla Ram Reddy and others Vs. Arredla Alivelamma*<sup>1</sup>**
- 2. *Batchu Narayana Rao Vs. Batchu Venkata Narasimha Rao*<sup>2</sup>**
- 3. *Yenugonda Bal Reddy Vs. Manemma and others*<sup>3</sup>**
- 4. *Chekuri Lavanya Vs. Kalidindi Ravi Kumar Varma and others*<sup>4</sup>**

A perusal of the above decisions would show that ultimately, the issue as to whether the appointment of an advocate commissioner is necessary or not turned on the facts of the individual cases and no legal position having precedential value was laid down in those decisions. Now the law is well settled that an advocate commissioner can be appointed at any stage of the matter to make local investigation, provided the Court deems that a local investigation is requisite or is necessary for the purpose of elucidating any matter in dispute. There is no hard and fast rule or a settled position of law that an advocate commissioner cannot at all be appointed for any purpose in a suit for perpetual

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<sup>1</sup> 2004 (5) ALD 388

<sup>2</sup> 2010 (5) ALD 83

<sup>3</sup> 2011 (2) ALD 472

<sup>4</sup> 2015 (4) ALD 464

injunction. And, it cannot be laid down as a rule of thumb that in no suit for perpetual injunction, an advocate Commissioner can be appointed; however, the law is well settled that a Commissioner cannot be appointed to find out as to who amongst the parties is in possession of the suit property as it is the function of the Court to decide the issue as to who amongst the parties is in possession of the property in dispute and the said judicial function cannot be delegated to an advocate commissioner. Under law, in any suit in which the Court deems local investigation is requisite or proper for the purpose of elucidating any matter in dispute, the Court may issue a commission to an advocate or any competent person and direct to make such investigation and to report to the Court. The question whether or not the appointment of commissioner is essential depends upon the circumstances and necessity in a suit and also on the reliefs claimed in the suit. In a case of this nature, noting down the physical features of the old dilapidated joint wall, in the well considered view of this Court, is relevant; and if a commissioner is appointed to note down the physical features and files a report after personal inspection in the presence of both the parties, such a report having dependability would be of considerable assistance to the Court below in determining the issues settled in the suit. As rightly contended, if both the parties and their witnesses assert the respective pleaded cases of the parties in the respective depositions, such oral evidence may not be sufficient to conclusively determine the correctness or otherwise of the contentions of either of the parties. Orders in the nature of appointment of an advocate Commissioner

to note down the physical features of the disputed properties are incidental and complimentary in nature and assist the Court in arriving at a just decision in the *lis* unlike supplementary orders; therefore, if a commissioner's appointment is made and a report is called for regarding the physical features of the suit wall, the said report will be one more assured piece of evidence on record and would be helpful to the Court in effectively adjudicating the issues. The request for appointment of a commissioner for noting down the physical features of a property, in the well considered view of this court, by no stretch of imagination can be called as an attempt to gather evidence. In that view of the matter, this Court finds that the revision is *devoid* of merit and that the order of the trial Court, which is justified, does not warrant interference.

**12.** In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand dismissed.

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**M. Seetharama Murthi, J**

07<sup>th</sup> December, 2016  
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